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Legal Policy & Pandemics

**The Journal of the
Global Pandemic Network**

Legal Policy & Pandemics

The Journal of the Global Pandemic Network

FOUR-MONTHLY REVIEW

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Table of Contents

Editors-in-Chief, Managing Editors and Director <i>Editorial</i>	5
---	---

SECTION I

ESSAYS

eds. Elisa Scotti, Cristiana Lauri, Maria Antonia Tigre

Tianbao Qin, Chen Cheng <i>China's Legal Response to COVID-19</i>	11
Anton Ming-Zhi Gao <i>Critical Review of the Legal Measures Against COVID-19 in Taiwan</i>	21
Linda Yanti Sulistiawati <i>Legal and Regulatory Measures and Responses to Prevent and Control COVID-19 in Indonesia</i>	39
Uday Shankar, Shubham Pandey <i>Government Responses During COVID-19: a Study from India</i>	53
Emmanuel B. Kasimbazi <i>Legal and Regulatory Measures and Responses to Prevent and Control COVID-19 in Uganda</i>	67
Alexandra Harrington <i>Summary Report Concerning Responses to COVID-19 in the USA</i>	85
Matteo Fermeglia, Steven Van Garsse <i>Belgian Responses to COVID-19</i>	95
Cristina Fraenkl Haberle, Elena Buoso <i>COVID-19 and Government Response in Germany. Building Resilience by Comparison of Experiences</i>	103
Yiannis Drossos <i>COVID-19 as a Global Institutional Event and Its Institutional Treatment in Greece</i>	115
Miriam Bartolozzi, Ronald Car, Stephanie Mackenzie-Smith, E. Patterson <i>Civil Rights in Times of Pandemic – A Code of Conduct for City Governance</i>	123
Matteo Gnes <i>Italian Response to COVID-19</i>	135
Irene Antonopoulos, Andrea Bruscia, Ronald Car, Stephanie Mackenzie-Smith <i>Political Rights in Times of Pandemic – A Code of Conduct for City Governance</i>	149

SECTION II

LITIGATION

eds. Fabrizio Cafaggi, Paola Iamiceli

Fabrizio Cafaggi, Paola Iamiceli <i>Global Pandemic and the Role of Courts</i>	159
Sébastien Fassiaux <i>Comparative Survey on Vaccination</i>	181

Table of Contents

Chiara Angiolini
Case Law Survey on Data Protection 197

Gianmatteo Sabatino
COVID-19 and Freedom to Conduct a Business 225

SECTION III

REPORTS

eds. Elisa Scotti, Cristiana Lauri, Maria Antonia Tigre

Ittai Bar-Siman-Tov, Itay Cohen, Chani Koth
COVID-19 Litigation in Israel 271

Maira Tito, Caroline Lima Ferraz
COVID-19 Litigation in Brazil 279

Chiara Feliziani, Ilde Forgione, Viviana Di Capua
*Judicial Review and Restrictive Measures. How Has the Intensity and Scope of
And Scope of Judicial Review Changed During COVID-19 in Italy?* 287

Anton Ming-Zhi Gao, Yunchang Jeffrey Bor, Jong-Shun Chen, Kuan-Chuan Tsou
Return to the Facemask Monopoly 297

E. Donald Elliott
US Response to COVID-19 313

Maria Antonia Tigre, Alexandra Harrington, Natalia Urzola,
Alice Kasznar, Amy van der Kleyn, Antonio Pulgar,
Astrid M. Bernal, Giada Giacomini, Hayley Evans,
James R. May, Margherita Birri, Paola Apollaro, Sarah Slinger;
Victoria Lichet, Wellington Migliari
Environmental Protection and Human Rights in the Pandemic 317

List of Authors 375

Editorial

*Editors-in-Chief**, *Managing Editors*** and *Director*

1. Aims and Scope

The editors-in-chief, managing editors and director are excited to share with you the first Volume (issues 1, 2, 3) of Legal Policy & Pandemics (LPPJ), an open-access publication of the Global Pandemic Network (GPN)¹ designed to host and promote comparative debate on the legal and social issues related to pandemics.

The focus starts with the current COVID-19 pandemic, recognized as ‘the greatest challenge we have faced since World War II’² emerged in Asia in late 2019 and rapidly spread to Europe, Africa, the Americas, and Oceania.

It undoubtedly represents the major global health crisis of our time still unresolved after two years,³ despite the wide range of measures adopted at all levels of governance to respond to it.⁴

Healthcare systems in all countries have proven inadequate, compromising people’s access to treatment and medical services.⁵ Globally, the COVID-19 pandemic showed the weakness of the international health architecture, also in its relationship to non-health sectors (e.g., environment, trade, travel, migration).⁶

But, as widely recognized, COVID-19 is not just a health crisis.⁷ It has induced severe social, economic, and institutional challenges,⁸ including links to the ecological crisis.⁹

Early data¹⁰ shows a national and global recession, increase in absolute poverty and inequality,¹¹ job losses, a devastating impact on education and the enjoyment of many fundamental rights, civil, political, and ecological,¹² particularly affecting those least able to cope, such as women,¹³ youth, low-skilled workers, vulnerable communities, and

* Antonio Herman Benjamin, Paola Iamiceli, Emmanuel Kasimbazi, Jolene Lin, Nicholas Robinson, Elisa Scotti.

** Cristiana Lauri and Maria Antonia Tigre.

¹ Global Pandemic Network. <<https://www.globalpandemicnetwork.org>>. See below § 2.

² United Nations Development Programme (UNDP). COVID-19 Pandemic. Humanity Needs Leadership and Solidarity to Defeat the Coronavirus. 2020. <<https://www.undp.org/content/undp/en/home/coronavirus.html>> accessed 10 October 2021.

³ WHO Coronavirus (COVID-19) Dashboard <<https://covid19.who.int>> accessed 10 October 2021.

⁴ The Articles in the first section of this Volume provide a wide overview of the government response around the word.

⁵ GHS. The Global Health Security Index. <<https://www.ghsindex.org/>> accessed 10 October 2021.

⁶ IDI, 12th Commission, S. Murase (rapporteur) Report on Epidemics and International Law, May 2021, <<https://www.idi-ii.org/app/uploads/2021/05/Report-12th-commission-epidemics-vol-81-yearbook-online-session.pdf>> accessed 10 October 2021. Resolution 2/2020Global health law, International law Association, Kyoto <https://disaster-law.ifrc.org/sites/default/files/media/disater_law/2021-01/Resolution%20%20Kyoto%202020%20Global%20Health%20Law%20FINAL..pdf> accessed 10 October 2021.

⁷ United Nations Development Programme (UNDP). COVID-19 Pandemic. Humanity Needs Leadership and Solidarity to Defeat the Coronavirus. 2020. <<https://www.undp.org/content/undp/en/home/coronavirus.html>> accessed 10 October 2021.

<<https://www.undp.org/content/undp/en/home/coronavirus.html>> accessed 10 October 2021.

⁸ *Ibidem*.

⁹ OECD ‘The long-term environmental implications of COVID-19’ <https://read.oecd-ilibrary.org/view/?ref=1095_1095163-jpelnkdei2&title=The-long-term-environmental-implications-of-COVID-19> accessed 10 October 2021. David Quammen, *Spillover: Animal Infections and the Next Human Pandemic* (Norton, W. W. & Company, Inc, 2013).

¹⁰ OHCHR, ‘COVID-19 and its human rights dimensions’ <<https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx>> (accessed on 10 October 2021). World Bank, Global Economic Prospects, June 2021, <<https://www.worldbank.org/en/publication/global-economic-prospects>> accessed 10 October 2021.

¹¹ OHCHR ‘COVID-19 and its human rights dimensions’ <<https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx>> accessed 7.9.2021; World Bank, Global Economic Prospects, June 2021, <<https://www.worldbank.org/en/publication/global-economic-prospects>> accessed 10 October 2021.

¹² Maria Antonia Tigre and others, Environmental Protection and Human Rights in the Pandemic. Position Paper, in this Volume, Section III.

¹³ UNGA resolution 16 December 2020 n. 75/157, Women and girls and the response to the coronavirus disease (COVID-19) <<https://undocs.org/pdf?symbol=en/A/RES/75/157>> accessed 10 October 2021.

indigenous peoples.¹⁴ These inequalities are predicted to persist,¹⁵ even though states have adopted exceptional budgetary measures, liquidity, and aid policies through recovery plans to provide relief to citizens and sectors particularly affected and stimulate recovery.¹⁶ According to the current estimations,¹⁷ about 100 million people will have fallen back into extreme poverty by the end of this year despite the (uncertain and uneven) recovery. Additionally, in an expected scenario of persisting global inflation, climbing food prices may compound rising food insecurity in low-income countries and communities¹⁸.

At the institutional level, governments appeared to be unprepared to face the risk of a pandemic outbreak.¹⁹ The response, uneven, has been based on emergency procedures that derogate from the ordinary competencies of representative assemblies, strengthens the executive and central power, highlights the complexity of multilevel governance of digital society, and restricts fundamental rights in ways that are challenging jurisdictional systems²⁰ and reshaping the post-pandemic State.²¹

The link between the pandemic and the environmental crisis has come to the fore. This link is not limited to the risk that the pandemic economic recovery may hinder the pursuit of environmental goals.²² It concerns, first and foremost, the causes of

the pandemic and, therefore, its prevention strategy.²³ As broadly acknowledged, the COVID-19 pandemic reflects the ecological crisis, a zoonotic disease resulting from a spill-over from animals to humans driven by the loss of biodiversity and disruption of natural habitat.²⁴ It is not the first, nor will it be the last. In particular, what is drawing attention is the intensifying emergence of zoonotic diseases over the previous fifty years. This increase is driven by the growing anthropogenic impact on nature and, in particular, loss of biodiversity, disruption of natural habitat, and increasing rate of wildlife-human contacts.²⁵ We now realize that 'the next pandemic is here.'²⁶ We must act immediately to prevent future pandemics with an integrated approach by protecting the health of animals, humans, and the ecosystem together²⁷. Planetary health should be at the center of the strategy for a more resilient world.²⁸

The reaction against COVID-19, which is also essential to analyze given any potential future pandemic, touches on all these aspects. While we are still struggling with COVID-19 from a health perspective, we should also try to recover and rebuild a more resilient society against the various institutional, economic, social, and ecological risk factors. The declared intentions of the public²⁹ and private sectors³⁰ are aligned in this direction.

¹⁴ Maria Antonia Tigre and others, 'The Inter-American system during COVID-19: Development of Green Human Rights on Indigenous Cases' (2021) 15 *Revista de Derecho Ambiental* 7.

¹⁵ World Bank, *Global Economic Prospects*, June 2021, <<https://www.worldbank.org/en/publication/global-economic-prospects>> accessed 10 October 2021.

¹⁶ OECD, *The COVID-19 Recovery Dashboard*, <<https://www.oecd.org/coronavirus/en/recovery-dashboard>> accessed on 10 October 2021.

¹⁷ See footnote no. 15.

¹⁸ *Ibidem*.

¹⁹ See all the contribution in Sections I and II of this Volume and, in Section III, the reports on this matter.

²⁰ F. Cafaggi and P. Iamiceli, *Global Pandemic and the Role of Courts*, Opening Survey, in this Volume, Section II.

²¹ Frances Z. Brown, Saskia Brechenmacher and Thomas Carothers 'Coronavirus Reshape Democracy and Governance Globally? Carnegie Endowment for International Peace' <<https://carnegieendowment.org/2020/04/06/how-will-coronavirus-reshape-democracy-and-governance-globally-pub-81470>> accessed 10 October 2021. For the large-scale intervention of the state in the economy see OECD, *The COVID-19 Recovery Dashboard*, <<https://www.oecd.org/coronavirus/en/recovery-dashboard>> accessed 10 October 2021.

²² UNDP Green Recovery Data Platform, <<https://data.undp.org/greenrecovery/>> accessed 10 October 2021.

²³ Maria Andotina Tigre, 'COVID-19 and Amazonia: Rights-based approaches for the pandemic response' (2021) *Review of European, Comparative & International Environmental Law* 30 162.

²⁴ David Quammen (n. 9).

²⁵ *Ibidem*.

²⁶ Nicholas A. Robinson, 'The Next Pandemic is Here', *The Environmental Forum*, 2020 <<https://www.globalpandemicnetwork.org/wp-content/uploads/2020/11/ZoonosisEssayEnvForumEliNov2020.pdf>> accessed 10 October 2021.

²⁷ FAO/OIE/WHO (2017) 'The Tripartite's Commitment. Providing multi-sectoral, collaborative leadership in addressing health challenges' <https://www.who.int/zoonoses/tripartite_oct2017.pdf> accessed November 30, 2021.

²⁸ Nicolas A. Robinson, *Juridical Principles to Sustain Planetary Health. Pathway to the 2022 Declaration Blog*, 5 May 2021 <www.pathway2022declaration.org/?post_type=article&p=621> accessed 10 October 2021.

²⁹ See, for example, the Recovery Plan for Europe. <https://ec.europa.eu/info/strategy/recovery-plan-europe_en#introduction> accessed on 10 October 2021; the US Recovery Plan <<https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/>> accessed 10 October 2021; for the People's Republic of China approach see *Fighting COVID-19 and Leading Economic Recovery Through Solidarity and Cooperation*, Remarks by the President H.E. Xi Jinping at the APEC Informal Economic Leaders' Retreat, 16 July 2021 <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1895056.shtml> accessed 10 October 2021.

³⁰ See the Larry Fink's 2021 letter to CEOs <<https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>> accessed 10 October 2021 and the BlackRock's 2021 letter to clients <<https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter>> accessed 10 October 2021.

Many are the paradigm shifts implied, influenced mainly by public policies and state plans attempting to recover from the crisis and transition towards more robust and resilient economic, social and institutional paradigms.

Against this backdrop, 'legal policy and pandemics' has rapidly emerged as a crucial cross-sectoral field of inquiry. The question of how pandemics are re-shaping public policy and how to increase the systemic resilience of our society to the many risks it faces (not only limited to health) is becoming a priority. Relatedly, it is essential to consider how to bring policies, law, and science into a balanced relationship with a preventive and precautionary perspective.

What is a resilient society is indeed a complex issue that starts from the recognition, in the Anthropocene era, of the importance of a holistic and adaptive perspective that considers the mutual interdependence and inseparability of social and ecological systems.

Stimulating comparisons and a global discussion on these common issues in the social sciences is therefore of particular importance today, not only in academic research but also to offer a valuable contribution to the ongoing transitions towards a more resilient society. To this end, it will be essential to verify the changes in the nineteenth and twentieth-century paradigms of the rule of law, economic freedoms, and fundamental rights. Moreover, legal comparisons are crucial to grasp the most important trends and foster pluralism of ideas and methods, an essential asset that the freedom of academic research provides.

2. The Global Pandemic Network (GPN)

In 2020, a group of scholars from various universities founded the GPN,³¹ an international network in the humanities, intending to bring together young researchers alongside distinguished academics and experts to mutually exchange research and information on pandemics, engage in in-depth discussions, and propose solutions to decision-makers based on the analysis of best practices and the comparison of experiences in the field of law and policy of pandemics. The field of study and comparison are the following thematic focuses: COVID-19 and government response, human rights, environment, cities, competition, digital society, taxation, health systems, public management, international organizations, international investment.

The intention is to develop resilience models based on environmental protection, respect for human rights, and sustainable economic paradigms.

As a stimulus to debate and confrontation in full respect of differences and recognition of their fundamental value, the GPN is also intended as a tool for resilience, able to contribute to the ongoing transition process through debates, discussions, and academic reflections, focusing on the creativity of young scholars and stimulating the establishment of international teams working together on different aspects of the response. Working groups have been established on cities, human rights, the environment, and governmental response. GPN activities include webinars, scientific reports, and academic studies, and founding this Journal.

3. The WHO Litigation Project

The GPN had the opportunity to partner with the Covid-19 litigation project³² through fruitful collaboration.

The COVID-19 litigation project is supported by the WHO and coordinated by Trento University. The project's main goal is to collect, organize, and present a worldwide collection of relevant cases concerning the disputes arising from the governments' adoption of public health measures to address the COVID-19 pandemic.

This project is aimed at enabling access by public and private stakeholders to these decisions, mainly:

- governments and institutions that need to adopt measures in emergency contexts like the present one;
- courts that need to address unprecedented conflicts between the right to health and other fundamental rights, fundamental freedoms and other rights;
- lawyers and other legal experts, who need to assist persons/institutions affected by these decisions and measures;
- scholars who engage in legal and interdisciplinary research in the field of public health and related fields.

To this end, an online open-access archive (Co-Lit Database) will be set up and constantly updated to classify and present relevant case law collected worldwide.

At a different level, this work also aims to compare different approaches and techniques for balancing the governmental police power and the right to health with other fundamental rights, fundamental freedoms, and other rights, and the possible definition of guidelines on balancing techniques in these challenging situations.

The approach is selective and not comprehensive. The selection is based on two pillars:

³¹ See footnote n. 1.

³² COVID-19 Litigation (Development preview) <<https://www.covid19litigation.org/>> accessed 10 October 2021.

- representativeness within the context of the country litigation;
 - relevance in respect to some focal points adopted in this initiative, namely:
 - o The extent to which emergency leads to a revision of power allocation (division) among public authorities (part. legislative v. administrative; central v. peripheral powers);
 - o The identification of conflicts between (fundamental) rights and freedoms, generated by the adoption of containment measures;
 - o The different techniques used by courts to strike a balance between the right to (public) health and other (fundamental) rights and freedoms whenever they conflict with each other;
- Additional criteria for selection relate to case relevance in respect of:
- o the type of court involved (supreme courts' decisions are favored);
 - o the type of procedure (heading to a balanced mix between interim/urgency procedures and final ones);
 - o the kind of measures/remedies sought (so that different measures/remedies are dealt with in selected cases);
 - o the case result (so that decisions in which the claim is upheld or the challenged act is annulled are considered distinct from those in which the claim is rejected or the challenged act is upheld).

Based on a long-term experience developed in judicial training projects at the EU level, the current initiative builds on close cooperation between judges and academics. This cooperation extends from project design to project results; the role assigned to the International Network of Judges and Scholars³³ reflects this methodological choice.

4. The Journal

The Legal Policy & Pandemics Journal (LPPJ) is a publication of the GPN designed to host research on the legal and social issues related to pandemics.³⁴

More specifically, the research topics included are in the area of social sciences and cover law, political science, sociology, and the history of institutions. LPPJ hosts contributions on pandemics and government responses; sustainable development; markets and the circular economy; digitalization; climate change, environmental protection, and human rights.

With its mission to reflect on issues related to systemic changes driven by the pandemic, LPPJ strives to be at the forefront by stimulating debate, encouraging reflection, and shaping discussions on the most important and relevant legal issues

through a rigorous selection, peer review, and editing process.

Without renouncing the scientific rigor of the contributions hosted, LPPJ is open to reflections of scholars and experts from universities, institutions, professions, and social spheres that have experience in these issues.

LPPJ is intended to serve as essential reading for scholars, policymakers, advocates, institutions, NGOs, public officials, and the general public interested in learning more about the global response to pandemics and a wide range of related issues.

It is structured in three parts.

The first part (Articles), edited by the Journal's editors-in-chief and managing editors, features articles by scholars from different parts of the world, aiming for an original and critical examination of the issues addressed while respecting different research methodologies. This objective is balanced with the need to understand a new and constantly changing reality and the related need for speed, given the intention of reflecting on ongoing issues and stimulating debate.

The second part (COVID-19 Litigation) edited by Fabrizio Cafaggi and Paola Iamiceli, focuses on the litigation generated by COVID-19. This section is linked to the COVID-19 Litigation project mentioned above and will be inaugurated by the introductory article by both editors. This section examines the role of courts in overseeing the adoption and implementation of governmental policies to contrast the pandemics. National and international courts have been quite relevant to ensuring the preservation of the rule of law and respecting democratic values during pandemics. Courts have been custodians of fundamental rights when overseeing the constitutional validity of legislation and the conformity of administrative acts. However, they face new challenges when adjudicating cases in which individuals and organizations claim compensation for losses suffered due to the pandemic or the adoption of restrictive measures. Courts are also scrutinizing the vaccination campaign and its impact on fundamental freedoms through the lenses of proportionality, self-determination, and non-discrimination.

This section will also compare different approaches of judicial oversight and investigate the relationship between governments and courts during the various stages of pandemics. Moreover, it will explore the role of science and decision-making control in conditions of uncertainty and lack of consolidated medical and scientific knowledge. Finally, the section will monitor the evolution of case law in a comparative perspective combining surveys and

³³ International Network of Judges and Legal Scholars, <<https://www.covid19litigation.org/international-network-judges-and-legal-scholars>> accessed 10 October 2021.

³⁴ See above paragraph 1.

articles focusing on specific aspects or legal domains.

A third section (Report) is devoted to the reports of the GPN working groups and is edited by the coordinators of the group involved.

As a global journal, it represents the different areas of the world in its editorial, scientific, and management committees. It has a strong presence of young scholars in international research groups that form its stimulating backbone.

In the context of such a wide-ranging discussion, the fundamental approach of the Journal is pluralism and mutual respect for all visions and different methodological traditions, subject to strict compliance with criteria of research quality and originality guaranteed by anonymous referencing according to international standards and the prior verification of the coherence of the articles submitted with the research areas of the Journal.

5. The first Volume

The first Volume we present here (issues 1,2,3) is devoted to the legal response to COVID-19 and the comparison between different systems, the first significant challenge to which the pandemic has subjected our legal community, and to the impact of COVID-19 on cities, which are on the 'front lines managing zoonotic diseases, since most of the world's people live in cities', so that 'spatial planning of cities and new developments determines environmental security'³⁵. It features analyses from several countries representing world regions: Europe, Asia, Africa, North America, and South America.

The theme is institutional, and is discussed from a legal perspective. How different systems have reacted to the crisis and what strengths and weaknesses have emerged will be examined in the first section with contributions on individual countries by C. Fraenkl Haeberle and Elena Buoso for Germany, M. Fermeglia and S. Van Garsse for Belgium, Y. Drossos for Greece, M. Gnes for Italy, E. Kazimbasi for Uganda, T. Qin for mainland China, A. Gao for Taiwan, L. Sulistiawati for Indonesia, U. Shankar for India, A. Harrington for the USA.

The need for a Code of Conduct for local urban governments that should consider a range of interconnected civil rights and political rights is explored by the two essays authored by Ronald Car and other members of the 'COVID-19, Cities and Civil Rights' Working Group.

The litigation section investigates how jurisprudence has reacted to the central issues of personal freedoms, data protection, and vaccinations with

contributions by S. Fassiaux, C. Angiolini, G. Sabatino. The section is opened by an in-depth and wide-ranging contribution of a methodological framework by Fabrizio Cafaggi and Paola Iamiceli.

The impact of Covid-19 on cities, fundamental rights and the environment will be examined in the third section, with an extensive and in-depth report by the 'COVID-19, Cities and Ecological Rights' Working Group led by Maria Antonia Tigre. This section will also feature reports from the working group on government response focusing on case study analyses.

The Volume builds on two global webinars organized by the GPN and supported by Un-Habitat: 'Covid-19 and cities. Building resilience on human rights and environmental protection' (July 2020) and 'Supernational, national and regional responses. Building resilience through comparative experiences' (March 2021). Both webinars hosted a comprehensive discussion with authoritative academics from diverse regions of the world and, in open sessions, meetings of global scholars and international working groups (coordinated and participated by Giovanni Antonelli – GPN co-founder, Flaminia Aperio Bella, Ittai Bar-Siman-Tov, Ronald Car, Gianluca Crispi, Martin Crook GPN co-founder, Chiara Feliziani, Matteo Fermeglia, Anton Ming-Zhi Gao, Valina Geropanta, Maria Luisa Gomez Jimenez, Emma Guernaoui, Cristiana Lauri - GPN co-founder, Eduardo Parisi, Maciej M. Sokolowski, Maira Tito, Maria Antonia Tigre) to reflect and discuss the topic. We are particularly grateful to them for their enthusiasm, innovation, cohesion and inspiration, making the GPN and the LPPJ a place open to the participation of all those interested in the debate and joining our project. We look forward to engaging with our authors and reviewers and receiving feedback from our readers.

³⁵ Nicholas A. Robinson, 'The Next Pandemic is Here' (2020) The Environmental Forum <<https://www.globalpandemicnetwork.org/wp-content/uploads/2020/11/Zoo>

nosisEssayEnvtForumEliNov2020.pdf> accessed 10 October 2021.

China's Legal Response to COVID-19

Qin Tianbao and Chen Cheng

Abstract. After the outbreak of COVID-19, China quickly adopted a series of response measures. New laws and policy documents have been introduced in the legislation. These laws and documents cover all aspects of compulsory isolation, market regulation, economic recovery, and people's livelihood protection. In terms of implementation of laws and policies, law enforcement agencies help enterprises resume production and work, they use technological methods to implement laws and policies, and focus on strengthening law enforcement and supervision in areas such as public health and medical health. The Chinese judicial organs have clarified the common charges of crimes involved in the pandemic, attached importance to civil dispute resolution, issued guiding cases, and implemented online litigation. China conducted communication and cooperation with the international community, shared information as soon as possible, and actively fulfilled its obligations under international law. China's experience can be used for reference by other countries.

Keywords: COVID-19 Pandemic, China, Legal Response

1. Introduction

Since the COVID-19 outbreak, China quickly took a series of measures to respond.¹ The epicenter of China's outbreak were the city of Wuhan and Hubei province. Chinese government restricted travel from and to Hubei province and implemented a number of measures to contain the outbreak.² The quick containment of COVID-19 in China is impressive and sets an encouraging example for other countries.³ In China, one of the most important aspects was to prevent and control the pandemic through legal means such as making laws and policies, and implementing them.⁴ In comprehensively advancing the rule of law, it is an inevitable choice for governments to improve public security, enact scientific legislation.⁵ We conclude that China's legal response to the pandemic is specifically divided into four parts: (i) laws and policies formulation, (ii) laws and policies implementation, (iii) judicial protection of

pandemic prevention in accordance with law, and (iv) international response. This article will delve into these four aspects separately as a way to assess China's legal experience in tackling the pandemic.

2. Formulation of Laws and Policies

Before the pandemic outbreak, China had already promulgated laws related to public health incidents, such as:

- *'The Emergency Response Law of the People's Republic of China (the PRC) (2007)' and 'Law of the PRC on the Prevention and Control of Infectious Diseases (2013)'*. These two laws provide a legal basis for preventing and eliminating the occurrence and prevalence of infectious diseases and ensuring citizens' health and public health.

- *"Animal Epidemic Prevention Law of the PRC (2015)" and "Wild Animal Protection Law of the PRC (2018)"*. These two laws have strengthened the

¹ Tina J. Park, 'China's Response to COVID-19: Turning Crisis into an Opportunity' *China Today* (19 March 2020) 14, 16.

² WHO, *Infection prevention and control during health care when novel coronavirus (nCoV) infection is suspected Interim guidance* (25 January 2020) <<https://apps.who.int/iris/handle/10665/330674>> accessed 30 September 2021.

³ 'Sustaining Containment of COVID-19 in China' (18 April 2020) *The Lancet* 395, 10232, 1230 <[https://www.thelancet.com/journals/lancet/article/PIIS01406736\(20\)30864-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS01406736(20)30864-3/fulltext)> accessed 30 September 2021.

⁴ Chen Jun, 'A Study on Chinese Communist Party's Leadership in Legislation for Fighting COVID-19 Pandemic' (July 2021) 42, 4 *Journal of Xinjiang Normal University, Philosophy and Social Sciences* 32, 41.

⁵ Dai Haijun, 'The Governance Logic and Legal Path of Emergencies from the Perspective of the Prevention and Control of the COVID-19 epidemic', (April 2020) 2 *Administrative Law Review* 53, 66.

management of animal epidemic prevention activities, especially the prevention and elimination of animal epidemics, so as to promote the development of breeding industry and prevent and control zoonotic infectious diseases.

Since the beginning of the pandemic, China has issued a new law and policy documents to build a strong legal system regarding pandemic prevention and control, as will be studied in the next section.

2.1. Enacted a New Law

The Standing Committee of the National People's Congress promulgated a law on 24 February 2020 entitled *"The Decision of the Standing Committee of the National People's Congress on the Total Banning of Illegal Wildlife Trade, Eliminating the Bad Habits of Wild Animals, and Effectively Protecting the People's Life, Health and Safety."*⁶

Some studies have even shown that wild animals are the source of many human infectious diseases, accounting for 43% of the 335 confirmed acute infectious diseases.⁷ This law is mainly to deal with the problem of great hidden dangers to public health caused by indiscriminate eating of wild animals. Preventing public health events such as the COVID-19 pandemic urgently requires the country to strengthen the prevention and control of the spread of wild animal viruses.⁸

The law focuses on the prominent problem of wild animals' consumption. It establishes a system to completely ban wild animals' consumption and severely crack down on illegal wildlife trade.⁹ For example, it stipulates that hunting, trading and transporting terrestrial wild animals that naturally grow and reproduce in the wild environment for the purpose of eating are completely prohibited and take strict enforcement measures.

2.2. Issued a Significant Number of Policy Documents

These policy documents are regulatory documents that were issued by the central and local

governments to fight the pandemic. They are executive orders in nature. The execution of these executive orders from top to bottom ensures laws can be implemented.

3. Longitudinal Perspective: Government-led Prevention and Control Model from Central to Local

3.1. Central

After the COVID-19 outbreak, the Central Committee of the Communist Party of China (the CPC) and the State Council of the PRC respectively established a leading group and a joint mechanism, and issued a series of policy documents to deal with the pandemic with these two institutions.¹⁰ These policy documents play a leading and guiding role in the fight against the pandemic.¹¹ Firstly, the policy documents are efficient and flexible, overcoming the limitations of written law, so that the epidemic prevention and control can achieve the effect of unified leadership, unified command and unified action; Secondly, the legislative cost of policy documents is low; Finally, policy documents can supplement legislative gaps, so these policy documents play an important role in governance.

For example, the Ministry of Finance issued 33 documents including the *"Notice on Facilitation of Procurement for Epidemic Prevention and Control"*¹², which provides guidance for government procurement activities during the epidemic; the Ministry of Communications issued 26 important documents such as the *"Notice on the Control of Transport Means in and Out of Wuhan"*¹³, which strictly controls the flow of people during the pandemic; the Ministry of Education issued 9 documents including the *"Guiding Opinions on the Organization and Management of Online Teaching in Universities"*¹⁴, which requires schools to carry out online teaching. These policy documents stipulate all aspects of people's life and minimize the impact of the epidemic on residents' normal study and life.

⁶ See <<http://www.legaldaily.com.cn/government/content/2020-02/25/content8125301.htm>> accessed 30 September 2021.

⁷ Kate E. Jones, Nikkita G. Patel, *et al.*, 'Global trends in emerging infectious diseases.' (2008) 451, 7181 Nature 990, 993.

⁸ Zhang Qi, 'Solving the wildlife legal problems in response to the epidemic' (2020) 15 People's Tribune 224, 225.

⁹ Zhou Ke, Sun Sijia, 'Adaptation and Disruption of the Legal Regime for Wildlife Use' (2020) 224, 6 Law Review 135, 145.

¹⁰ See <<http://kns.cnki.net/kcms/detail/11.2787.R.20200205.1133.002.html>> accessed 30 September 2021.

¹¹ Xue Xiaohui, 'Substantial Effect and Legal Rules of COVID-19 Normative Documents' (August 2020) Journal of North Minzu University, Philosophy and Social Science 4 165, 170.

¹² See Ministry of Finance of the People's Republic of China <http://gks.mof.gov.cn/guizhangzhidu/202001/t20200126_3464030.htm> accessed 30 September 2021.

¹³ See <https://xxgk.mot.gov.cn/2020/jigou/ysfws/202006/t20200623_3316058.html> accessed 30 September 2021.

¹⁴ See Ministry of education of the People's Republic of China <http://www.moe.gov.cn/jyb_xwfb/gzdt_gzdt/s5987/202002/t20200205_418131.html> accessed 30 September 2021.

3.2. Local

Under the guidance of the policy documents of the State Council and its ministries and commissions, local governments issued policy documents in accordance with local pandemic prevention and control, forming a joint model between the central and local governments.¹⁵ For instance, the Hubei Provincial Government has continuously released documents on COVID-19 epidemic prevention and control since 21 January, 2020, such as: "Notice on Implementing Measures to Wear Masks in Public Places in Wuhan"¹⁶, which requires people wear masks in public; "Notice of the People's Government of Hubei Province on Strengthening the Prevention and Control of Pneumonia Infected by Novel Coronavirus"¹⁷ and "Interim Measures for the Prevention and Control of the Pneumonia Epidemic Caused by the Novel Coronavirus Infection in Wuhan"¹⁸, these two documents make overall arrangements for epidemic prevention and control in Hubei Province.

4. Horizontal Perspective: All-round Coverage in Various Fields

4.1. Mandatory Control

On 23, January, 2020, China raised its national public health response to the highest state of emergency: Level 1 of 4 levels of severity in the Chinese Emergency System, defined as an "extremely serious incident".¹⁹ The National Health Commission had included COVID-19 into Category B infectious diseases according to the "Infectious Disease Prevention and Control Law", and had taken prevention and control measures against Class A infectious diseases.²⁰ According to Articles 41 to 44 of the "Law of the PRC on the Prevention and Control of Infectious Diseases",

when Category A and Category B infectious diseases break out or spread, the government may adopt quarantine measures against personnel in specific areas, close down affected area and carry out health quarantine on people, materials and vehicles entering or leaving the epidemic area.²¹

In the early morning of 23, January 2020, Wuhan issued a city closure announcement. This administrative order mandated residents to quarantine at home. To cooperate with Wuhan's closure measures, the Ministry of Communications issued the "Emergency Notice on the Prevention and Control of the Epidemic Prevention and Control of Transportation in and Out of Wuhan".²² As part of the national emergency response, Wuhan ordered quarantine to suspected and confirmed cases, suspended public transportation (buses and subways), closed schools and entertainment venues, banned public gatherings, and conducted health checks on immigrants who were entering the country at the moment.²³ Since then, 31 provinces have launched first-level responses to public health emergencies.²⁴ Regions have issued policy documents for restrictions on travel or quarantine measures.²⁵

4.2. Market Regulation

The full-blown outbreak of the epidemic has also led to a shortage of epidemic prevention materials, such as masks, antiviral drugs, disinfection and sterilization supplies, related medical devices.²⁶ In the face of possible materials shortages and price raise, the State Administration for Market Regulation issued "Guiding Opinions of the State Administration for Market Regulation on the Investigation and Punishment of Illegal Acts of Price Raising during the Prevention and Control of the COVID-19 Epidemic"²⁷, which severely crack down

¹⁵ See *ibidem* at 11.

¹⁶ See 'China-Africa innovation cooperation conference opens in Wuhan, central China' <http://www.hubei.gov.cn/zwgk/hbyw/hbywqb/202001/t20200123_2014357.shtml> accessed 30 September 2021. <http://m.news.ctv.com/2020/02/16/ARTInYY6x6kJnLiooQigfrQJ200216.shtml>>.

¹⁷ See <http://sthjt.hubei.gov.cn/hjsj/ztzl/zcckyyq/tzgg/202002/t20200217_2039965.shtml>.

¹⁸ See The Government of Wuhan <http://www.wuhan.gov.cn/zwgk/tzgg/202003/t20200316_972483.shtml> accessed 30 September 2021.

¹⁹ Tian Huaiyu, *et al.* 'An Investigation of Transmission Control Measures during the First 50 Days of the COVID-19 Epidemic in China' (May 2020) 368, 6491 *Science* 638, 642.

²⁰ 'Urgent Research Agenda for the Novel Coronavirus Epidemic: Transmission and Non-Pharmaceutical Mitigation Strategies' (February 2020) 41, 2 *Chinese Journal of Epidemiology* 135, 138.

²¹ See The National People's Congress of the People's Republic of China <http://www.npc.gov.cn/wxzl/wxzl/200012/05/content_4516.htm> accessed 30 September 2021.

²² See The State Council of the People's Republic of China <http://www.gov.cn/zhengce/zhengceku/202001/23/content_5471864.htm> accessed 30 September 2021.

²³ See *ibidem* (n. 19).

²⁴ See <<https://baijiahao.baidu.com/s?id=1660602278686510102&wfr=spider&for=pc>> accessed October 11, 2021.

²⁵ Wei Chen, Qing Wang, *et al.* 'Early Containment Strategies and Core Measures for Prevention and Control of Novel Coronavirus Pneumonia in China' (March 2020) 54, 3 *Chinese Journal of Preventive Medicine* 239, 244.

²⁶ Feng Qiaobin, 'Solving the shortage of epidemic prevention materials requires the concerted efforts of the government and the market' (17 February 2020) *China Economic Times*.

²⁷ See The State Council of the People's Republic of

on fabricating or disseminating false information about the epidemic, causing panic among the masses and pushing up prices.

4.3. Economic Recovery and Livelihood Security

The Central Committee of the CPC and local governments have issued a series of policy documents on stimulating consumption. For example, the Leading Group of the CPC Central Committee for COVID-19 Prevention and Control issued the *“Guiding Opinions on Actively Promoting the Resumption of Work and Production While Effectively Preventing and Controlling the Epidemic”*²⁸. This document has made overall arrangements for the resumption of production and work, with the following aspects.

(i) Return to work in batches and orderly staggered peaks. Energy supply, transportation and logistics, urban and rural operations, medical supplies, food and other important sectors of the national economy and people’s livelihood should resume work and production immediately.

(ii) Make every effort to ensure the organization of transportation such as railways and civil aviation, and effectively reduce the risk of epidemic transmission.

(iii) Improve rapid screening capabilities such as nucleic acid testing, and strengthen the isolation of key populations and the admission of cases.

(iv) Guide enterprises to implement various epidemic prevention requirements seriously.

(v) Investigate major safety risks in a timely manner.

4.4. Improved the Treatment and Security of Medical Staff

In order to ensure the working conditions of the medical staff working on the front line of pandemic prevention and control, the State Council and local governments have introduced various measures to improve the treatment of medical staff, such as: the State Council issued the *“Notice on the Title of Professional and Technical Personnel on the Front Line of COVID-19 Epidemic Prevention and Control”*.²⁹ Hubei Province issued the *“Notice of the 4 Provincial Departments on Several Measures to Further Care and Inspire Frontline Medical Staff in the Prevention and Control of COVID-19 Epidemic”*.³⁰

China <http://www.gov.cn/zhengce/zhengceku/202002/02/content_5473889.htm> accessed 30 September 2021.

²⁸ See The State Council of the People’s Republic of China <http://www.gov.cn/zhengce/content/2020-04/09/content_5500698.htm?trs=1> accessed 30 September 2021.

²⁹ See <<http://www.mohrss.gov.cn/SYrlzyhshbzb/rencairenshi/zcwj/zhuanyejishurenuyuan/202003/t2020>

0305_361440.html> accessed 30 September 2021.

These documents are useful for improving the working and living conditions of medical staff. Specific measures include:

(i) Provide financial subsidies to medical and epidemic prevention workers participating in the front-line epidemic prevention and control, and the central government will fully cover it.

(ii) Provide work-related injury insurance protection for medical staff infected with COVID-19 and open a green channel for work-related injury identification.

(iii) Recognize and reward the medical team and individuals who have made outstanding contributions in a timely manner.

(iv) The subsidies and bonuses received by medical personnel participating in epidemic prevention and control are exempt from personal income tax.

5. Implementation of Laws and Policies

In terms of implementation of laws and policies, law enforcement agencies help enterprises resume production and work, they use technological methods to implement laws and policies, and focus on strengthening law enforcement and supervision in areas such as public health and medical health.

5.1. Help Enterprises Resume Production and Work

In the early stage of the COVID-19 epidemic, the Ministry of Industry and Information Technology, the Ministry of Human Resources and Social Security, the Ministry of Commerce, and the National Development and Reform Commission collected various difficulties in production and operation during the pandemic prevention and control period from the national small and medium-sized enterprises³¹, which can be summarized as follows:

(i) Transportation and logistics were restricted. Affected by the pandemic, some inter-provincial highways were closed, which greatly increased the transportation cost, time cost, management cost, and coordination cost of enterprises.

(ii) Employees cannot return to work. Various prevention and control measures such as isolation, traffic control, and closure have been adopted in various regions, making it difficult for many non-local employees to return to work on schedule.

0305_361440.html> accessed 30 September 2021.

³⁰ See <http://wjw.hubei.gov.cn/bmdt/ztl/fkxgzbgfyyq/fkdt/202002/t20200218_210433.shtml> accessed 30 September 2021.

³¹ Yang Dongri, et al, ‘Central and local governments should work together in an orderly manner to restore work and production of small and medium-sized enterprises’ (16 March 2020) China Information Weekly.

(iii) Insufficient anti-epidemic materials. It is difficult to purchase anti-epidemic and protective materials such as disinfectants, protective clothing, and temperature measuring guns.

(iv) Difficulties in the delivery of upstream and downstream products in the industrial chain.

(v) Rising costs and greater pressure on the capital chain.

Law enforcement agencies have understood the difficulties and problems, so they have adopted humanized law enforcement measures during law enforcement to support corporations in going back to resume production.³² For example, the Tianjin city have established a fault-tolerant mechanism, which exempts some minor market violations from punishment. The Tianjin Municipal Market Supervision Commission and the Municipal Drug Administration have formulated the "*Tianjin Municipal Market Supervision Field Exemption List*" and identified 50 illegal acts that are exempt from punishment.³³ The exemptions correspond to minor illegal violations that are not intentional and do not cause harmful consequences. Administrative punishment is hence exercised prudently. Law enforcement officials have taken full account of the pandemic's impact on small, medium and micro enterprises, and set a reasonable time limit for rectification for those companies that have taken proactive measures to fulfill relevant obligations and have temporarily been excluded from the list of joint punishments.³⁴ The implementation of flexible law enforcement can promote the unity of legality and rationality, and make law enforcement produce better social effects.³⁵

5.2. Use of Technological Methods to Implement Laws and Policies

During the pandemic, law enforcement agencies used modern technology such as big data, the Internet of Things, and artificial intelligence to enforce the law. For example, Shanghai connected

the "Smart City Management" app with the city's "One Network Management" data platform to provide information for pandemic prevention and control.³⁶

Similarly, using the "Urban Management and Epidemic Prevention App", the market supervision and management department can dynamically grasp business openings, health status of the operators, and implementation of the pandemic prevention measures.³⁷ Citizens can also use personal mobile terminals to handle some urban management law enforcement matters without leaving the house, which greatly improves the effectiveness of epidemic prevention and control.³⁸

Finally, the special environment in pandemic prevention period also gave birth to the practical application of "off-site" law enforcement.³⁹ Based on modern scientific and technological means, multi-angle and all-around video evidence collection for illegal activities were carried out, this method helped reduce on-site law enforcement conflicts, reduce law enforcement manpower costs and risks, and improve case handling efficiency.⁴⁰

5.3. Specific Implementation Measures

a. Home Quarantine Measures

During quarantine, residents stayed at home as much as possible to reduce gatherings and visits.⁴¹

Measures such as social distancing, personal hygiene, disinfection and mask-wearing have been extensively carried out.⁴² In areas where the pandemic prevention and control situation is severe, each family's daily needs were delivered to their home by community volunteers, and residents were not allowed to go out without authorization.⁴³ In areas with less pandemic prevention and control, each household were able to send a member to a designated store to buy daily commodities at regular intervals.⁴⁴

³² Xu Zhihu, 'Thoughts on law enforcement work of urban management under the COVID-19 epidemic' (24 April 2020) China Construction News.

³³ See <http://scjg.tj.gov.cn/tjsscjdglwyh_52651/zwgk/zfgznew/bdwwjnew/sjwwj_1/202012/t20201214_4995029.html> accessed 30 September 2021.

³⁴ See Tianjin Administration for Market Regulation <http://scjg.tj.gov.cn/tjsscjdglwyh_52651/zwgk/zfgznew/bdwwjnew/jdhynew/202012/t20201214_4998502.html> accessed 30 September 2021.

³⁵ Yao Jianming, et al, 'The Enlightenment from Covid-19 Prevention and Control to Market Regulation' (November 2020) 11 Research on China Market Regulation 72, 75.

³⁶ Ju, Yunpeng, 'Social governance in a screen' *People's Daily* (29 April 2020).

³⁷ *Ibidem* at 32.

³⁸ *Ibidem* at 36.

³⁹ Cheng Weijia, 'Enabling off-site supervision with intelligence' *China Environment News* (20 January 2021).

⁴⁰ *Ibidem* at 32.

⁴¹ Jingzhong Wang, Yi Liao, et al., 'Incidence of novel coronavirus (2019-nCoV) infection among people under home quarantine in Shenzhen, China' (2020) 37 *Travel Medicine and Infectious Disease* 101, 660.

⁴² See <<http://health.people.com.cn/n1/2020/0628/c14739-31760766.html>> accessed October 2021.

⁴³ See <https://www.sohu.com/a/442842120_816671> accessed 5 October 2021.

⁴⁴ See <https://www.sohu.com/a/370897787_561929> accessed 5 October 2021.

b. Community-Level Public Health Intervention

Community closed management can effectively hinder the spread of the virus and buy precious time for fighting the epidemic.⁴⁵ Communities were under closed management and strict control measures were adopted by local government. Law enforcers in urban management, health, market supervision, traffic control, and communities are involved together.⁴⁶ They were on duty at community crossings, assisting the community in pandemic investigation and information registration.⁴⁷ Chinese government departments have extensively persuaded members and cadres of the CPC, and government organs, enterprises and public institutions to join the frontline of community prevention and control as volunteers, and set up work teams to serve as “propagandists”, “inspectors”, “sterilizers” and “distributors” in the community grid, so as to realize all-around investigation and closed management.⁴⁸ Finally, these volunteers have guarded the community’s line of defense, and the prevention and control work has achieved obvious results, and the epidemic prevention situation has improved.⁴⁹

c. Stronger Market Supervision and Management

During the pandemic, some illegal businesses were raising prices, making significant profits, or producing and selling fake and of inferior quality prevention and protection products and medicines, which severely disrupted market order.⁵⁰ Law enforcers kept a close watch on products such as masks and disinfectant, and on daily necessities such as vegetables, rice and noodles.⁵¹ They dealt with price gouging promptly and severely to ensure the daily needs of residents by strict supervision

and severe penalties. The market supervision and management department has strengthened the random inspection of anti-pandemic materials and cracked down on the fake products.⁵²

d. Stronger the Supervision of Medical and Health Work

The health supervision department urged the COVID-19 designated hospitals to implement infection measures.⁵³ On the one hand, hospitals should strengthen the prevention and control of nonsocial infection, promote time-divided appointment diagnosis and treatment, strictly implement the requirements for the zoning management of medical institutions, timely check risks and take measures to deal with them.⁵⁴ On the other hand, hospitals should implement protective measures for medical staff and check protection procedures and the protection work to avoid cross-infection of medical staff.⁵⁵

e. Stronger the Supervision of Public Health Conditions

Law enforcement agencies strengthen the supervision of the sanitary conditions of public places. For example, law enforcement agencies checked centralized air-conditioning in key places such as supermarkets, office buildings, and hotels, and evaluated main disinfection status.⁵⁶ Law enforcement officers conducted key supervision and inspection of hotels, supermarkets, and entertainment venues that had not yet closed to prevent large-scale crowds from gathering.⁵⁷

⁴⁵ Shen Guoming, ‘Rule of law is the fundamental follow of risk society governance’ (April 2020) 4 Exploration and Free Views 16, 18.

⁴⁶ See <<https://baijiahao.baidu.com/s?id=1662311340901451854&wfr=spider&for=pc>> accessed 5 October 2021.

⁴⁷ See <<https://baijiahao.baidu.com/s?id=1662544169184536263&wfr=spider&for=pc>> accessed 5 October 2021.

⁴⁸ See Beijing Municipal Civil Affairs Bureau <http://mzj.beijing.gov.cn/art/2020/3/10/art_4490_622218.html> accessed 5 October 2021.

⁴⁹ Geng Lian, ‘Community prevention and control efforts will be tightened’ *Xinhua Daily* (14 August 2021).

⁵⁰ Ding Jiufa, ‘Price gouging under the pretext of the epidemic will be severely punished’ *People’s Court Daily* (8 August 2021).

⁵¹ *Ibidem* (n. 32).

⁵² Wang Wenhua, Yao Shuju, ‘The application of law in cases involving epidemic crimes is balanced with the

criminal policy’ (2020) 8 People’s Procuratorial Semimonthly 152, 157.

⁵³ General Office of National Health Commission of the People’s Republic of China, Office of National Administration of Traditional Chinese Medicine. ‘Diagnosis and treatment of corona virus disease-19 (8th trail edition)’ (October 2020) 15, 10 *China Medicine* 1494, 1499.

⁵⁴ *Ibidem* (n. 53).

⁵⁵ See The State Council of the People’s Republic of China <http://www.gov.cn/zhengce/content/202005/08/content_5509896.htm> accessed 8 September 2021.

⁵⁶ See <http://wjw.beijing.gov.cn/xwzx_20031/jcdt/202005/t20200528_1910564.html> accessed 30 September 2021.

⁵⁷ Tao Feng, Wang Chenting, ‘Beijing has stepped up quarantine checks on ‘three types of workplaces’ as businesses resume work’ *Beijing Business Today* (12 February 2020).

6. Judicial Guarantee for Epidemic Prevention According to Law

This part will describe the efforts made by China's judicial authorities to fight the epidemic. The Chinese judicial organs have clarified the common charges of crimes involved in the pandemic, attached importance to civil dispute resolution, issued guiding cases, and implemented online litigation.

6.1. Criminal justice — Clarified the Common Charges of Crimes Involving the Pandemic

In order to severely crack down on crimes about epidemic prevention and control, the Supreme People's Court have issued judicial interpretation clarifying the common charges of pandemic-related crimes,⁵⁸ and requiring the following crimes to be cracked down:

- Crimes that resist pandemic prevention and control measures: crime of employing dangerous means to endanger public security, crime of impairing the prevention and treatment of infectious diseases, crime of disturbing public service.
- Violent medical crimes: crime of offense of intentional injury, crime of provocation, crime of insult, crime of false imprisonment.
- Crimes of manufacturing and selling counterfeit products: crime of producing and selling counterfeit medicines, crimes of producing and selling inferior medicines, crimes of producing and selling medical devices that do not meet standards.
- Crime of forcing up price: crime of illegal business operations.
- Crimes of spreading rumors: crime of fabrication and deliberate dissemination of false information.
- Crimes of dereliction of duty in epidemic prevention: crime of impairing the prevention and treatment of the infectious diseases, crimes of spreading infectious.

⁵⁸ Zhao Bingzhi, *et al.*, 'Research on China's Criminal Policy for the Prevention and Control of Major Public Health Incidents: Focusing on China's New Crown Epidemic Prevention and Control Criminal Policy' (December 2020) 6 Jianghai Academic Journal 149, 157.

⁵⁹ Sun Hang, 'Proper trials of civil cases related to the epidemic in accordance with the law serve to ensure economic and social development' *People's Court Daily* (21 April 2020).

⁶⁰ See China Court <<https://www.chinacourt.org/law/detail/2020/05/id/150160.shtml>> accessed 30 September 2021.

6.2. Civil Law — Emphasis on Dispute Resolution

Pandemic adverse impacts made it crucial for judicial departments to strengthen their pre-litigation mediation and conflicts and disputes resolution through non-litigation means, which will fully restore social order and boost the economic restart.⁵⁹

During the pandemic, the Supreme People's Court attached great importance to civil disputes closely related to people's livelihoods. For example, the Supreme People's Court issued "*opinions on the force majeure rules and labor disputes*"⁶⁰ that are of the greatest concern to the public, this judicial interpretation provides guidance for courts at all levels in handling labor dispute cases.⁶¹

In addition, it is difficult for the courts to carry out enforcement work during the pandemic. The Supreme People's Court has issued a judicial interpretation on the basis of full investigation and soliciting opinions from all parties in the early stage, which provides a unified standard for the handling of enforcement cases during the pandemic prevention and control process.⁶²

6.3. Guiding Cases Issued by Judicial Organs

Judicial authorities have successively released guiding cases related to the pandemic.⁶³ These cases mainly involve various COVID-19 response measures such as obstructing the prevention and control of infectious diseases, making and selling fakes, illegal operations, obstructing public affairs, provoking troubles, maintaining the order of pandemic prevention and control, maintaining economic and social order, and helping to resume work and production.⁶⁴

These cases cover almost all the practical needs of judicial cases in the process of preventing and controlling the pandemic according to law, and objectively alleviates the urgency requirements of the COVID-19 on judicial organs.⁶⁵ For example, these cases provide solutions on how to conduct investigations and obtain evidence during the special

⁶¹ *Ibidem* at 59.

⁶² Xiao Jianguo, 'Judicial Guidelines for Properly Handling Execution Cases Involving the COVID-19' *People's Court Daily* (9 June 2020).

⁶³ 'Give full play to the role of demonstration and guidance of typical cases related to the epidemic' *Procuratorial Daily* (9 March 2020).

⁶⁴ *Ibidem* at 62.

⁶⁵ See <<https://baijiahao.baidu.com/s?id=1660602278686510102&wfr=spider&for=pc>> accessed 30 September 2021.

period, how to apply compulsory measures, how to conduct interrogations and appear in court to support public prosecution, and how to accurately distinguish between crimes of endangering public safety by dangerous methods and crimes of hindering the prevention and control of infectious diseases.⁶⁶ This provides guidance for the uniform application of laws to ensure the correct application of law.

6.4. Online Litigation

Prior to the pandemic outbreak, Chinese laws and judicial interpretations had some provisions on online litigation by using modern information technology.⁶⁷ For example, Article 87 of the 2012 *Civil Procedure Law* stipulated that courts could use electronic methods to serve litigation documents for the first time.⁶⁸ In September 2018, the Supreme People's Court issued the "Regulations on Several Issues Concerning the Trial of Cases by Internet Courts".⁶⁹

When the COVID-19 pandemic broke out, local courts spontaneously adopted online methods for filing, trial, and enforcement.⁷⁰ In order to standardize online litigation activities and meet the judicial needs of the people during the pandemic, the Supreme People's Court issued in April 2020 a judicial interpretation entitled "Notice on Strengthening and Standardizing Online Litigation Work during the Prevention and Control of the New Coronary Pneumonia Epidemic". This judicial interpretation requires that cases with online handling conditions should be handled online in principle to minimize personnel travel and gatherings.⁷¹

On June 17th, 2020, the Supreme People's Court issued the "People's Court Online Litigation Rules."⁷²

Its introduction marked a new stage in China's Internet judicial development. The "Rules" established an online litigation rule system covering all trial areas and the entire litigation

process, comprehensively summed up the results of the court's online litigation field in recent years, and actively responded to the people's new judicial needs in the Internet era. Since then, China has formed a relatively systematic and complete online litigation rule system, which has effectively filled the institutional gaps in the field of online litigation in China and has also provided Chinese wisdom and Chinese solutions for the development of Internet justice in the world, this experience will help other countries better conduct online litigation.

7. International Response—Actively Fulfilling Obligation under International Law

In the face of the global public health crisis, countries to strengthen cooperation in epidemic prevention will not only help maintain global and regional public health security, but also help build a community with a shared future for mankind.⁷³ China has made the following efforts from the level of international law.

7.1. Information and Evidence Sharing

Based on the principles of transparency and openness, China has publicly communicated the characteristics of the virus, the route of infection, the current situation of the pandemic, and treatment plans to the international community.⁷⁴ China is a party to the *International Health Regulations*.⁷⁵ According to Article 6 of the Regulations: After a public health emergency in a country, the country shall notify WHO (World Health Organization) within 24 hours of assessing public health information, carry out international prevention and control of the epidemic as soon as possible.⁷⁶

In this pandemic, the Chinese government actively fulfilled the obligation of information notification under international law.⁷⁷ The Chinese government has taken the following actions: First,

⁶⁶ *Ibidem* at 52.

⁶⁷ Zhou Cui, 'The present situation and future of civil judicature pluralism reform in China' (2018) 1 China Legal Science.

⁶⁸ See The National People's Congress of the People's Republic of China <http://www.npc.gov.cn/wxzl/gongbao/2012-11/12/content_1745518.htm> accessed 8 October 2021.

⁶⁹ See China Court <<https://www.chinacourt.org/article/detail/2018/09/id/3489797.shtml>> accessed 8 October 2021.

⁷⁰ See China Court <<https://www.chinacourt.org/article/detail/2020/02/id/4822417.shtml>> accessed 8 October 2021.

⁷¹ See The State Council Information Office of the People's Republic of China <<http://www.scio.gov.cn/xwfbh/xwfbfh/wqfbh/42311/42602/xgzc42608/Document/1674055/1674055.htm>> accessed 8 October 2021.

⁷² See The Supreme People's Court of the People's Republic of China <<http://www.court.gov.cn/fabu-xiangqing-309551.html>> accessed 8 October 2021.

⁷³ Ding Jinguang, Wang Mengmeng, 'Strengthen international cooperation in epidemic prevention and maintain global public health security' *Chinese Social Sciences Today* (28 July 2020).

⁷⁴ Yang Yongchun, 'The crisis test requires more legal thinking' (2020) 22, *People's Tribune* 90, 91.

⁷⁵ See <https://apps.who.int/gb/ebwha/pdf_files/WHA58/WHA58_3-ch.pdf> accessed 30 September 2021.

⁷⁶ *Ibidem*.

⁷⁷ The State Council Information Office of the PRC, 'China's response to COVID-19' *People's Daily* (8 June 2020).

quickly established a response mechanism, carried out etiological and epidemiological research.⁷⁸ Second, the government shared the gene sequence of the new coronavirus as soon as possible, and the rapid development of a national and international consortium helped in the swift analysis of the virus and in making the sequences publicly available within a few days.⁷⁹ Third, successfully developed a test kit within 16 days, and immediately notified the international community of virus data and related epidemics.⁸⁰

7.2. Pandemic Prevention and Control Measures

China takes prevention and control measures based on the characteristics of the pandemic, transmission route, susceptible population, and country's medical conditions, including controlling the source of infection, cutting off infection route, and actively treating patients, while protecting medical staff from infection.

Pandemic prevention and quarantine measures adopted by China have been highly appraised by the international community. United Nations Secretary-General Antonio Guterres praised China's contribution to the global fight against the novel coronavirus pneumonia outbreak, noting that the Chinese people are making efforts for all of humanity.⁸¹

7.3. Communication and Cooperation with International Organizations

As pointed out in the *White Paper: Fighting COVID-19: China in Action*:

The global spread of COVID-19 is causing great concern. Both the fight to rein in the virus and the endeavor to fend off a deepening global recession call for the international community to stand in unity and engage in cooperation. They also call for multilateralism, and commitment to building a global community of shared future. Solidarity and cooperation are the most powerful weapons available to the international community in the war against the pandemic.⁸²

During this pandemic, China opened its door to experts such as the World Health Organization, and

Chinese medical institutions communicated and cooperated with them in a timely and effective manner.⁸³ According to official data, by April 2020, China had organized and implemented anti-pandemic assistance to 89 countries and 4 international organizations in four batches, donated a large amount of anti-epidemic materials to these countries and regions, and sent expert groups to help these countries quickly control the pandemic.⁸⁴

In international cooperation on joint prevention and control, it is essential that major countries take the initiative, fulfill their responsibilities and do their share of the work. China is ready to strengthen exchanges and cooperation with other countries including the US to jointly tackle this pandemic, especially in the fields of research, development, production and distribution of vaccines and drugs.⁸⁵

8. Conclusion

The Chinese model emphasizes the establishment and strict prevention of disease spread, supplemented by strict accountability afterwards.⁸⁶ Specifically, China has made comprehensive efforts in four aspects: (i) legislation, (ii) law enforcement, (iii) justice and (iv) international response. In terms of legislation, China fully relied on the *"Infectious Disease Prevention Law"*, *"Animal Epidemic Prevention Law"*, *"Wild Animal Protection Law"* and other existing laws and has issued a series of legal documents on market control, illegal wildlife trade, restoration of the people's economy, promotion of people's livelihood, security and improvement of the medical workers' treatment. These documents have provided a sufficient legal basis for fighting the pandemic in accordance with law. In terms of law enforcement, China has adjusted law enforcement concepts in a timely manner, optimized implementation methods, implemented closed management of communities and focused on strengthening law enforcement and supervision in areas such as public health and medical health. The Chinese judicial organs have clarified the common charges of crimes involved in the pandemic, issued guiding cases, unified the enforcement standards,

⁷⁸ *Ibidem* at 78.

⁷⁹ Nkengasong John, 'China's Response to a Novel Coronavirus Stands in Stark Contrast to the 2002 SARS Outbreak Response' (March 2020) 26, 3 *Nature Medicine* 310, 311.

⁸⁰ *Ibidem* at 78.

⁸¹ See UN Covid-19 Response <<https://www.un.org/zh/coronavirus>> accessed 8 October 2021.

⁸² See 'White Paper: Fighting COVID-19: China in Action' <http://www.china.org.cn/chinese/2020-08/06/content_76173252.htm?f=pad> accessed 8 October 2021.

⁸³ *Ibidem* at 78.

⁸⁴ See The State Council Information Office of the People's Republic of China <<http://www.scio.gov.cn/xwfbh/xwfbh/wqfbh/42311/42784/index.htm>> accessed 30 September 2021.

⁸⁵ *Ibidem* at 73.

⁸⁶ Chen Zhong, 'Resilience: Behavioral Philosophy Response to Risk Society' (April 2020) 4 *Exploration and Free Views* 29, 32.

and implemented online litigation. These measures provide standards for the proper handling of judicial cases in the context of normalization of pandemic prevention and control. In terms of fulfilling its international obligations, China shared the gene sequence of the new coronavirus as soon as possible, and actively fulfilled its obligation to report information under international law. China timely controlled the source of infection, cut off the route of infection, and actively treated patients, which helped win time for other countries and regions to fight the pandemic. Chinese medical institutions have conducted timely and effective communication and cooperation with the WHO. China has sent expert teams to help other countries quickly control the epidemic.

In general, the response of the Chinese government to the pandemic can be summarized as follows: pandemic prevention according to law. This way was China able to balance limiting individual basic rights and freedoms and effectively protecting individual life and health, while rapidly restoring life and the economy, ensuring the legitimacy and efficiency of pandemic prevention measures and the credibility of the government according to law. This way was China able to balance limiting individual basic rights and freedoms and effectively protecting individual life and health, while rapidly restoring life and the economy, ensuring the legitimacy and efficiency of pandemic prevention measures and the credibility of the government.

Critical Review of the Legal Measures Against COVID-19 in Taiwan

Anton Ming-Zhi Gao

Abstract. Covid-19 pandemic strikes all over the world. With a view to tackling this pandemic, a wide range of unprecedented fundamental right intrusive measures, such as large-scale lock down, electronic tracking without court decision, medical device rationing measures, etc., have been adopted and implemented. Despite the effectiveness of these measures in preventing further virus spreading, the concerns of violation of constitution law concerns would be raised after the pandemic has eased. Taiwan performed very well in tackling covid-19 from the record of 253 days without local confirmed cases in 2020 and the only 16250 confirmed cases by 4 October 2021. However, success in avoiding virus spreading may not mean the legal measures play key role. Also, if the law does play roles, it is also possible that these measures could not pass the unconstitutional tests. In order to provide a structural analysis of the related fundamental right intrusive measures, this article will begin with the introduction of the main laws and “guidelines” in combating COVID-19. Afterwards, a critical review will be provided to investigate into the institutional failure and the unconstitutional concerns from the measures.

Keywords: *Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens, Special COVID-19 Act, Name Based Facemask Scheme, Taiwan*

1. Introduction

Since early 2020, the world has been severely affected by the COVID-19 pandemic.

However, Taiwan was perhaps not as severely affected, having 1121 confirmed cases with twelve deaths by 29 April 2021¹ (in spite of the outbreak in mid May 2021, Taiwan has only 16,250 confirmed cases)². Additionally, Taiwan has established a record of 253 days without any local confirmed case.³ Consequently, Taiwan performs

very well in several COVID-19 safety rankings, ranking 16th in DKG’s COVID-19 Regional Safety Assessment⁴ and 2nd in Bloomberg’s COVID Resilience Ranking.⁵

According to the government’s ‘Crucial Policies for Combating COVID-19 in Taiwan’,⁶ Taiwan’s success was attributed to eight factors,⁷ the successful national health insurance system,⁸ and the seven key policy measures:⁹

- border control;

¹ <<https://sites.google.com/cdc.gov.tw/2019-ncov/taiwan>> accessed 1 December 2021; ‘Taiwan confirms 4 local, 2 imported infections, totally 868’ <<https://china.post.nownews.com/20210119-2038782>> accessed 1 December 2021.

² ‘Taiwan CDC, CECC confirms 6 more imported COVID-19 cases’, *PublishTime* (3 October 2021) <<https://www.cdc.gov.tw/En/Bulltin/Dtail/nqCeKH1DG1WjIP9Mp0yPBg?typeid=158>> accessed 1 December 2021.

³ ‘Coronavirus, Taiwan reports first domestic case of COVID-19 in 253 days’, *Focus Taiwan* (22 December 2020) <<https://focustaiwan.tw/society/202012220006>> accessed 1 December 2021.

⁴ DKV, *Taiwan: #16 Region by COVID-19 Safety Ranking* (June 2020) <<http://analytics.dkv.global/covid-regions/taiwan.pdf?fbclid=IwAR1me0TY3BEtafsOz1f38t8J5aesVAicxsPSPrUEOKVaYsW5UxRayarL0>> accessed 1 December 2021.

⁵ Bloomberg, *The COVID Resilience Ranking*, <<https://www.bloomberg.com/graphics/covid-resilience-ranking/>> accessed 1 December 2021.

⁶ MOHW, *Crucial Policy for Combating Covid-19*, <<https://covid19.mohw.gov.tw/en/mp-206.html>> accessed 1 December 2021.

⁷ SARS experience, Central Epidemic Command Center, Information Transparency, Good resource allocation, Timely border control, Smart community transmission prevention, Advanced medical technology, Good etiquette of citizens.

⁸ MOHW, *Healthcare system*, <<https://covid19.mohw.gov.tw/en/np-4777-206.html>> accessed 1 December 2021.

⁹ MOHW, *Key success factors*, <<https://covid19.mohw.gov.tw/en/np-4769-206.html>> accessed 1 December 2021.

- stockpiling masks and supplies;
- community transmission prevention;
- infection control policies for medical facilities and relevant institutions;
- inspection and testing;
- international cooperation; and
- information protection.

However, the purpose of this article is to provide an overview and critical review the legal responses against COVID-19. Since different ministries may have various legal responses to COVID-19, this article mainly covers the national responses and the MOHW (Ministry of Health and Welfare) responses.

2. Main Laws Governing Combating COVID-19 in Taiwan

2.1. Communicable Disease Control Act

2.1.1. The Existing Legal Regime

In terms of the rule of law, Taiwan came very close to declaring a state of emergency. Since the outbreak of COVID-19, many legal scholars and legislators have urged for the declaration of the state of emergency in as early as mid-March 2020.¹⁰

Article 43 of the Constitution authorizes the issuance of emergency decrees. These powers may be issued in cases of a natural calamity, an epidemic, or a national financial or economic crisis that calls for emergency measures.¹¹ In reality, there was no need for an emergency declaration as noted before the record of more than 200 days without local cases in 2020.¹²

¹⁰ Central News Agency (CNA), *Summary of pandemic measures in counties and cities*. *Taiwan News* (12 May 2020) <<https://www.cna.com.tw/news/firstnews/202105115006.aspx>> accessed 1 December 2021.

¹¹ Article 43 of the Constitution states: 'In case of a natural calamity, an epidemic, or a national financial or economic crisis that calls for emergency measures, the President, during the recess of the Legislative Yuan, may, by resolution of the Executive Yuan Council, and in accordance with the Law on Emergency Decrees, issue emergency decrees, proclaiming such measures as may be necessary to cope with the situation. Such decrees shall, within one month after issuance, be presented to the Legislative Yuan for confirmation; in case the Legislative Yuan withholds confirmation, the said decrees shall forthwith cease to be valid'.

¹² Anton Ming-Zhi Gao, 'Taiwan's Success—A Hard-won Battle', in Rose-Liza Eisma-Osorio, Karsten Grabow, Peter Hefele and Stefan Samse (eds.), *Parliaments in the COVID-19 Pandemic: Between Crisis Management, Civil Rights and Proportionality Observations from Asia and the Pacific* (2021), 192.

¹³ Taiwan CDC, *SARS (Severe Acute Respiratory Syndrome)* <SARS (Severe Acute Respiratory Syndrome) - Taiwan Centers for Disease Control (cdc.gov.tw)> accessed 1 December 2021.

Before the COVID-19 pandemic, Taiwan was already struck by another very serious pandemic of SARS in 2003.¹³ Taiwan already had an established legal regime to tackle the threat from these diseases before the SARS crisis in the form of legislative act of the Communicable Disease Control Act (CDC Act) (promulgated very early in 1944 and the latest revision on 19 June 2019).¹⁴ COVID-19 was designated as Category 5 important (cardinal) disease on 15 January 2020¹⁵ and subject to commensurate measures. For instance, Art. 44(1) of the CDC Act provides that "patients with Category 4 and Category 5 communicable diseases shall be managed in accordance with the control measures announced by the central competent authority."¹⁶

When competent authorities conduct isolation care of patients with communicable diseases, they shall prepare isolation care notice, deliver the original to the patient or the family, and the copy to the isolation care institution in three days from the second day of mandatory isolation care.¹⁷

Under the CDC Act, there are laboratory testing and reporting requirements for relevant specimens from Category 1 to Category 5 levels. Relevant specimens of communicable diseases shall be sent to the central competent authority or its designated local competent authorities, medical institutions, academic or research institutes that are certified for laboratory testing capabilities; specimens of other communicable diseases may be laboratory-tested by health or medical institutions, academic or research institutes commissioned or recognized by

¹⁴ The following examples are the important diseases subject to the regime of this Act Amebiasis 12 June 2017; Complicated Varicella 12 April 2017; Leptospirosis 10 April 2017; Hantavirus Syndrome 10 April 2017; Ebola Virus Disease 6 April 2017; Rift Valley Fever 6 April 2017; Anthrax 6 April 2017; Marburg Hemorrhagic Fever 6 April 2017; Rubella(CRS) 6 April 2017; Middle East Respiratory Syndrome Coronavirus (MERS-CoV) 6 April 2017; Lassa Fever 6 April 2017; Measles 6 April 2017; Herpesvirus B Infection 6 April 2017; Toxoplasmosis 6 April 2017; Botulism 6 April 2017; Tularemia 6 April 2017; Scrub Typhus (Tsutsugamushi Disease) 6 April 2017; Plague 6 April 2017; Smallpox 6 April 2017. Taiwan CDC, *Important Diseases* <https://www.cdc.gov.tw/En/Category/NewPage/bg0g_VU_Ysrgkes_KRUDgQ> accessed 1 December 2021.

¹⁵ Taiwan CDC, *The Declaration of Covid-19 (Taiwan Centers for Disease Control*, 15 January 2020) <<https://www.cdc.gov.tw/Disease/SubIndex/N6XvFa1Y P9CXYdB0kNSA9A>> accessed 1 December 2021.

¹⁶ Communicable Disease Control Act (Amended Date: 19 June 2019) <Communicable Disease Control Act - Article Content - Laws & Regulations Database of The Republic of China (moj.gov.tw)> accessed 1 December 2021.

¹⁷ *Ibidem*, art. 44(2).

the MOHW.¹⁸ The results of laboratory testing must be reported to the local and central competent authorities.¹⁹ Individuals who are fully aware that they have been infected with Category 5 diseases, such as Covid-19, but fail to comply with instructions from competent authorities and further infect others, are to be sentenced to imprisonment for up to three years or a fine up to NT\$ 500,000.²⁰

Apart from these provisions that are directly related to Category 5 diseases, other measures could be adopted by relevant authorities under the Act as well. For instance, the powers granted under Art. 37 have been frequently used by local governments to adopt the following measures to tackle COVID-19:²¹

- regulate education, meeting, gathering or other group activities;
- regulate access to specific places and restrict the number of people allowed;
- regulate traffic in specific areas;
- evacuate people from specific places or areas; and
- restrict or prohibit patients or suspected patients with communicable diseases from traveling and using public transportation.

For instance, the facemask mandate in the metro is based on the open clause of this legal provision: “other disease control measures announced by government organizations at various levels.”²² A person who violates this provision will be fined NT\$ 3,000 up to NT\$ 15,000.²³

2.1.2. Related Sub-Regulations Under the Act

There were further detailed administrative orders published and/or revised to respond to the needs of COVID-19. For example, to improve the *Surveillance and Advance-Alert System*, the Regulations

Governing the Implementation of the Epidemiological Surveillance and Advance-Alert System for Communicable Diseases, which based on the legal authorization of Art. 26 of the CDC Act, were amended on 14 September 2020.²⁴ To improve testing, the Regulations Governing Laboratory Testing for Communicable Diseases and Management of Laboratory Testing Institutions, based on the legal authorization of Art. 46 of the CDC Act, were amended on 13 May 2020.²⁵

Since many citizens could be fined under Art. 37, 25, 58 or 48 of the CDC Act, the central and local governments published further rules to harmonize the enforcement of administrative fines. They are as follows:

Central government	the standards for administrative fines for violation of Article 58 of the CDC Act(違反傳染病防治法第五十八條第一項第二款、第三款及第三項規定所為之檢疫措施案件裁罰基準) (2020.12.07) ²⁶ the standards for administrative fines for violation of Article 48 of the CDC Act (違反傳染病防治法第四十八條第一項規定所為之隔離措施、第五十八條第一項第二款及第四款規定所為之檢疫措施案件裁罰基準) (2020.04.17) ²⁷
Tainan city	the standards for administrative fines for violation of Article 25 of the CDC Act (臺南市政府衛生局處理違反傳染病防治法第二十五條第二項規定案件裁罰基準) (2020.09.28) ²⁸
Taichung city	the standards for administrative fines for violation of Article 37 of the CDC Act (臺中市政府衛生局處理違反傳染病防治法第三十七條第一項第六款有關嚴重特殊傳染性肺炎防疫措施事件統一裁罰基準) (2020.04.10) ²⁹

(source: compiled by this author)

¹⁸ *Ibidem*, art. 46(1).

¹⁹ *Ibidem*, art. 46(1).

²⁰ *Ibidem*, art. 62.

²¹ *Ibidem*, art. 37.

²² *Ibidem*, art. 70.

²³ *Ibidem*, art. 70.

²⁴ Regulations Governing the Implementation of the Epidemiological Surveillance and Advance-Alert System for Communicable Diseases (Amended Date: 14 September 2020) <Regulations Governing the Implementation of the Epidemiological Surveillance and Advance-Alert System for Communicable Diseases - Article Content - Laws & Regulations Database of The Republic of China (moj.gov.tw)> accessed 1 December 2021.

²⁵ Regulations Governing Laboratory Testing for Communicable Diseases and Management of Laboratory Testing Institutions (Amended Date: 13 May 2020) <Regulations Governing Laboratory Testing for Communicable Diseases and Management of Laboratory

Testing Institutions - Article Content - Laws & Regulations Database of The Republic of China (moj.gov.tw)> accessed 1 December 2021.

²⁶ The standards for administrative fines for violation of Article 58 of the CDC Act, 7 December 2020 <<https://www.cdc.gov.tw/File/Get/ubfwWHWWsAz3coMDDyWg4w>> accessed 1 December 2021.

²⁷ The standards for administrative fines for violation of Article 48 of the CDC Act, 20 March 2020 <https://www.cdc.gov.tw/?aspxerrorpath=/File/Get/sqrAKrJg_Uq8Ki5B0Ht03g> accessed 1 December 2021.

²⁸ The standards for administrative fines for violation of Article 25 of the CDC Act <<http://law01.tainan.gov.tw/glsnewsout/LawContent.aspx?id=GL001366>> accessed 1 December 2021.

²⁹ The standards for administrative fines for violation of Article 37 of the CDC Act <<http://lawsearch.taichung.gov.tw/glsout/LawContent.aspx?id=GL003834>> accessed 1 December 2021.

2.2. Special COVID-19 Act

2.2.1. Overview of the Special COVID-19 Act

After the outbreak of the pandemic, a 'Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens (Special COVID-19 Act)' was promulgated by the parliament in February and amended in April 2020.

Of the 19 provisions in this Special Act, most of the articles deal mainly with the relief and revitalization measures, except for Art. 5, 6, 7, 8.

Firstly, Art. 5 and 6³⁰ supplement the *expropriation or requisition/compensation scheme* for the production equipment and raw materials needed, which were already provided for in Art. 54 of the CDC Act. These two provisions are exceedingly relevant for Taiwan's establishment of the first facemask legal monopoly scheme in the world during COVID-19.³¹ Under this regime, facemask manufacturing companies were obliged to produce and supply facemasks to the government. The government then used approximately 6000 pharmacy channels to distribute the masks to the market.³² All citizens were required to present a National Health Insurance card and use the name based system to buy the facemask with the fixed price and amount quota. For instance, in early February, individuals were allowed to buy two facemasks with a total price of 10 NTD every week.³³ Thus, the facemask rationing scheme was considered by the MOHW a key policy in successfully combating COVID-19. The

government provided a steady supply of disease prevention supplies to reassure the people.³⁴

Art. 7 and 8 have added more concerning *preventive and responding measures*. Art. 8 is related to the privacy and personal data protection of individuals in isolation or quarantine during the disease prevention period. Recording videos of or photographing the individual's violation of these measures, publishing their personal data, or conducting other necessary disease prevention measures or actions are allowed under this provision. Additionally, Art. 7 provides a very general legal basis for almost all combating COVID-19 measures, in that the Commander of the Central Epidemic Command Center may, for disease prevention and control requirements, *implement necessary response actions or measures*.

Apparently, the power conferred by this clause as in most cases at the time, was very general and gave wide margins of power to the executive branch. This provision was criticized by legal scholars and practitioners³⁵ and human rights groups³⁶ for the lack of legal clarity. Despite being seldom mentioned by the government as the legal basis for COVID-19 measures, it plays the role of an 'implicit' legal basis for many measures that did not have a legal basis. For instance, the government has long been used the mobile GPS to monitor the movement of the 14-day home quarantine citizens or incoming passengers from abroad. The government may use this general clause as the legal basis. Also, after the mid May outbreak in 2021, all customers are oblig-

³⁰ Article 5 of the Special COVID-19 Act: 'To produce disease prevention supplies specified in Paragraph 1, Article 54 of the Communicable Disease Control Act, where necessary, government authorities on all levels may, based on instructions of the Commander of the Central Epidemic Command Center, expropriate or requisition required production equipment and raw materials and provide appropriate compensation. The operating procedures for expropriation or requisition, methods of compensation, and other related matters in the preceding paragraph shall be established by the central competent health authority after consulting related authorities.' Article 6 of the Special COVID-19 Act: 'The management, use, proceeds, and disposal of disease prevention supplies, production equipment, and raw materials expropriated or requisitioned in accordance with Paragraph 1, Article 54, of the Communicable Disease Control Act and Paragraph 1 of the preceding article shall not be restricted by Article 11, Article 28, and Article 60 of the National Property Act or local public property management regulations.'

³¹ Anton Ming-Zhi Gao et al., 'Lessons from the facemask monopoly system in Taiwan to tackle the Covid-19 challenge', (Management and Medical Sciences Interdisciplinary Conference, October 30 - November 1, 2020).

³² Yulin Tai, Hsin Chi, Nan-Chang Chiu, Cheng-Yin Tseng, Ya-Ning Huang and Chien-Yu Lin, 'The Effect of a Name-Based Mask Rationing Plan in Taiwan on Public

Anxiety Regarding a Mask Shortage During the Covid-19 Pandemic' (22 January 2021), Observational Study JMIR Form Res, 5, 1 <<https://formative.jmir.org/2021/1/e21409>> accessed 1 December 2021.

³³ Taiwan CDC, *Name-based rationing system for purchases of masks to be launched on February 6; public to buy masks with their (NHI) cards* <Name-based rationing system for purchases of masks to be launched on February 6; public to buy masks with their (NHI) cards - Taiwan Centers for Disease Control (cdc.gov.tw)> accessed 1 December 2021.

³⁴ MOHW, *Provide a steady supply of disease prevention supplies to reassure society and the people* <<https://covid19.mohw.gov.tw/en/cp-4785-53788-206.html>> accessed 1 December 2021.

³⁵ A prosecutor attacked the legitimacy of Art. 7 of the Special Covid-19 Act. UP media, *The ignored legal troops in fighting Covid-19*, 4 April 2020 <https://www.upmedia.com/news_info.php?SerialNo=84502> accessed 1 December 2021.

³⁶ Taiwan Association for Human Rights <when the rule of law meets the virus: do not abuse the general provisions, and only by preventing the epidemic and democracy can coexist | taiwan association for the promotion of human rights (tahr.org.tw)> accessed 1 December 2021.

ed to scan the QR code in front of the all convenience stores, shops, restaurants, etc, before entering. The legal basis for this is more likely to be this general clause as well.³⁷

2.2.2. Related Sub-Regulations Under This Act

Since the main focus of this Act is to deal with relief and revitalization aspects of the pandemic and pandemic responses, the Act was implemented with many sub-legislative implementing acts.

A nation-wide scheme of 'Triple volume coupon' was launched by the Regulation of Issuing of Triple Volume Coupon at the COVID-19 Time, based on the legal authorization of Art. 9(3) of the Special COVID-19 Act.³⁸ Under this, a citizen must pay 1000 NTD to buy the coupon with the value of 3000. It is anticipated that such a scheme is helpful to encourage economic recovery by encouraging customers to spending and shopping.

Based on the same legal basis of Art. 9(3) of the Special COVID-19 Act, different ministries also promulgated subsidy ordinances to assist the industries or affected persons as follows:

- Subsidy ordinance to assist broadcasting businesses helping to share COVID-19 re-

lated information (National Communication Council) (6 November 2020);³⁹

- Subsidy ordinances to assist affected national parks (Ministry of Interior Affairs) (12 March 2020);⁴⁰
- Subsidy ordinances to assist the affected business (Ministry of Culture) (4 May 2020);⁴¹
- Subsidy ordinances to assist affected business (Ministry of Transportation) (31 December 2020);⁴²
- Subsidy ordinances to assist affected business (Agricultural Council) (27 April 2020);⁴³
- Subsidy ordinances to assist affected business (Hakka Affairs Council) (12 March 2020);⁴⁴
- Subsidy ordinances to assist affected businesses of indigenous people (12 March 2020);⁴⁵
- Subsidy ordinances to assist Public Welfare Lottery Distributors (Ministry of Finance) (14 May 2020);⁴⁶
- Subsidy ordinances to assist tobacco and alcohol related businesses (Ministry of Finance) (10 July 2020);⁴⁷

³⁷ Liao Jan, 'The privacy concerns of QR code scanning scheme' *HSU Legal* (1 July 2021) <<https://hsu.legal/article/48>> accessed 1 December 2021.

³⁸ Decree on Stimulus vouchers aimed at spurring consumption at the Covid-19 time, 16 November 2020 <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=J0140019>> accessed 1 December 2021.

³⁹ Subsidy ordinance to assist broadcasting businesses helping broadcast Covid-19 related information, National Communication Council, 6 November 2020 國家通訊傳播委員會對廣播電視事業協助播送嚴重特殊傳染性肺炎防疫訊息所受影響補貼辦法 (民國 109 年 11 月 06 日) <<https://nclaw.ncc.gov.tw/FLAW/FLAWDAT01.aspx?id=FL095345&keyword=>> accessed 1 December 2021.

⁴⁰ Subsidy ordinances to assist affected national parks, Ministry of Interior Affairs, 12 March 2020 內政部對受嚴重特殊傳染性肺炎影響發生營運困難國家公園事業紓困辦法 (民國 109 年 03 月 12 日): <<https://glrs.moi.gov.tw/LawContentSource.aspx?id=GL001251>> accessed 1 December 2021.

⁴¹ Subsidy ordinances to assist the affected busines, Ministry of Culture, 4 May 2020 文化部對受嚴重特殊傳染性肺炎影響發生營運困難產業事業紓困振興辦法 (民國 109 年 05 月 04 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=H0170156>> accessed 1 December 2021.

⁴² Subsidy ordinances to assist the affected busines, Ministry of Transportation, 31 December 2020 交通部對受嚴重特殊傳染性肺炎影響發生營運困難產業事業紓困振興辦法 (民國 109 年 12 月 31 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=K0020068>> accessed 1 December 2021.

0020068> accessed 1 December 2021.

⁴³ Subsidy ordinances to assist the affected business, Agricultural Council, 27 April 2020 行政院農業委員會對受嚴重特殊傳染性肺炎影響發生營運困難產業事業紓困振興辦法 (民國 109 年 04 月 27 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=M0020036>> accessed 1 December 2021.

⁴⁴ Subsidy ordinances to assist the affected business, Hakka Affairs Council, 12 March 2020 客家委員會對受嚴重特殊傳染性肺炎影響發生營運困難產業振興辦法 (民國 109 年 03 月 12 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=D0140025>> accessed 1 December 2021.

⁴⁵ Subsidy ordinances to assist the affected businesses of indigenous people, 12 March 2020 原住民族委員會對受嚴重特殊傳染性肺炎影響原住民族產業事業振興辦法 (民國 109 年 03 月 12 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=D0130044>> accessed 1 December 2021.

⁴⁶ Subsidy ordinances to assist affected the business of Public Welfare Lottery Distributors, Ministry of Finance, 14 May 2020 (財政部對受嚴重特殊傳染性肺炎影響發生營運困難公益彩券經銷商紓困辦法 (民國 109 年 05 月 14 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=G0320035>> accessed 1 December 2021.

⁴⁷ Subsidy ordinances to assist affected the business of tobacco and alcohol, Ministry of Finance, 10 July 2020, (財政部對受嚴重特殊傳染性肺炎影響營運艱困之專營菸酒批發及零售業紓困辦法 (民國 109 年 07 月 10 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=G0320036>> accessed 1 December 2021.

- Subsidy ordinances to assist affected business (Ministry of Education) (7 May 2020);⁴⁸
- Subsidy ordinances to assist affected business (Ministry of Economic Affairs) (31 August 2020);⁴⁹
- Subsidy ordinances to assist affected medical institutions and businesses (ministry of health and welfare) (20 April 2020);⁵⁰ and
- Subsidy ordinances to assist affected labourers (Ministry of Labor) (20 April 2020).⁵¹

Additionally, there were three subsidy ordinances based on other than Art. 9 of the Special COVID-19 Act:

- Regulations Governing Disease Prevention Compensation During Severe Pneumonia with Novel Pathogens Isolation and Quarantine Periods.⁵² Legal basis: Article 3(4) of the Special COVID-19 Act;
- Regulations Governing Tax Preferences for Quarantine Leave of Severe Pneumonia with Novel Pathogens.⁵³ Legal basis: Article 4(3) of the Special COVID-19 Act;
- Regulations Governing the Operational Procedures and Compensation for Expropriation of Manufacturing Equipment

and Raw Materials of Disease Prevention Supplies for Severe Pneumonia with Novel Pathogens.⁵⁴ Legal basis: Article 5(2) of the Special COVID-19 Act.

Interestingly, there is a very high intensity of rule of law and legal reservation for relief measures and budget allocation rules.

2.3. Other Laws

Apart from these legal regimes, certain laws were used to combat COVID-19 as well. For instance, Article 251 of the Criminal Law, which was never used before, has been used frequently against those who sell facemasks higher than the government-approved price as per the government-run facemask rationing scheme.⁵⁵ Facemasks were designated as ‘essential necessities’ by the cabinet. Once a product has been considered to be “essential necessities”, those who stocks up on any of the following items and then refrains from selling to the market, without justification and with the intention of raising the transaction price would be an criminal offense.

Yet, this is criticized by the human rights groups for misuse and out of concerns that it may cause ‘empty criminal law’⁵⁶, ie., the criminal charge should be on ‘clear’ legal provision with clear

⁴⁸ Subsidy ordinances to assist affected business, Ministry of Education, 7 May 2020(教育部對受嚴重特殊傳染性肺炎影響發生營運困難產業事業紓困振興辦法 (民國 109 年 05 月 07 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=H0010068>> accessed 1 December 2021.

⁴⁹ Subsidy ordinances to assist affected busines, Ministry of Economic Affairs, 31 August 2020 (經濟部對受嚴重特殊傳染性肺炎影響發生營運困難產業事業紓困振興辦法 (民國 109 年 08 月 31 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=J0140018>> accessed 1 December 2021.

⁵⁰ Subsidy ordinances to assist affected medical institutions and business, Ministry of Health and Welfare, 20 April 2020 (衛生福利部對受嚴重特殊傳染性肺炎影響醫療(事)機構事業產業補償紓困辦法(民國 109 年 04 月 20 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=L0050043>> accessed 1 December 2021.

⁵¹ Subsidy ordinances to assist affected labourers, Ministry of Labor, 20 April 2020 (勞動部對受嚴重特殊傳染性肺炎影響勞工紓困辦法(民國 109 年 04 月 20 日) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=N0020022>> accessed 1 December 2021.

⁵² Regulations Governing Disease Prevention Compensation During Severe Pneumonia with Novel Pathogens Isolation and Quarantine Periods (Amended Date: 17 June 2020) <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=L0050040>> accessed 1 December 2021.

⁵³ Regulations Governing Tax Preferences for Quarantine Leave of Severe Pneumonia with Novel

Pathogens (Announced Date: 10 March 2020) <Regulations Governing Tax Preferences for Quarantine Leave of Severe Pneumonia with Novel Pathogens - Article Content - Laws & Regulations Database of The Republic of China (moj.gov.tw)> accessed 1 December 2021.

⁵⁴ Regulations Governing the Operational Procedures and Compensation for Expropriation of Manufacturing Equipment and Raw Materials of Disease Prevention Supplies for Severe Pneumonia with Novel Pathogens <<https://law.moj.gov.tw/ENG/LawClass/LawSearchCNK ey.aspx?BTType=CON&pcode=L0050041>> accessed 1 December 2021.

⁵⁵ Article 251 of Criminal Code of the Republic of China: ‘A person who stocks up on any of the following items and then refrains from selling to the market, without justification and with the intention of raising the transaction price, shall be sentenced to imprisonment for no more than three years, short-term imprisonment; in lieu thereof, or in additional thereto, a fine of no more than three hundred thousand New Taiwan Dollars may be imposed:

1. Basic provisions, agricultural products, or other food-and-drink consumer essentials.

2. Plant seeds, fertilizer, raw materials or other products required for agriculture or industry.

3. Essential necessities, other than those described in the preceding two paragraphs, as announced by the Executive Yuan.’

⁵⁶ Wang Chunyi, ‘Stockpile facemask may commit a crime: knowledge on ‘empty criminal law’ *Legispedia* (24 April, 2020) <<https://www.legis-pedia.com/article/crim e-penalty/734>> accessed 1 December 2021.

constituents in provision. It may be against the fundamental criminal law principle of no penalty without a law (or *Nulla poena sine lege; Nullum crimen, nulla poena sine praevia lege poenali*).

Finally, such persecution of this provision for those who sells higher than government price under the facemask scheme would not be helpful in encouraging the release of the stocks to alleviate the supply shortage. Certain volumes was not release into market, until the government allowing non-name based facemask on the market since June 2020. It seemed the court took very strict approach to this clause and consider 14 NTD and 12 NTD (which is higher than the government's price of 5 NTD) for violation of this clause. One was sentenced to four-month prison in a case.⁵⁷

3. Guidelines and Directions Governing COVID-19 Responses in Taiwan

3.1. New Legal Tools for COVID-19

Under Taiwan's ordinary constitutional and administrative legal system, if a measure would affect the rights and obligations of citizens, (apart from the substantive requirement of proportionate principle) the minimum requirement of a legal basis provided by law or administrative order with clear legal designation/basis, provided by law, is necessary.⁵⁸ However, due to the urgency of COVID-19, such rigid compliance with the ordinary constitutional and administrative legal system may impede the efficiency of tackling the pandemic.

Thus, several un-authorized or 'guidelines or directions' lacking legal basis that may affect the rights and obligation of citizens were promulgated by different Ministries. For instance, in order to provide a fast response guide for the medical institutes, MOHW published more than forty such guidelines and directions to regulate the medical institute on the official website.⁵⁹

The original purpose of these guidelines/directions was to regulate the operation of hospitals/institutes (öffentliche Anstalt) during COVID-19, but, unfortunately, certain measures may have indirect effects on the fundamental rights of the citizens. For instance, the testing right for asymptomatic patients was restrained. According to the 'Guideline on Self-pay application for COVID-19 testing' (before the winter program in November),⁶⁰ citizens could not qualify for self-testing if they failed to show symptoms.⁶¹ This is perhaps the most rigid testing rule in Taiwan's history and among most countries in the world.

Clearly, the original purpose was to save medical resources and avoid stressing the testing system at the beginning of the pandemic, however this also affected the citizens' right to know their health status. Even after facing the mass testing request from certain medical experts, the Chief Commander and the Minister of Welfare and Health both went public to reply to criticism of Taiwan's limited testing policy by referring to the failure of other countries'⁶² mass testing policies, asking 'why Taiwan should learn from those failed schemes?'.⁶³

⁵⁷ Tainan Local simple procedural course cases, Case No.42 (2021)(臺灣臺南地方法院 110 年度簡字第 42 號判決), <<https://db-lawbank-com-tw.nthulib-oc.nthu.edu.tw/SBAR/RESULTS.aspx?KW=%E5%9A%B4%E9%87%8D%E7%89%B9%E6%AE%8A%E5%82%B3%E6%9F%93%E6%80%A7%E8%82%BA%E7%82%8E%E9%98%B2%E6%B2%BB%E5%8F%8A%E7%B4%93%E5%9B%B0%E6%8C%AF%E8%88%88%E7%89%B9%E5%88%A5%E6%A2%9D%E4%BE%8B%E7%AC%AC%E5%8D%81%E4%BA%8C%E6%A2%9D>> accessed 1 December 2021.

⁵⁸ See also, Art. 5 of the Central Regulation Standard Act: 'The following objects shall be stipulated by a statute:

1. It is required to stipulate by a statute as the Constitution or a statute expressly stipulated.

2. Stipulation concerns the rights or obligations of the people.

3. Stipulation concerns the organization of a government agency at national level.

4. Other objects with substantial importance shall be stipulated by a statute.'

Art. 150 of the Administrative Procedure Act: 'The term 'legal order' used in this Act means an abstract prescription with external legal effects, established by an administrative authority as enabled by law in respect of general matters and applicable to a multiple number of non-specified persons.

A legal order shall specify the authority conferred by

law based on which it is established and shall not transgress the scope of such authority or divert from the legislative purposes of the enabling law.'

⁵⁹ Taiwan CDC, *Covid-19 Related Guidelines* <https://www.cdc.gov.tw/Category/MPage/I92jtdmXZO_oofPzP9HQ> accessed 1 December 2021.

⁶⁰ See e.g., Guideline on Self-pay application for Covid-19 testing, (7 October 2020, Version 37) <<https://ws.moi.gov.tw/Download.ashx?u=LzAwMS9VcGxvYwQvT2xkRmlsZS9kb3dubG9hZERfZmlsZS%2FplovmLL7msJHnnL7oh6rosrvmqLpQzDDT1ZJRC0xOSjmrabmvKLogrrngo4p55Sz6KuL6KaP5a6aMTA5MTAwNy5wZGY%3D&n=6ZaL5pS%2B5rCR55y%2B6leq6LK75qqi6amXQ09WSUQtMTko5q2m5ryi6IK654KOKeeUs%2Biri%2Bimj%2BWumjEwOTEwMDcucGRm&icon=.pdf>> 開放民眾自費檢驗 COVID-19 (武漢肺炎) 申請規定 109 年 10 月 7 日第 37 版 accessed 1 December 2021.

⁶¹ E.g., to enter other countries for the compassionate reasons listed above; job requirements; short-term business travelers; to study abroad Application Form for Out-of-Pocket Polymerase Chain Reaction (PCR) Test_1090814.odt, available at: <<https://www.cdc.gov.tw/File/Get/h78rGiw8nDBMzX-3lCtXQ>> ---accessed ---1 December 2021.

⁶² E.g., Germany.

⁶³ Luo Libang, 'Why not mass testing? The chief commander of the Taiwan CECC: "Why should Taiwan

Moreover, the CDC also published certain guidelines/directions directly affecting the fundamental rights of citizens. For instance, under the 'COVID-19 Guideline: Public Gathering', mandatory measures were adopted that affect citizens' right to assembly, such as taking body temperature prior to entry and asking people with high body temperature not to participate in certain events.⁶⁴

Finally, government news announcements that abuse a citizen's rights are taken seriously in Taiwan. For instance, the controversial going abroad ban of senior/junior high and elementary school teachers and students was implemented from 17 March, 2020 by a new announcement the Ministry of Education.⁶⁵ During the pandemic, the Ministry of Education prescribed and promoted the use of the Zoom app, but the government abruptly claimed that there are security issues with it and prohibited its use on 7 April, 2020.⁶⁶ In both the news announcements, a legal basis was lacking.

These measures have not published in the government gazette either.

3.2. Art. 7 of the Special Covid-19 Act as Explicit or Implicit Legal Basis

As noted above, due to the abstract nature of Art. 7 of the Special Covid-19 Act, it could become the legal basis for all measures affecting rights and obligations during COVID-19. Additionally, due to its abstract nature, referring to this has attracted outcries of human rights groups and law societies.⁶⁷

In this regard, this legal basis was not cited very often. Nonetheless, at the time of the outbreak of COVID-19 in January and February, there was a very controversial ban on medical personnel traveling abroad. A letter was issued by CECC to all hospitals and institutions.

learn from the failure countries?" *Storm Media* (25 August 2020) <<https://www.storm.mg/article/2972168>> accessed 1 December 2021.

⁶⁴ Taiwan CDC, *Covid-19 Guideline: Public gathering* (4 March 2020) <https://www.cdc.gov.tw/File/Get/jp6pAJa7IDRIB6AbRO_-cg> 「COVID-19(武漢肺炎)」因應指引：公眾集會 修訂日期：2020/03/04 accessed 1 December 2021.

⁶⁵ MOE, *Newsletter: All teachers and students below high school are prohibited from going abroad* (16 March 2020) <https://www.edu.tw/News_Content.aspx?n=9E7AC85F1954DDA8&sms=169B8E91BB755> accessed 1 December 2021.

⁶⁶ MOE, *Zoom has information security concerns* (7 April 2020) <https://www.edu.tw/News_Content.aspx?n=9E7AC85F1954DDA8&s=868B3A6EDF9BA52D> accessed 1 December 2021.

⁶⁷ The public law professor from law school of National Taiwan University criticizes this clause. See Ming-Hsin Lin, 'The Revisit of the Constitutionality issues of the Art. 7 of the Special Covid-19 Act' (14 January 2021),

This regulation explicitly cites Art. 7 as its legal basis.⁶⁸ The violator would be fined 5000 NTD to 1 million NTD under Art. 16 of Special Covid-19 Act.⁶⁹ Yet, as there is compensation to the affected medical staff, perhaps such measures could be justified under the rule of law consideration.⁷⁰

Despite that, Art. 7 could contribute to the implicit legal basis for many measures that do not have a clear legal basis. For instance, the launch of privacy-intrusive Skynet to detect the movement of people and catch the violators of 14 days home quarantined rules in the year-end music concert may use this clause as an implicit legal basis. Despite the government's mentioning the CDC Act (and not indicating specific provision under the CDC Act) as legal basis,⁷¹ perhaps a more appropriate legal basis is Art. 7 of the Special COVID-19 Act.

However, this provision is also criticised for its lack of legal certainty and broadness and may be unconstitutional.

4. Critical Review of Taiwan's Legal Framework for COVID-19 Response

4.1. General Review

Taiwan is presently experiencing minimal confirmed cases of Covid-19 compared to the rest of the world. Perhaps this is because of the effectiveness of the government measures, or simply luck. Yet, considering the legal framework, the government's approach is very problematic regardless of the potential public health benefits.

First, the government's approach is based on an unbalanced legal framework. The use of legal measures to provide subsidies or implement recovery measures is much easier and more

407 Taiwan Law Journal, 53-68.

⁶⁸ MOWH, *Letter relating to the Medical staffs going abroad at the Covid-19 time* (17 March 2020) (醫院因應嚴重特殊傳染性肺炎(Covid-19)人員出國規定(109年3月17日函)) <<https://covid19.mohw.gov.tw/ch/cp-4847-52362-205.html>> accessed 1 December 2021.

⁶⁹ Article 16 of the Special Covid-19 Act: 'In the event of one of the following conditions, the central competent authority of the respective industry or the municipality or county (city) government shall impose a fine of no less than NT\$50,000 and no more than NT\$1 million: ... 3. Violation of response actions or measures instructed by the Commander of the Central Epidemic Command Center in accordance with Article 7.'

⁷⁰ MOHW, *The Compensation for going abroad ban of medical staffs* (27 February 2020) <<https://www.mohw.gov.tw/cp-4635-51720-1.html>> accessed 1 December 2021.

⁷¹ CNA, *Skynet is based on the legal basis of CDC Act* (2 January 2021) <<https://www.cna.com.tw/news/first-news/202101020091.aspx>> accessed 1 December 2021.

palatable than undermining people's rights and obligations. Under Taiwan's legal regime, and similar to that of continental Europe, the requirements for forming a law are greater when it affects people's rights. For instance, the use of information technology, such as GPS, to monitor on the home-quarantined individuals without permission from the courts since early 2020, is considered unconstitutional by scholars.⁷² At least, a clearer legal basis or authorisation should be necessary.

Second, such a legal framework tells a different story in terms of the low number of confirmed cases.

A typical law-abiding country would follow normal legal protocols, except during emergency situations. Under Taiwan's constitutional law, Emergency Order does exist.⁷³ Yet, in the face of the COVID-19 pandemic, this provision was not utilized. For a country with more than 2/3 number of days in a year (253/365) without locally confirmed cases, it seemed like a perfect environment to develop a legal regime, gradually and thoughtfully. However, the large numbers of guidelines/directions that continuously violated human rights, including the use of a privacy intrusive program without clear legal basis, such as Skynet (or Electronic Fence 2.0) to monitor the movement of home quarantine individuals, shows the unsophisticated nature of the Taiwanese legal framework in tackling the challenges brought on by COVID-19. The legal response from the government seemed to imply the 'emergency' situation of the pandemic in Taiwan instead.

Third, the government's measures could be considered disproportionate and not coherent with the precautionary principle. For instance, even if individuals who previously contacted a person who tested positive for COVID-19 test

negative, additional regulations are enforced by the government, such as a prohibition on visiting public eating and drinking establishments.⁷⁴ Moreover, when months passed without any locally confirmed cases, the additional directive of facemasks in eight types of public spaces was enforced.⁷⁵ Scientifically, regulation should correspond to the seriousness of the pandemic. Yet, in Taiwan, it is on the contrary.

4.2. Violation of the Existing Laws?

4.2.1. Controversial Phone Tracking

While facing the unprecedented threat of COVID-19, Taiwan developed, adopted and tested many new technologies. The most controversial type of technology with privacy intrusive features was GPS tracking of the movement of people under home quarantine. Such technology originated in Israel and was tested in Taiwan with great success.⁷⁶

However, this COVID-19 phone tracking technology was soon declared illegal by the Supreme Court of Israel for the lack of legislation in adopting such technology.⁷⁷ This year, The High Court of Justice of Israel ruled that "the Shin Bet security service must halt its digital tracking of citizens for coronavirus contact tracing in most cases, finding that it unjustifiably violated citizens' privacy rights."⁷⁸ In this regards, the constitutionality of such phone tracking should rely on the new statute to legitimize it.

In spite of the argument of several Taiwanese legal scholars⁷⁹ against the legal basis of phone tracking, the government turned a deaf ear and even wished to further develop Skynet or electronic fence version 2 to monitor its citizens.⁸⁰ This is also very likely to violate the Communication Security

⁷² See e.g., Chen Renqi, 'Electronic Fence: Pandemic expert challenges its constitutionality' *China Times* (4 January 2021) <<https://www.chinatimes.com/newspapers/20210104000360-260102?chdtv>> accessed 1 December 2021.

⁷³ Article 2(3) of Additional Articles of the Constitution of the Republic of China: 'The president may, by resolution of the Executive Yuan Council, issue emergency decrees and take all necessary measures to avert imminent danger affecting the security of the State or of the people or to cope with any serious financial or economic crisis, the restrictions in Article 43 of the Constitution notwithstanding. However, such decrees shall, within ten days of issuance, be presented to the Legislative Yuan for ratification. Should the Legislative Yuan withhold ratification, the said emergency decrees shall forthwith cease to be valid.'

⁷⁴ Keoni Everington, 'Taiwan closes all KTV bars, dance halls amid coronavirus crisis' *Taiwan News* (9 April 2020) <<https://www.taiwannews.com.tw/en/news/3913186>> accessed 1 December 2021.

⁷⁵ 'Taiwan announces eight public venues where mask-wearing is compulsory' *Taiwan News* (5 August

2020) <<https://www.taiwannews.com.tw/en/news/3981125>> accessed 1 December 2021.

⁷⁶ 'All leisure venues closing as Netanyahu tells Israel: Adjust to new way of life' *The Time of Israel* (14 March 2020) <<https://www.timesofisrael.com/pm-says-all-leisure-venues-to-shut-urges-israel-to-adjust-to-new-way-of-life/>> accessed 1 December 2021.

⁷⁷ Maayan Lubell, 'Israel's top court says government must legislate Covid-19 phone-tracking' *Reuters* (27 April 2020) <Israel's top court says government must legislate COVID-19 phone-tracking | Reuters> accessed 1 December 2021.

⁷⁸ 'Israel's Top Court Limits Digital Tracking of Covid Patients, Warning of a "Slippery Slope"' *Israel News* (1 March 2021) <Israel's top court limits digital tracking of Covid patients, warning of a 'slippery slope' - Israel News - Haaretz.com> accessed 1 December 2021.

⁷⁹ 'The legal society argue the unconstitutionality of phone tracking' *Storm Media* (17 April 2020) <<https://www.storm.mg/article/2523188?page=2>> accessed 1 December 2021.

⁸⁰ 'Electronic fence' nabs concertgoers breaching COVID-19 protocol' *Focus Taiwan* (1 January 2021)

and Surveillance Act, which is subject to the approval of the prosecutor and the court for surveillance during criminal investigations.⁸¹ Even criminal investigations require to be subject to due process; however, it is bizarre to see the government easily accessing COVID-19 phone tracking data, bypassing such due process. It also led to an ‘authoritarian’ accusation directed at the Taiwan government, by the *New York Post* with respect to the aforementioned measures.⁸²

Following Israel courts cases, without further clear legal basis and provision to serve as legal basis for such phone tracking, such phone tracking seemed to be unconstitutional.

4.2.2. The Expansion of the Use of The National Health Insurance Card

To prevent people from hiding their travel history when visiting the doctor and to prevent them from causing cluster infection in the hospitals thus exploiting a loophole in the war on the Wuhan coronavirus epidemic, Taiwanese health authorities announced that a new feature would be added to the National Health Insurance (NHI) smart cards in February 2020.⁸³ When accessing hospitals, patients had to produce their National Health Insurance Card to prove that they had no travel history to mainland China, Hong Kong, and Macau in the past 14 days.⁸⁴ Adding the travel history to the health insurance card was criticised for its lack of a legal basis. The ‘addition of non-medical-related information’ in the card was considered a clear violation of the National Health Insurance Act.⁸⁵ Article 16 of the Act explains: ‘However, the card may not store any information *not used for medical care purposes* as well as those *unrelated to the insured receiving insurance medical services*’. The question of whether such travel history would be relevant to the medical function

was thus raised.

Moreover, under the facemask ration scheme, one must show a National Health Insurance card while purchasing facemasks in order to confirm if the designated quota has been used or not. However, such card inserting process also led to the concerns of violation of clause similar to Article 16 of the National Health Insurance Act. As the face mask quota would not be generally seen as “information used for medical care purposes as well as those related to the insured receiving insurance medical services”, such use under the face mask rationing scheme is apparently a violation.⁸⁶

Perhaps inserting the card in pharmacies would be proportionate and legitimate. Yet, later on, under the new version of facemask rationing scheme, people were allowed to make facemask quota purchase in convenience stores and began to insert cards in convenience stores. Such a situation was seen as the further abuse and misuse of the NHI card.

4.2.3. Lack of Legal Basis for Measures Affecting Citizens’ Rights and Obligations

According to Taiwan’s constitutional law, Administrative Procedural Act and Central Regulation Standard Act, any measures affecting citizens’ rights and obligations should have clear legal basis or administrative orders with clear authorisation by the specific legal statute.⁸⁷ Yet, as noted above, measures against COVID-19 may not follow such regular legal practices.

First, for certain guidelines and directions, it is not easy to find the legal basis in their clauses. According to the Administrative Procedure Act, for administrative orders affecting citizens’ rights and obligations, a clear legal basis should be provided in the first paragraph of such an administrative order. However, such legal basis is often missing in the COVID-19 guidelines and directions. For instance,

<<https://focustaiwan.tw/society/202101010017>> accessed 1 December 2021.

⁸¹ The Communication Security and Surveillance Act <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=K0060044>> accessed 1 December 2021.

⁸² ‘Life after lockdown: Electronic monitoring, fines and compulsory face masks’ *New York Post* (25 April 2020) <<https://nypost.com/2020/04/25/taiwan-gives-peek-in-to-how-life-could-look-after-coronavirus-lockdown/>> accessed 1 December 2021.

⁸³ ‘Taiwan to add travel history to health ID cards amid coronavirus outbreak’ *Taiwan News* (4 February 2020) <<https://www.taiwannews.com.tw/en/news/3870719>> accessed 1 December 2021.

⁸⁴ Sophia Yang, ‘Taiwan to add travel history to health ID cards amid coronavirus outbreak’ *Taiwan News*, (4 February 2020) <Taiwan to add travel history to health ID cards amid coronavirus outbreak | Taiwan News | 2020-02-04 17:58:00> accessed 1 December 2021.

⁸⁵ National Health Insurance Act, Amended Date 20 January 2021 <<https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=L0060001>> accessed 1 December 2021.

⁸⁶ Chou YS and Chia WY, ‘There is a need to have balancing thinking on human right and the needs of pandemics’ (14 February 2020) Taiwan Association for Human Rights <<https://www.tahr.org.tw/news/2604>> accessed 1 December 2021.

⁸⁷ See e.g., Article 5 of Central Regulation Standard Act: ‘The following objects shall be stipulated by a statute:

1. It is required to stipulate by a statute as the Constitution or a statute expressly stipulated.
2. Stipulation concerns the rights or obligations of the people.
3. Stipulation concerns the organization of a government agency at national level.
4. Other objects with substantial importance shall be stipulated by a statute.’

there is only a general explanation at the beginning of the Guidelines on Social Distancing without referring to any legal basis.⁸⁸ Despite the lack of an official pandemic emergency announcement to tackle COVID-19, this did not mean that there was no rule of emergency or crisis law for handling COVID-19 at the time. In order to tackle COVID-19, a 'set of guidelines', a clear legal basis which may affect the rights and obligations of people, have been widely used and adopted.⁸⁹

I. Preface: While the COVID-19 has become a worldwide pandemic, Taiwan has been in a relatively stable and safe situation, up until now. Taiwan has experienced far more imported cases than local cases. Many Taiwanese people who study or work abroad have been flocking back to the country, in response to the situations abroad. Although the peak of the returning citizens has passed and the number of imported cases has declined, asymptomatic cases or symptomatic cases not seeking medical attention still pose threats to fighting COVID-19 in Taiwan. In order to prevent the increasing risks of local transmission and keep potential spread with unidentifiable sources of infection from threatening the safety in Taiwan, it has become urgent that the "social distancing guidelines" be laid down to encourage the public to maintain social courtesy or *keep a compulsory social distance*, in stages. Therefore, for the sake of both people's rights and domestic safety, these guidelines have been drawn up for the public to adhere to.

(Source: COVID-19: Guidelines for Social Distancing, Revised on April 10, 2020, https://www.cdc.gov.tw/En/File/Get/reB429_3fV4GulfumH9Vcg)

⁸⁸ Taiwan CDC, *COVID-19: Guidelines for Social Distancing, Revised on April 10th, 2020*, <https://www.cdc.gov.tw/En/File/Get/reB429_3fV4GulfumH9Vcg> accessed 1 December 2021.

⁸⁹ Taiwan CDC, *Important Guidelines* <<https://www.cdc.gov.tw/Category/List/Lb3VfrbgbUmy51C0gtKPNa>> accessed 1 December 2021.

⁹⁰ See e.g., *Guideline on Self-pay application for Covid-19 testing*, version 37 (7 October 2020) <<https://ws.moi.gov.tw/Download.ashx?u=LzAwMS9VcGxvYWQvT2xkRmlsZS9kb3dubG9hZERfZmlsZS%2FplovmlL7msJHnnL7oh6rosrvmqLpQzdDT1ZJRC0xOSjmrabmvKLogrrngo4p55Sz6KuL6KaP5a6aMTA5MTAwNy5wZGY%3D&n=6ZaL5pS%2B5rCR55y%2B6leq6LK75qqi6amXQ09WSUQtMTko5q2m5ryi6IK654KOKeeUs%2Biri%2Bimj%2BWumjEw0TEwMDcucGRm&icon=.pdf>> accessed 1 December 2021.

⁹¹ *Application for Self-paid Covid-19 testing*, version 63 (19 March 2021) <<https://www.chshb.gov.tw/sites/default/files/202103/%E9%96%8B%E6%94%BE%E6%B0%91%E7%9C%BE%E8%87%AA%E8%B2%BB%E6%AA%A2%E9%A9%97COVID19%E7%94%B3%E8%AB%8B%E8%A6%8F%E5%AE%9A1100319.pdf>> accessed 1 December 2021.

⁹² CNA, *Taiwan bans its healthcare professionals from traveling abroad*, (23 February 2020) <<https://www.taiwannews.com.tw/en/news/3880226>> accessed 1 December 2021; Focus Taiwan, *Taiwan amends travel ban on medical personnel* (24 February 2020) <<https://focustaiwan.tw/society/202002240006>> accessed 1 December 2021.

Spill over effects of such measures would be likely, as the guidelines on hospitals would affect the patient's rights as well. For instance, one guideline in a hospital limited the right to know a person's health by limiting self-paid testing for more than six months.⁹⁰ Since the outbreak of COVID-19, to avoid the spread of hospital cluster infections, even self-paying testing could not be conducted for those without symptoms. Due to the political and legal controversy for its limit people's right to know, such rules were updated and revised regularly. The latest 63rd version was published on 19 March 2021.⁹¹

Second, for certain measures, only a *newsletter without publishing in government gazette* or measures with *unclear legal basis* may be provided. In February 2020, Taiwan announced a travel ban on its medical personnel.⁹² In March 2020, the ban was expanded to cover school teachers and students, including those in senior/junior high and elementary school. This measure was announced by the Central Epidemic Command Center (CECC) and by the Ministry of Education in a newsletter.⁹³ The Zoom ban in April can be seen as yet another example.⁹⁴ However, interestingly, in these newsletters, there was no reason given and no administrative relief explanation was provided. Such an approach could also violate the due process for administrative disposition in Administrative Procedural Act as well.⁹⁵ Also, these measures have been criticised for their lack of legal basis.⁹⁶

⁹³ Ministry of Education, *The Prohibition from going abroad for all senior/junior/elementary school students and teachers* (16 March 2020) <https://www.edu.tw/News_Content.aspx?n=9E7AC85F1954DDA8&s=377DC75FB0C50AA3> accessed 1 December 2021.

⁹⁴ Ministry of Education, *The explanation on the concerns of Zoom to internet security and the follow up measures* (教育部對 zoom 資安疑慮後續處置說明), (7 April 2020) <https://www.edu.tw/News_Content.aspx?n=9E7AC85F1954DDA8&s=868B3A6EDF9BA52D> accessed 1 December 2021.

Article 96 of the Administrative Procedure Act: 'An administrative disposition rendered in writing shall give the following particulars: ...

2. The subject matter, facts, *reasons* and legal basis of the disposition; ...

6. The statement to the effect that it is an administrative disposition and the means of remedy available in case of dissatisfaction with the administrative disposition, the time period within which remedy may be sought and the authority with which application for remedy must be filed.

The requirement set forth in the preceding paragraph shall apply mutatis mutandis to written dispositions made under paragraph 2 of the preceding article.'

⁹⁶ Heho Health, 'The lack of legal basis to restrict medical doctors and staff from going abroad: Where are the rights of medical Staff?' (法源依據不明就限制醫事人員出國！醫師工會怒吼：醫護人員的權利在哪裡？), (27

Third, the legal basis referred to, may not be solid enough. For instance, the facemask mandate was launched based on the legal basis of Article 37 of the CDC Act. However, as facemasks were not mentioned in the first five clauses comprising the example list of provisions,⁹⁷ and the local government could only use the very abstract open clause of “6. Other disease control measures announced by government organizations at various levels.” This could also lead to the problem of “empty” administrative penalty clause, which fine the people without clear legal indication of violation behaviour in the legal statute. It is doubtful whether this meets the criteria of the law to fine people not wearing face masks due to the empty legal authorisation under the sixth clause.

4.3. Violation of the Proportionality Principle?

In order to deal with pandemic in an efficient way, the use of overly stringent and rigid measures that violate the proportionality principle occurs frequently. For example, Article 14 of the Special COVID-19 Act provides fake news regulations. Individuals who disseminate rumours or false information regarding the epidemic conditions, causing damage to the public or others, must be sentenced to imprisonment for up to three years or criminal detention, or in lieu thereof/ in addition thereto, a fine of no more than NT\$3 million. Individuals who violate the isolation measures face a fine of no less than NT\$200,000 and no more than NT\$1 million.⁹⁸ Again, these provisions raise concerns regarding proportionality or unconstitutionality.

The expropriation scheme under the facemask rationing scheme can be seen as an example of infringement of business freedom without meeting the proportionality principle. Perhaps such a scheme could have been justified during the global shortage supply in February and March 2020. Thus, at that time, such a taking would be justified and pass the test of proportionality. Yet, after the over-supply and huge price drop in late March 2020, the rationale to intrude the business freedom and property rights had already faded. Yet, such a scheme remains imposed as of April 2021.

February 2020) <<https://heho.com.tw/archives/71025>> accessed 1 December 2021.

⁹⁷ ‘1. Regulate schooling, meeting, gathering or other group activities;
2. regulate entry and exit of people to and from specific places and restrict the number of people admitted;
3. regulate traffic in specific areas;
4. evacuate people from specific places or areas;
5. restrict or prohibit patients or suspected patients with communicable diseases from traveling by means of public transportation or entering/leaving specific places.’

⁹⁸ Art.15 of the COVID-19 Act.

Finally, the Guideline limiting the testing right of citizens can be seen as a disproportionate response as well. Perhaps this restriction of citizens’ right to know could have been justified at the outbreak of the pandemic early in 2020. The worries about floods of false positive cases paralyzing hospitals could be justified. Yet, as Taiwan had limited cases since mid-2020, such testing limitation of citizens could not be justified as it was disproportionate.

The self-paid testing option should have been gradually accessible to those who were asymptomatic since then. However, such accessibility was not available until quite late, during the Autumn and Winter Programme in 2020.

4.4. Discrimination Concerns

Discriminatory measures against the country of origin of COVID-19 and citizens with different occupations is very severe in Taiwan.

First, the 14-day home quarantine rules applied to travellers from mainland China, Hong Kong, and Macao, since 7th February, 2020. Yet, the same rule was applied to travellers from other countries since 19th March, 2020. Despite having a legal basis for such-measures and having public health justification for this, there remain discriminatory concerns regarding the travellers’ country of origin.

There were also additional discriminatory quarantine rules applying to Filipino and Indonesian workers. From 9 November 2020, asymptomatic travellers from the Philippines were required to observe a 14-day home quarantine and a 7-day self-health management set of measures.⁹⁹ Commencing on 26th July, 2020, travellers arriving in Taiwan from the Philippines had to undergo mandatory COVID-19 testing at airports and observe quarantine measures.¹⁰⁰ Taiwan also restricted the number of Indonesian workers allowed onto the island in December, 2020. There seemed to be discriminatory concerns regarding these actions. However, it is also interesting to see that the Taiwanese government highly valued the right to know the health of Filipinos by providing mass testing service for them!

⁹⁹ Taiwan CDC, *Starting from November 9, asymptomatic arrivals from Philippines are required to observe 14-day home quarantine and 7-day self-health management measures* <<https://www.cdc.gov.tw/En/Bulletin/Detail/AQsGtw9Q38RgLHzb7TgbeA?typeid=158>> accessed 1 December 2021.

¹⁰⁰ Taiwan CDC, *Starting from July 26, travellers arriving in Taiwan from Philippines must undergo Covid-19 testing at airports and observe quarantine measures*, <<https://www.cdc.gov.tw/En/Bulletin/Detail/gyyHQjWwDqMZ8lzkkZBi2A?typeid=158>> accessed 1 December 2021.

Finally, citizens with different occupations were discriminated against as well. As noted above, a travel ban applied only to medical personnel in February 2020,¹⁰¹ but not for other non-medical professionals. In March, the travel ban was expanded to cover school teachers and students, including those in senior and junior high and elementary school. It is unclear why these rules did not apply to university professors, leading to the concerns of discrimination. Additionally, the fact that the compensation regime provided only for medical personnel,¹⁰² but not senior/junior/elementary school teachers and students, leads to discriminatory concerns as well.

4.5. Weak Role of the Parliament

Under normal circumstances, the aforementioned legal issues violating existing laws or the proportionality principles could be rectified by the intervention of the parliament, particularly the opposition parties. Yet, that was not the case during the COVID-19 pandemic.

From the promulgation of the Special COVID-19 Act, one could consider the important role of Taiwan's parliament in terms of response time to COVID-19 situations. In reality, the role of Taiwan's parliament did not respond well in terms of time.

Due to the special political situation in Taiwan, the ruling party account for all positions of the ministries and majority in the parliament.

Therefore, check and balance didn't function well.

As noted above, this Act does not deal with the controversial issues of COVID-19 measures, such as privacy-intrusive measures. What is worse is the provision of a very abstract and supreme legal basis for the government to launch any measures affecting the rights and obligations of citizens, according to Article 7 of the Special COVID-19 Act.

The parliament has played a limited role since, during the COVID-19 pandemic.

4.5.1. Proximate Cause in Early 2020

The proximate cause for the weak role of the parliament is related to the political situation-change early in the year 2020. Immediately before the COVID-19 outbreak early in 2020, Taiwan had a presidential and legislative election in January. The current president managed to garner a historically high 8.17 million votes and maintained the majority in Parliament with more than 61 seats out of 113 seats.¹⁰³ Such a weak opposition party situation leads to discretionary government decisions where measures are launched without a proper legal basis.

The main opposition party, KMT (Kuomintang, Chinese Nationalist Party), and other opposing parties are still learning to function as opposition parties. This may be the reason why the government has had much room to manoeuvre.

Further, the license of the main opposition media, CTI (CTI Television Inc.), a new channel, was not granted an extension and it subsequently shut down.¹⁰⁴ In this way, attacks from media companies were heavily reduced.¹⁰⁵ Finally, trust in the general commander of the CECC also played a role.

The Minister of Welfare and Health (MOWH) hosted a daily briefing on the ongoing COVID-19 situation. This gained citizens' trust. A phenomenon of societal blaming arose against those who criticised the government; they were seen to be uncooperative and not united in combatting COVID-19. All of this created an atmosphere for the government to ignore the role of the parliament in launching COVID-19 measures.

This led to the unprecedented passive role of the Parliament amidst a global threat, and may have led to a crisis in the separation of power. For instance, to monitor the government, legislators usually have the right to question government staff and have access to and/can request the data from the government.

This right is confirmed by Article 57 and 67 of the Taiwanese Constitution.¹⁰⁶ The denial of

¹⁰¹ CNA, *Taiwan bans its healthcare professionals from traveling abroad* (23 February 2020) <<https://www.taiwannews.com.tw/en/news/3880226>> accessed 1 December 2021; 'Taiwan amends travel ban on medical personnel' *Focus Taiwan* (24 February 2020) <<https://focustaiwan.tw/society/202002240006>> accessed 1 December 2021.

¹⁰² MOHW, *The Compensation for the Prohibition of Medical staff From Going Abroad* (防疫期間醫院醫事人員及社工出國與相關補償規定 自 2 月 23 日適用), 109-02-27 <<https://www.mohw.gov.tw/cp-4635-51720-1.html>> accessed 1 December 2021.

¹⁰³ 2020 Taiwanese legislative election <2020 Taiwanese legislative election - Wikipedia> accessed 1 December 2021.

¹⁰⁴ 'Taiwan to shut down China-friendly tycoon's news channel' *Reuters* (18 November 2020) <Taiwan to

shut down China-friendly tycoon's news channel | Reuters> accessed 1 December 2021.

¹⁰⁵ 'Taiwan Shuts Down Pro-China' *CTi News* (19 November 2020) <<https://international.thenewslens.com/article/143510>> accessed 1 December 2021.

¹⁰⁶ Article 57 of the Constitution: 'The Executive Yuan shall be responsible to the Legislative Yuan in accordance with the following provisions:

1. The Executive Yuan has the duty to present to the Legislative Yuan a statement of its administrative policies and a report on its administration. While the Legislative Yuan is in session, Members of the Legislative Yuan shall have the right to question the President and the Ministers and Chairmen of Commissions of the Executive Yuan.

2. If the Legislative Yuan does not concur in any important policy of the Executive Yuan, it may, by resolution, request the Executive Yuan to alter such a

access to or provision of data has been quite limited in the past, though not during the COVID-19 pandemic. As an example, after the facemask rationing scheme was launched in February 2020, the Ministry of Economic Affairs controlled all daily supplies, distribution, manufacturing, and data of facemasks.

To monitor the necessity of these measures, facemask data are important. However, neutral and non-confidential facemask flow and supply statistics were required for accurate reporting, yet the Ministry of Economic Affairs refused to provide the information to legislators in early April 2020.¹⁰⁷

Such examples only show how weak the opposition party and parliament have been in Taiwan during the COVID-19 pandemic.

Weak parliaments, opposition parties, and strong governments/president were further maintained by the re-election of the president and legislators in early 2020.

The President even received over 8 million votes, a historical high, in 2020. As there is usually a political fever ‘cooling-down’ period after the election, a cold way of handling the pandemic-related issues followed.

Citizens are usually emotional during this period.

The phenomenon of ‘post-election solidarity’ followed suit.

Country	Total tests per thousand tests per 1,000			
	Feb 20, 2020	Mar 22, 2021	Absolute Change	Relative Change
Madagascar	0.11	4.86	+4.75	+4,281%
Taiwan	0.26	7.73	+7.48	+2,909%
Nigeria	0.02	8.38	+8.36	+34,817%
Malawi	<0.01	11.11	+11.11	+1,110,600%
South Sudan	1.74	11.23	+9.49	+547%
Mozambique	<0.01	14.66	+14.65	+209,286%
Vietnam	0.01	15.10	+15.09	+125,742%
Cote d'Ivoire	0.14	18.39	+18.25	+13,127%
Tunisia	0.01	19.04	+19.03	+146,369%
Ethiopia	0.00	19.83	+19.83	
Iceland			+19.99	+40,567%

Figure 1: The Least Testing countries in the world

In February 2020, the government had already adopted several measures with human rights concerns, such as taking facemasks and distributing facemasks without a clear legal basis for launching such utility like price control regime. The travel ban on medical doctors and staff also raised human rights concerns. The government used the ‘empty’ criminal law to criminalise sellers who sold face masks at higher prices. The word ‘empty’ refers to the provision stipulating that ‘A person who stocks up on any of the following items and then refrains from selling to the market, without justification and with the intention of raising the transaction price, shall be sentenced to imprisonment for no more than three years, short-term imprisonment; *in lieu* thereof, or in addition thereto, a fine of no more than three hundred thousand New Taiwan Dollars may be imposed... Essential necessities, other than those described in the preceding two paragraphs, as announced by the Executive Yuan’.

The government designated the facemask as an essential item in February. For the above issues, at the beginning, legislators and legal experts¹⁰⁹

policy. With respect to such resolution, the Executive Yuan may, with the approval of the President of the Republic, put a request to the Legislative Yuan for reconsideration. If, after reconsideration, two-thirds of the Members of the Legislative Yuan present at the meeting uphold the original resolution, the President of the Executive Yuan shall either abide by the same or resign from office.

3. If the Executive Yuan deems a resolution on a statutory, budgetary, or treaty bill passed by the Legislative Yuan difficult of execution, it may, with the approval of the President of the Republic and within ten days after its transmission to the Executive Yuan, request the Legislative Yuan to reconsider the said resolution. If after reconsideration, two-thirds of the Members of the Legislative Yuan present at the meeting uphold the original resolution, the President of the Executive Yuan shall either abide by the same or resign from office.

Article 67 of the Constitution: ‘The Legislative Yuan may set up various committees.

Such committees may invite government officials and

private persons concerned to be present at their meetings to answer questions.’

¹⁰⁷ ‘MOEA refused to provide the facemask data to legislators’ (口罩數據竟蓋牌逾 2 周 立委狂批政院「鴨霸」規避監督), *Apple Online* (7 April 2020) <<https://tw.appledaily.com/property/20200407/H5NJ27AA5KTYFHMBG2RVFSBH2E/>> accessed 1 December 2021.

¹⁰⁸ ‘Hong Kong-China extradition plans explained’ *BBC News* (13 December 2019) <<https://www.bbc.com/news/world-asia-china-47810723>> accessed 1 December 2021.

¹⁰⁹ See e.g., ‘Lawyers criticized the designation of facemask as life necessities and criminalized the facemask sales; it is the abuse of “empty criminal law”’ *Eatnews* (4 February 2020) 行政院引刑法公告「口罩是生活必需品」律師批：這是對空白刑法的... <<https://eatnews.squarespace.com/article-1/20200204-2>> accessed 1 December 2021.

raised concerns. However, the government tried to direct these criticisms as non-cooperative measures to jeopardise the efficiency of pandemic measures, simply ignored the accusation of the rule of law and proceeded as planned.

Another factor affecting the concentration of power in the government is the *media environment*.

As Taiwan is famous for many 24-hour news channels in such a small country, new competition from the new Internet media has resulted in decreased media profit margins than previously enjoyed by the industry. As a result, there has been a tendency to rely on government-funded projects as part of their profit model in recent years. Even the anti-DPP (ruling party) media have begun to focus on promoting the success of Taiwan in combatting COVID-19. Article 10 of the Special COVID-19 Act explains: 'Where radio/television businesses or satellite broadcasting businesses are assigned to broadcast disease prevention information or programs due to disease prevention requirements in the operation period of the Central Epidemic Command Center, the competent authority of communications may relax regulations on the duration of advertisement based on the conditions of the impact. The restrictions specified in Article 31 of the Radio and Television Act and Article 36 of the Satellite Broadcasting Act shall not apply'.

Thus, it is doubtful that the media would dare to attack the government's mishandling of a situation or a lack of legal basis of the rule of law, while receiving funding from the same source.

The global norm during the pandemic is testing as much as possible to find out the sources. Yet, Taiwan government and along with media seemed to try their best to change such norm. The matters discussed combine to make the citizens of Taiwan believe that we are one of the best COVID-19 combatting countries in the world. The commander of the CECC has even criticised the mass testing model as a failure, expressing that Taiwan will not follow the failed experience of Germany.¹¹⁰ It is, however, widely accepted, that mass testing is not

wrong. The CECC has continued to argue that wasting money will lead to the collapse of the medical system and have insisted that the 14 days 'at home' quarantine rule, instead of going to a centralised facility, is sufficient. Unthinkably, a lack of science and the 'word-of-mouth' method have gained wide public support. Cities and the government are believed to be 'lowering the numbers of local confirmed cases'. Further strengthening the problem is the very high testing price for 'self-pay' testing at 7000 NTD, in a low health cost country like Taiwan. This price is criticised by opposition party legislators.¹¹¹

However, in Taiwan, such concerns do not last long to draw public attention.

4.5.2. Still, There Is Light in the Darkness

There is good news regarding the role of the Parliament in supervising vaccine purchase issues. On 18 March 2021, opposition party legislators on the Health and Environmental Committee proposed to establish an investigation team to investigate the likely scandal when purchasing vaccines. As there were several legislators of the ruling party missing on this particular day, the opposition party could successfully pass such a resolution. The right to establish a special investigation team is conferred by Article 45 of the Act on Enforcing Legislator's Duties.¹¹² However, on 22 March, the ruling party legislator of that committee decided to re-vote the case which led to a serious protest from the opposition party. On 24 March, the ruling party legislator decided to accept the proposal and proceed with the investigation team.¹¹³ However, in recent years, the government has always denied or refused to provide data to the legislator, to escape scrutiny.¹¹⁴ Hopefully, this action will act as a spark to further illuminate the role of the parliament during the COVID-19 pandemic.

¹¹⁰ 'The failure of Hamburg's mass testing scheme' *Tai Sounds* (24 August 2020) <<https://www.taisounds.com/Global/Top-News/US-Europe/uid4975355134>> accessed 1 December 2021.

¹¹¹ 'The opposition party legislators criticize Taiwan's most expensive self-paid testing scheme in the world' *New Talk* (18 February 2021) <<https://newtalk.tw/news/view/2021-02-18/537947>> accessed 1 December 2021.

¹¹² Act on Enforcing Legislator's Duties (立法院職權行使法) <<https://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0020058>> accessed 1 December 2021.

¹¹³ Lianhe Bao and Wu Zixian, 'DPP agreed to establish the Vaccine Procurement Investigation Group in the Legislative Yuan' *UDN* (24 March 2021) <<https://udn.com/news/story/6656/5340037>> access-

ed 1 December 2021.

¹¹⁴ For instance, the legislators asked for the Medication package insert of the local made vaccine heavily promoted by the ruling party and the current government. Yet the government refuse to provide out of the reason of business confidentiality. 'The final 10 days count down before starting injecting Medigen (taiwan made) vaccine: Why Medication package insert is considered as the business confidentiality' *CNews* (13 August 2021) <<https://cnews.com.tw/174210813a04/>> accessed 1 December 2021. This example also shows how serious such problem is. As Medication package insert should be provided in according to medical legislations, how come the government can refuse to provide such information to the general public?

4.6. Problematic Vertical Separation of Power

Despite the provision for local autonomy in the Constitution and the CDC Act, this line is not always clear. For example, there was a controversy over the important lock-down decisions of municipal hospitals by the Taipei city mayor during the SARS outbreak in 2003.¹¹⁵ In addition, as noted above, at the same time, compulsory facemask wearing measures were launched and implemented by special municipality mayors under Article 37 of the CDC Act, despite the establishment of the CECC at the central government level. Finally, why did the Ministry of Education, instead of the CECC, prohibit teachers and students of municipal high/junior high/elementary school from going abroad?

The unclear line between central and local authorities can be demonstrated in the following example. The local governments had the authority to regulate the operation of bars and ballrooms under Article 37 of the CDC Act, but the CECC announced measures to stop such establishments' operations on 9 April 2020 after a 'Gogo Girl' tested positive for COVID-19. However, due to the unlimited time of the order, it led to a dispute over who had the power to re-open 'Gogo Bars'.

Ultimately, implementing a lockdown for 14 days was sufficient for COVID-19 purposes. However, in Taiwan, such measures were adopted for more than 14 days, beyond the necessity of COVID-19 protocols.

However, this does not mean that local governments have not played a role in combatting COVID-19. The local governments may have had a limited role in intervening in COVID-19 issues, if the central government did not show opposite opinions or did not want to intervene in 'troubled waters'.

Facing Taiwan's low testing ability, many scholars, particularly prestigious scholars of the Public Health Department of National Taiwan University, began to fight back. These scholars

observed the inability to collaborate with the central government, which did not want to implement mass testing or even random testing to identify more cases, keeping the numbers of COVID-positive cases as low as possible. Professors began to collaborate with the local governments, specifically with the opposition party mayor of the Changhua County. The random antibody testing was conducted for several months in the middle of the year 2020. However, at the time of announcement of the report, the central government began to blame such research openly and tried to postpone the announcement of the mid-term results of such reports. Subsequently, a serious violation of such a project was found. There was a lack of an Institutional Review Board (IRB) review process¹¹⁶ and a violation of Article 22 of the Human Subjects Research Act for conducting any activity without IRB approval. The fine no less than NT\$100,000 and no more than NT\$1,000,000.¹¹⁷

The fight against limited testing policy failed in the first phase by May 2021 and before the mid May outbreak in 2021 Taiwan remains a country adopting a very limited testing policy. Only after the mid May outbreak, the CECC began to have U-turn on all testing policy. For instance, the airport mass testing policy was introduced in early July 2021,¹¹⁸ while the establishment of fast testing kiosks were allowed since mid May¹¹⁹ and the fast testing kits were allowed to sell in the pharmacies and convenience stores since mid July 2021.¹²⁰

Following the Local Government Act and the CDC Act, there seemed to be no problems. Legally speaking, a test without an IRB review is problematic. Yet, with such a review, there would be no barriers for local governments to conduct such research.

Another interesting 'fight-back' occurred during the New Year celebrations of the year-end open-door big music concerts in the city and counties. Case no. 765 ended Taiwan's record of 253 days without local cases in mid-December.¹²¹ The CECC

¹¹⁵ Coronavirus/Tsai discusses lessons learned from 2003 SARS hospital lockdown, 24 April 2020 <<https://focustaiwan.tw/politics/202004240016>> accessed 1 December 2021.

¹¹⁶ 'Coronavirus/Changhua COVID-19 study violated public health rules: CECC' *Focus Taiwan* (23 September 2020) <<https://focustaiwan.tw/society/202009230022>> accessed 1 December 2021.

¹¹⁷ The 10 thousand anti-body testing violated the Human Object Research Act (萬人抗體檢測 台大公衛·彰化衛生局確定違法/研究計畫 IRB 審查程序違反「人體研究法」 可處 10 萬~百萬罰鍰), (8 December 2020) <<https://news.ltn.com.tw/news/focus/paper/1417677>> accessed 1 December 2021.

¹¹⁸ Taiwan CDC, *In response to spread of Delta variant globally, Taiwan to tmc*. However, because the government is reluctant to expand access to testing and

even represses tighten health monitoring measures for people entering Taiwan via airport/port starting 12:00 pm on July 2, 1 July 2021 <https://www.cdc.gov.tw/En/Category/ListContent/tov1jahKUv8RGSbvmzLwFg?uaid=FEq_1cKkRDoHZTPRTAGgDQ> accessed 1 December 2021.

¹¹⁹ Coronavirus/What happens after you get a rapid Covid-19 test, 25 May 2021 <https://focustaiwan.tw/society/202105250022> accessed 1 December 2021.

¹²⁰ 'Coronavirus/Covid home test kits to go on sale in Taiwan next week: FDA' *Focus Taiwan* (19 June 2021) <<https://focustaiwan.tw/society/202106190014>> accessed 1 December 2021.

¹²¹ Taiwan CDC, *CECC confirms 3 more Covid-19 cases; two are colleagues of Case #760, and one arrives in Taiwan from Indonesia* <CECC confirms 3 more COVID-19 cases; two are colleagues of Case #760, and one arrives in Taiwan from Indonesia - Taiwan Centers for Disease Control (cdc.gov.tw)> accessed 1 December 2021.

started to tighten pandemic measures. However, the opposition mayors of Taipei and New Taipei City decided not to follow the suggestion of cancelling and proceeded with the concerts as planned. The Taipei City mayor claimed that the decision to stop such a big event should be based on scientific evidence. As there was no evidence supporting the cancellation, there was no tangible reason to stop such activities.¹²² However, mayors of the ruling party in other cities did cancel such events.¹²³ Interestingly, immediately after the Taipei year end ceremony, the Ministry of Foreign Affairs promoted such activities as being part of the success of Taiwan in combatting COVID-19.¹²⁴ One would need to consider why the different ministries of the central government held such contradictory attitudes toward the same events.

5. Conclusion

If the confirmed number of COVID-19 cases is accurate, the Taiwanese government has surely performed very well during the pandemic. Freedom of independent research in conducting random testing, there is no way to confirm if the situation is as good as the government claims. The right to know the health of Taiwanese citizens is not as accessible as those of citizens in other Asian countries such as Japan, South Korea, Singapore, and even mainland China, not to mention the more advanced Western countries. In spite of expanding the testing since mid May outbreak, Taiwan's daily testing reached peak in mid June to close to 30000 per day, but now average around 20000 per day,¹²⁵ which is quite low if compared with the 60000 tests in Singapore¹²⁶ with only 1/4 population of Taiwan.

Perhaps the Taiwanese government is very good at avoiding the coronavirus spread by 'non-

legal measures' though it may not be approved by legal measures or legislation. From the above analysis, Taiwan may not be facing an emergency in terms of a pandemic, but it appears that Taiwan has experienced an emergency in terms of a constitutional crisis during the COVID-19 pandemic.

In particular, an unprecedented 'checks and balances' crisis has ensued through government officers refusing to give the statistical data of face masks to legislators. Added to this is the wide use of unconventional legal schemes, such as 'The Guidelines', to bypass the formal tool of 'legal order under the Administrative Procedure Act which affects citizens' rights and obligations. What is worse is the citizens' and law society's oblivion of this situation or the acceptance of the use of such a lack of legal basis measures which intrudes on people's rights and obligations. During the time of writing this article, Taiwan's COVID-19 urgency and alarm has reached an unprecedented high with more than 15 local confirmed cases for consecutive days of over a week; simultaneously, the quarantine of 5000 people has been announced.¹²⁷ Taiwan's unique approach to tackle COVID-19 is under tremendous threat. For a long time, Taiwan relied on limited tests (with a very high cost of 7000 NTD) and 14 days of quarantine, with a face mask mandate to achieve the low numbers. Yet, whether such low numbers reflect the real situation of the infection has been questioned by many experts. Therefore, if the government of Taiwan were to abide by the rule of law and human rights, perhaps certain fundamental rights such as the right to know your own health status and the capacity of testing would improve. Yet, due to the claims that mass testing would waste medical resources and create too much of a burden on the medical personnel,¹²⁸ Taiwan is facing an unprecedented challenge.

¹²² 'Coronavirus/Taipei New Year's Eve countdown to go ahead as scheduled' *Focus Taiwan* (31 December 2020) <<https://focustaiwan.tw/society/202012310006>> accessed 1 December 2021.

¹²³ New Year's Eve activities, 31 December 2020 <<https://www.cna.com.tw/news/firstnews/202012240345.aspx>> accessed 1 December 2021.

¹²⁴ MOFA to broadcast Taipei 101 fireworks around world via satellite <<https://www.cna.com.tw/news/firstnews/202012240345.aspx>> accessed 1 December 2021.

¹²⁵ Google, Covid-19: Taiwan, <https://www.google.com/search?q=taiwan+covid+19+testing&rlz=1C1ONGR_zhTWTW951TW951&oq=taiwan+covid+19+testing&aqs=chrome..69i57.5423j0j4&sourceid=chrome&ie=UTF8#wp-tab=s:H4sIAAAAAAAAAAONgVuLVt9c3NMwySk6OL8zJecQYzy3w8sc9YamwSWtOXmMM4BL3TU3JTM7MS3XJLE5NLE71yU9OLMnMzxOS5mJzzSvJLkKUEpTi501RkiCiwOukEeKi4tDP1ffwCzN2IhnFxnHflqUVlMavkiVoln0zY8ndf9tG3B86G59Nbn62f9Kjp1_OmPgBUXQnzmqAAAA> accessed 1 December 2021.

¹²⁶ Google, Covid-19: Singapore, <https://www.google.com/search?q=singapore+covid+19&rlz=1C1ONGR_zhTWTW951TW951&ei=JQ5cYd70ONXrQaTu4uQCg&ved=0ahUKEwie9Yi37rLzAhXVdd4KHZPdAqIQ4dUDCA4&uact=5&oq=singapore+covid+19&gs_lcp=Cgdnd3Mtd2l6EAM6BQgAEIAEOgQIABBDoggIABCABBcxAzoLCAAQAQsQMqgwE6CagAELEDEIMBOgcIABCxAxBDOgoIABCxAxCDARBDOgcIABCxAxAKSgQIQRgAULPqCFi8iAlgpIJaANwAHgAgAFuiAHGDZIBBDE5LjKYAQcGQAHAHQ&scIent=gws-wiz> accessed 1 December 2021.

¹²⁷ '5,000 people to be isolated amid new hospital cluster cases in northern Taiwan' *Taiwan News* (25 January 2021) <<https://www.taiwannews.com.tw/en/news/4110967>> accessed 1 December 2021.

¹²⁸ 'Mass testing is still unnecessary in Taiwan as Covid-19 status in Taiwan is different from global Coronavirus developments' <<https://www.cdc.gov.tw/En/Bulletin/Detail/2K2hS5DverwbFczuZf9xSA?typeid=158>> accessed 1 December 2021.

Legal and Regulatory Measures and Responses to Prevent and Control COVID-19 in Indonesia

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Abstract: This paper discusses the laws and regulations used by the Government of Indonesia in tackling the COVID-19 Pandemic. To combat COVID-19, the Indonesian government opted to act via the Contagious Diseases Law without having to enact the Emergency Situation Law. Moreover, the Government of Indonesia utilized the Health Quarantine Law, established the COVID-19 Expediting Management Task Force, and Large-Scale Social Distancing policies. There have been at least 6 different types of regulations and policies utilized by the Government of Indonesia during the COVID-19 Pandemic period: (1) General policies, eq. large-scale social distancing, school closures, etc; (2) Policies toward COVID-19 patients, eq. Presidential Regulation on the development of observation and containment facilities in Galang Island, Batam City, Riau Province in relation to COVID-19 or other infectious diseases; (3) Stay-home policy to prevent spread of COVID-19, enacted by Ministerial Offices; (4) Travel bans to prevent spread of COVID-19 within and outside Indonesia; (5) Softening the economic impact of COVID-19 eq. various regulation from the Central Banks, Industrial and Trade Ministry, and Financial Services Authority on exports, imports, international currency, Giro, regular banking, Syariah banking, stock exchange, etc, in relation to COVID-19; and (6) Financing the management of COVID-19. The legal framework for combatting COVID-19 is already in place in Indonesia. There are many laws and regulations that are available, including the Constitution, and presidential, governmental and ministerial regulations. However, overlaps and inconsistencies can be seen in some cases, and these make the situation more dire for the people of Indonesia. These inconsistencies should be resolved quickly by the government.

Keywords: COVID-19, Indonesia, Law, Regulations, Policy, Legal Framework

1. Background

There is no country in the world that was well prepared to deal with the impact of the COVID-19 pandemic (COVID-19) after it was first reported in late 2019. The virus rapidly spread across national borders and, on March 11, 2020, the World Health Organization (WHO) elevated the status of COVID-19 from an epidemic to a pandemic. This means that the likelihood of the disease spreading from one human being to another is high, with a high fatality rate, and no effective medical treatment for this widespread disease.¹

A year has passed since the pandemic started, however, it is too early to say that the silver lining

of the pandemic is in sight. The ongoing situation shows that COVID-19 is still going strong, with outbreaks caused by various mutations of Sars-Cov-2, the virus that causes COVID-19.

One variant that claimed many lives and caused increased infection cases in most countries is the Delta variant (Sars-Cov-2. B.1.617.2), which was first documented in India in October 2020.² Southeast Asian countries are among the region that was hard hit by the Delta variant. On July 18, 2021, Indonesia reported the highest death rate in the world and the highest new infected rate in Asia.³

Aside from this variant, the contributing factors that increase the continuing transmission are increased social mixing and increased social

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¹ Amesh Adalja *et al.*, 'The Characteristics of Pandemic Pathogens' (2018) <https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2018/180510-pandemic-pathogens-report.pdf> accessed 23 October 2021.

² World Health Organization [WHO], *Tracking SARS-CoV-2 variants* (WHO, 22 October 2021) <<https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/>> accessed 23 October 2021.

³ Yudith Ho, 'Indonesia Daily Covid Deaths Top Brazil as the World's Highest' *Bloomberg* (18 July 2021) <<https://www.bloomberg.com/news/articles/2021-07-18/indonesia-daily-covid-deaths-top-brazil-as-the-world-s-highest>> accessed 23 October 2021.

mobility, the relaxation or the inappropriate use of public health and social measures, and the uneven and inequitable distribution of vaccines.⁴

Governments in the region have taken necessary steps to suppress and survive the impacts by enacted policies, rules, and regulations, including Indonesia. This article will discuss the Legal Framework that has been set by Indonesia in handling the COVID-19 pandemic.

2. Constitution and Hierarchy of Laws

Indonesia is a unitary state in the form of a republic. Indonesia's legal system is derived from the Dutch System and follows the French and German model of Civil Law.⁵

Having a presidential government system with separation of Executive, Legislative, and Judicative, Indonesia is based on the 1945 Constitution. The Constitution stipulates that there are eight 'State High-Institutions', namely: President and Vice President; General Assembly (*Majelis Permusyawaratan Rakyat* or MPR); the House of People's Representatives (*Dewan Perwakilan Rakyat* or DPR); the House of Regional Representatives (*Dewan Perwakilan Daerah* or DPD); Constitutional Court (*Mahkamah Konstitusi* or MK); Supreme Court (*Mahkamah Agung* or MA), Judicial Commission (Komisi Yudisial or KY) and State Audit Board (*Badan Pemeriksa Keuangan* or BPK).⁶

The most important of the above State High Institutions are MPR, as the supreme state body, who has the power to amend and enact the Constitution; DPR who has the function to make legislation and holds the President and his ministers accountable; and President, as the head of the executive, who holds the power of government.⁷

Under Article 20A(1) of the 1945 Constitution, DPR, as the legislative branch of the government, also has an oversight function. This function includes: (a) overseeing on the implementation of laws, State Budget (*Anggaran Pendapatan dan*

Belanja Negara or APBN) and government's policies; and (b) discussing and implementing the outcome of DPD's supervision (on the implementation of laws in regional autonomy, establishment, expansion, the merger of regions, management of natural resources and other natural resources, implementation of State Budget, taxes, education, and religion).⁸

The President is assisted by ministers in exercising his duties. The ministers are responsible for a particular area of government activity and, within the sphere of their respective ministries, can issue binding instructions to lower-level administrative bodies unless prohibited by law.⁹

Aside from the national political and administrative level, according to Article 18 (7) of the 1945 Constitution and the Local Government Law No. 23 Year 2014 there are also administrative bodies and representative assemblies at the regional level in the 34 provinces (*provinsi*) and at the local level in each of the 548 regencies and cities (*kabupaten* and *kota*).¹⁰

The hierarchy of laws in Indonesia starts from the 1945 Constitution, MPR (People's Consultative Council) Decree (*Tap MPR*) made by the MPR, Laws (*Undang-Undang*) enacted by DPR (House of Representative) or Interim Emergency Regulation (*Peraturan Pemerintah Pengganti Undang-undang*) made by the President, Governmental Regulation (*Peraturan Pemerintah*), Presidential Regulation (*Peraturan Presiden*), Provincial Regulation (*Peraturan Daerah*) made by provincial parliaments, and Municipality/City Regulation.¹¹ Regulations made by other government institutions such as ministries or task forces will derive their legal power based on one of these norms or authorities given therein.¹²

There is no change in the basic constitutional structure in response to the pandemic. Regulations are subject to certain constitutional limitations: they cannot conflict with higher norms, such as primary legislation and the Constitution.¹³

⁴ Maria Van Kerkhove, 'WHO's Science in 5 on COVID-19: Delta Variant' (5 July 2021) WHO <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/media-resources/science-in-5/episode-45---delta-variant?gclid=CjwKCAjw0qOIBhBhEiwAyvVcfy-HJ2EQyKJog7QhODqmcA6zxYLkc0xzLYK0c0jpYfl8a-uVgd1nhoCavAQAvD_BwE> accessed 11 October 2021.

⁵ Tim Lindsey, *Indonesia: Law and Society* (2nd edn, The Federation Press 2008) 12.

⁶ Jimly Asshidiqie, *Pengantar Ilmu Hukum Tata Negara / Introduction to Constitutional Law* (Rajawali Press) 24.

⁷ *Ibidem* p. 25.

⁸ The House of Representatives of the Republic of Indonesia (DPR), 'Tasks and Authorities' <<https://www.dpr.go.id/en/tentang/tugas-wewenang>> accessed 23 October 2021.

⁹ *Supra* note 7.

¹⁰ *Supra* note 7.

¹¹ Law No. 12 of 2011 on Development of Laws and Regulations, art 7(1) <<http://bphn.go.id/data/documents/11uu012.pdf>> accessed 11 October 2021.

¹² *Ibidem* arts 8(1) and (2).

¹³ Law No. 12 of 2011 on Development of Laws and Regulations, art 7(2) <<http://bphn.go.id/data/documents/11uu012.pdf>> accessed 11 October 2021.

3. Indonesia Legal Framework

3.1. Timeline

When President Joko Widodo announced that there were two confirmed cases of COVID-19 in Indonesia on March 2, 2020, the nation already had underlying laws that allowed the Government of Indonesia (GoI) to respond to the pandemic. According to Article 12 of the 1945 Constitution, the President has the authority to declare a state of emergency, where details of emergencies are to be explained in subsequent law. Relevant legislation concerning the above matter includes laws on Emergency Situations (Law No. 74/1957¹⁴ jo. Law No. 23/1959¹⁵), Law No. 4/1984 on Contagious Diseases,¹⁶ Law No. 24/2007 on Disaster Management,¹⁷ and Law No. 6/2018 on Health Quarantine.¹⁸

The GoI chose to act based on the Contagious Diseases Law instead of the Emergency Situation Law. The Contagious Diseases Law stipulates that the GoI is to establish perimeter areas of contagion and management efforts. The Minister of Health can designate specific areas as contagion areas¹⁹ by relying on epidemiological and community factors.²⁰ Epidemiology factors are based on epidemiology data (numbers of patients, number of fatalities, and methodology of managing the virus spread); social-community situation considerations are based on socio-cultural, economic, and security aspects based on deliberation from the Regent (*Bupati* in charge of a Regency) to be reported to the Minister.²¹

Aside from the Contagious Diseases Law, Indonesia also has Law No. 6 of 2018 on Health Quarantine to deal with the COVID-19 Pandemic.

This law aims to protect the community from diseases or risk factors which lead to emergency health problems in the community.²² This law allocates responsibility to both the central and local governments.²³ The central government, in collaboration with the local government, is responsible for handling and management of health quarantine in entry and exit ports of Indonesian territory.²⁴ Further, it requires that every person is entitled to basic health services during the quarantine session, as prescribed medically, including food, and other essential needs.²⁵ Under Law No. 6 of 2018, Community Emergency is defined as an extraordinary health event that occurs by the spread of infectious diseases or caused by other sources (such as nuclear radiation, biological pollution, chemical contamination, bioterrorism, etc.) which could potentially spread transboundary harm between countries.²⁶ This law also establishes requirements to define a community emergency.²⁷ Health Quarantine is categorized into 4 types: home quarantine,²⁸ hospital quarantine,²⁹ regional quarantine,³⁰ and large-scale social restrictions.³¹ The GoI opted to apply 'large-scale social restrictions' in relation with the COVID-19 pandemic, which includes the shutting down of schools, places of worship, and the requirement of social distancing in public facilities.³² The GoI is responsible for the medical needs, food, and essential needs of the people within the quarantine.³³

During the pandemic, the President and his aides, as the executive branch of government, has enacted and implemented the Contagious Diseases Law, Health Quarantine Law, Regional Government Law, etc., and subsequently enacting relevant regulations and bylaws that do not require prior

¹⁴ Law No. 74 of 1957 on Revocation of Regulation and Determination of Dangerous Conditions <<https://www.bphn.go.id/data/documents/57uu074.pdf>> accessed 23 October 2021.

¹⁵ Law No. 23 of 1959 on State of Emergency <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=47446&p_country=IDN&p_count=611> accessed 23 October 2021.

¹⁶ See Database Peraturan <<https://peraturan.bpk.go.id/Home/Details/46973/uu-no-4-tahun-1984#:~:text=UU%20No.%204%20Tahun%201984,Penyakit%20Menular%20%5BJDIH%20BPK%20RI%5D>> accessed 23 October 2021.

¹⁷ Law No. 24 of 2007 on Disaster Management <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC114997/>> accessed 23 October 2021.

¹⁸ Law No. 6 of 2018 on Health Quarantine <<https://www.ilo.org/dyn/natlex/docs/ELEcTRONIC/109278/135523/F-346886998/IDN109278.pdf>> accessed 23 October 2021, <<https://lexatlas-c19.org/indonesia/>> accessed 02 November 2021.

¹⁹ Law No. 12 of 2011 on Development of Laws and Regulations, arts 4(1), 4(2), 7(2)

<<http://bphn.go.id/data/documents/11uu012.pdf>> accessed 11 October 2021.

²⁰ Governmental Regulation No. 40 of 1991 on Management of Contagious Diseases, art 2 <<http://www.bphn.go.id/data/documents/91pp040.pdf>> accessed 11 October 2021.

²¹ *Ibidem* arts 4 and 5.

²² Law No. 6 of 2018 on Health Quarantine, art 3.

²³ *Ibidem*, art 4.

²⁴ *Ibidem*, art 5.

²⁵ *Ibidem*, art 8.

²⁶ *Ibidem*, art 1(2).

²⁷ *Ibidem*, art 10&11.

²⁸ *Ibidem*, art 1(8).

²⁹ *Ibidem*, art 1(9).

³⁰ *Ibidem*, art 1(10).

³¹ *Ibidem*, art 1(11).

³² Government Regulation No. 21 Year 2020 on Large Scale Social Restrictions to Expedite Covid-19 Management (31 March 2020).

³³ Law No. 6 Year 2018 on Health Quarantine, arts 49; 53; 56; 59; 77.

approvals from the legislative branch.³⁴ There has been limited parliamentary scrutiny from the DPR of the regulations adopted under the Contiguous Disease Law and Health Quarantine Law when otherwise mandated by their monitoring function in Article 20A (1) of the 1945 Constitution. DPR seemed to have not shown its best in implementing the monitoring function on the executives.³⁵ Parliament's official website lists several meetings and field visits for COVID-19,³⁶ but public information on how DPR is monitoring pandemic management in Indonesia is scarce. When available, it is in the form of global diplomacy – how Indonesia has been assisting or was assisted by other countries during the pandemic, practically detaching itself from the struggle of its Indonesian citizens.³⁷

Legal rules enacted to control infection are binding and violators may be subject to fines or criminal charges, whereas guidance to the public is advisory. Directives given to public authorities are binding within the limits of the law. The common form of Directives is that addressed by the President, which will subsequently be followed up by the government agencies or regional leaders issuing implementing regulations.³⁸ For example, the Minister of Home Affairs issued Instruction No. 3 of 2021 on the Implementation of Restriction on Public Activities (PPKM) on the Micro-Scale and the Establishment of COVID-19 Handling Post in the

Village and Sub-district level to prevent the spread of COVID-19, which was issued after the President addressed the urgency to extend the Restriction based on the Micro-Scale and establishing handling post to fight COVID-19.³⁹ Guidance is used extensively to supplement legal rules and to affect behaviour by resort to soft recommendations instead of using hard law. One example concerning the use of vaccines is enshrined in Minister of Health Decree No. HK.01.07/MENKES/4638/2021 on Technical Guidance of the Vaccine Inoculation to Fight the Pandemic of Corona Virus Disease 2019.⁴⁰ GoI has decided that everyone eligible to be vaccinated in Indonesia needed to be vaccinated for free.

Due to the recent crisis caused by the Delta variant, the GoI has issued Directives and regulations to curb the spread of the virus. Many strict regulations were enacted with the emphasis on limiting people's mobility, enforcing the usage of face masks, and expediting vaccines inoculation.⁴¹ As of August 6, 2021, at least 815 COVID-19 related regulations have been adopted at the national level either in the form of new regulations or amendments to existing non-pandemic specific regulations.⁴²

This is based on regulations published in the central legal repository,⁴³ and other provincial or ministerial repositories, as the central repository is often incomplete.

³⁴ Linda Yanti Sulistiawati, 'Pemerintahan Selama Pandemi: Berenang di Air Keruh' *Kompas* (12 August 2021) <<https://www.kompas.id/baca/opini/2021/08/12/pemerintahan-selama-pandemi-berenang-di-air-keruh>> accessed 02 November 2021.

³⁵ Amalinda Savirani and Linda Sulistiawati, 'The Malady of Ignorance? Indonesian Parliament During the COVID-19 Pandemic' *New Mandala* (6 April 2021) <<https://www.newmandala.org/the-malady-of-ignorance-indonesian-parliament-during-the-covid-19-pandemic/>> accessed 23 October 2021.

³⁶ The House of Representatives of the Republic of Indonesia (DPR), 'News' <<https://www.dpr.go.id/en/berita/index/category/bksap>> accessed 23 October 2021.

³⁷ The House of Representatives of the Republic of Indonesia (DPR), 'House Calls for Strengthening Support and Help Palestine to Handle COVID-19' (*DPR*, 18 January 2021) <<https://www.dpr.go.id/en/berita/detail/id/31374/t/Puan+Maharani+Serukan+Perkuat+Dukungan+da+n+Bantu+Palestina+Tangani+Covid-19>> accessed 23 October 2021; The House of Representatives of the Republic of Indonesia (DPR), 'BKSAP Distributes Face Mask Donation from Vietnamese Parliament to UI Hospital' (*DPR*, 11 September 2020) <<https://www.dpr.go.id/en/berita/detail/id/30036/t/BKSAP+Distributes+Face+Mask+Donation+from+Vietnamese+Parliament+to+UI+Hospital>> accessed 11 October 2021.

³⁸ Jurnal Bina Praja, Journal of Home Affairs Governance <<http://jurnal.kemendagri.go.id/index.php/jbp/article/view/38>> accessed 2 November 2021.

³⁹ Minister of Home Affairs Instruction No. 3 of 2021 on Implementation of Restriction on Public Activities (PPKM) on the Micro-Scale and the Establishment of COVID-19 Handling Post in the Village and Sub-district Level to Prevent the Spread of COVID-19 <<https://web.dpmpstsp.jatengprov.go.id/packages/upload/portal/files/INMENDAGRI%20NOMOR%203%20TAHUN%202021.pdf>> accessed 11 October 2021.

⁴⁰ Minister of Health Decree No. HK.01.07/MENKES/4638/2021 on Technical Guidance on Vaccines for COVID-19 <https://drive.google.com/file/d/1e6_11b6FXrhVlrpn27quhC8UkL6hcUaS/view> accessed 23 October 2021.

⁴¹ Johannes Mangihot, '3 Presidential Directives to Governors, Territorial Military Commander, and Chief of Provincial Police concerning the Spike of COVID-19 Cases in Jakarta' *Kompas TV* (15 June 2021) <<https://www.kompas.tv/article/183838/3-perhatian-presiden-jokowi-untuk-gubernur-pangdam-dan-kapolda-soal-lonjakan-kasus-covid-19-di-dki>> accessed 23 October 2021.

⁴² Hukum Online, 'Regulasi Covid-19' <<https://covid19.hukumonline.com/peraturan-perundang-undangan/>> accessed 02 November 2021.

⁴³ Government of Indonesia, *National Law Documentation and Information Network* <<https://jdih.go.id>> accessed 23 October 2021.

4. Covid-19 Expediting Management Task Force

Two days after COVID-19 was declared a pandemic, the President of Indonesia enacted the Presidential Decree No. 7 of 2020 establishing the COVID-19 Task Force with the responsibility to: a. increase national resilience with regards to health; b. expedite the management of COVID-19 through collaboration between governmental institutions, national institutions, and locals; c. increase preparedness for the escalation of the spread of COVID-19; d. increase the effectiveness of operational policy-making; and e. enhance the response via better management of measures to prevent and detect COVID-19.⁴⁴

Following the Presidential Decree, the Ministry of Home Affairs issued Decree No. 20 of 2020⁴⁵ on Expediting the Management of COVID-19 in the Regional Government as its implementing regulation which sets out that the task force is to be established in the region. Both regional and local governments are required to mitigate and manage the impact of COVID-19, and to prioritize COVID-19 management within existing local budgets. If no prior budget is available for COVID-19 management, local governments are to record their COVID-19 expenditure under the unexpected expenditure category and revise the annual budget as soon as possible.

On 29 March 2020, the Ministry of Home Affairs issued a Ministerial Circular Letter to provide further guidance on the implementation of the Decree.⁴⁶ Based on the letter, the Regional Head (either the Governor or Head of Region) shall be the head of the COVID-19 regional task force and each region is authorized to independently declare a regional emergency, even in the absence of approval from the national government. This provision contradicts the Health Quarantine Law. Furthermore, three months after the regional task forces were established, there were varying

approaches towards COVID-19 management and handling across different regions in Indonesia, thus demonstrating that the national and regional governments are lacking coordination.⁴⁷

On January 6, 2021, the GoI has chosen to apply a different approach to fighting the pandemic. The Large-Scale Social Restrictions (*Pembatasan Sosial Berskala Besar* or PSBB) changed into the Restriction toward Community Activities (*Pemberlakuan Pembatasan Kegiatan Masyarakat* or PPKM) based on the Minister of Home Affairs Instruction No. 1 of 2021 on Implementation of Restriction on Public Activities to Control the Spread of Corona Virus Disease 2019 (COVID-19).⁴⁸ This regulation changed the process of decision-making by the central government and regional government. With this Restriction, the central government tried to minimize the lack of coordination by taking a role in deciding which cities or provinces limit their public movement without prior request from the regional government. The GoI's responsibilities in providing medical needs, food, and essential needs of the people within the quarantine remain the same.

When there was a dramatic spike in the number of infected cases and death caused by the Delta variant that happened throughout the end of June 2021,⁴⁹ the President requested the COVID-19 Task Force to take immediate, stricter actions to suppress the spread. On July 2, 2021, The Minister of Home Affairs enacted Ministerial Instruction No. 15 of 2021 on An Emergency Restriction on Public Activities with the main priority for Java and Bali region, where every region in Java and Bali has to applied the Restriction from July 3 to July 20, 2021.⁵⁰

With respect to the developing situation, the COVID-19 Task Force then extended the Restriction until August 9th, 2021 and made several adjustments: (a) an expansion of the Restriction to

⁴⁴ Presidential Decree No. 7 of 2020 (13 March 2020) <<https://kemenkeu.go.id/media/14856/keppres-nomor-7-7-tahun-2020.pdf>> accessed 23 October 2021.

⁴⁵ Ministry of Home Affairs Decree No. 20 of 2020

⁴⁶ Minister of Home Affairs Circular Letter No. 440/2622/SJ of 2020 on Forming Local Covid Task Forces <https://covid19.hukumonline.com/wp-content/uploads/2020/04/surat_edaran_menteri_dalam_negeri_nomor_440_2622_sj_tahun_2020-2.pdf> accessed 11 October 2021.

⁴⁷ Devina Halim, 'Pemerintah Pusat Dinilai Harus Membantu Pemda dalam Penanganan Covid-19' *Kompas* (13 September 2021) <<https://nasional.kompas.com/read/2020/09/13/13563521/pemerintah-pusat-dinilai-harus-membantu-pemda-dalam-penanganan-covid-19?page=all>> accessed 2 November 2021.

⁴⁸ Minister of Home Affairs Instruction No. 1 of 2021 on Implementation of Restriction on Public Activities to

Control the Spread of Corona <<https://infocorona.baliprov.go.id/wp-content/uploads/2021/01/inmendagri-nomor-1-tahun-2021-tentang-pemberlakuan-pembatasan-kegiatan-untuk-pengendalian-penyebaran-coronavirus-disease-2019-covid-19.pdf>> accessed 11 October 2021.

⁴⁹ Natasia Wahyuni and Heru Andriyanto, 'Delta Variant Blamed for Dramatic Covid Surge in Indonesia' *Jakarta Globe* (8 July 2021) <<https://jakartaglobe.id/news/delta-variant-blamed-for-dramatic-covid-surge-in-indonesia>> accessed 23 October 2021.

⁵⁰ Minister of Home Affairs Instruction No. 15 of 2021 on Implementation of Restriction on Public Activities in Java and Bali <<https://covid19.go.id/storage/app/media/Regulasi/2021/Juli/INMENDAGRI%20NO%2015%20TAHUN%202021%20TENTANG%20PPKM%20DARURAT.pdf>> accessed 11 October 2021.

regions outside Java and Bali;⁵¹ (b) the level of contingency in every region in applying the Restriction is determined by the severity of the outbreak as assessed by the Ministry of Health.⁵²

5. Government Measures Responsibility During COVID-19 Pandemic

Government has set policies in the effort to manage COVID-19, which can be categorized into four major groups:

5.1. General Policies

The GoI issued Government Regulation No. 21 Year 2020 on Large-Scale Social Restrictions to Expedite COVID-19 Management that regulates social distancing measures through the Large-scale Social Restriction Government Regulation.⁵³

In principle, this regulation is similar to Article 59 of the Health Quarantine Law, although it specifically focuses on COVID-19. All regions are required to adhere to this regulation. In brief, the regulation provides for specific steps that the government should take to manage COVID-19, the scope of the government's responsibility to its people during the pandemic, and budget allocation for the management of COVID-19.

Concerning the ongoing COVID-19 variant crisis, the GoI opted to apply Micro-Scale Restriction on Public Activities (PPKM) enacted through the Minister of Home Affairs Instruction Number 1 of 2021⁵⁴ instead of Large-Scale Social Restriction.

Through this Restriction, the central government established several detailed measures that should be taken by the regional governments, including allocation and distribution of vaccines, strengthening the 3Ts (testing, tracing and treatment), distribution of social assistance and

social security, and budget allocation for the management of COVID-19.

5.2. Policies for COVID-19 Patients

The Health Quarantine Law determines quarantine and isolation. Quarantine is a process to reduce infectious risk and early detection of COVID-19 through separation of healthy individuals or symptomless individuals who already had contact with confirmed COVID-19 patients or travelled to areas with local transmission of COVID-19.⁵⁵ Quarantine is categorized into 4 types: home quarantine,⁵⁶ hospital quarantine,⁵⁷ regional quarantine,⁵⁸ and large-scale social restrictions.⁵⁹ Isolation is a process to reduce the risk of contagion through the separation of sick individuals (defined as laboratory-confirmed results or one demonstrating COVID-19 symptoms) with the community at large.

The Health Minister enacted the Health Ministry Decision KMK No.01.07/Menkes/413/2020 on Guidance on Avoidance and Control of COVID-19. This Decision highlights activities on public health management for COVID-19. These measures include quarantine, monitoring, isolation, specimen checking, epidemiology detection, risk communication, and community development.

The initial period set out for quarantine of individuals was at least 14 days (and until a COVID-19 diagnosis is given) and was set in the Minister of Health Circular Letter on 16 March 2020.⁶⁰ This was changed on 13 July 2020 by the Minister of Health's advice in its decision noting that a period of 14 of quarantine for individuals close to COVID-19 positive individuals including healthcare workers (the latter enter 10 days isolation if they are positively diagnosed with COVID-19; if asymptomatic they may exit isolation).⁶¹ The

⁵¹ Minister of Home Affairs Instruction No. 28 of 2021 on Implementation of Level 4 Restriction on Public Activities in Sumatera, Kalimantan, Sulawesi, Nusa Tenggara, Maluku, and Papua <https://drive.google.com/file/d/1pxUq_KwQtMyG93TJMB9BlpIYGHss5Hd4/view> accessed 11 October 2021.

⁵² Minister of Home Affairs Instruction No. 29 of 2021 on Implementation of Level 3, Level 2, and Level 1 Restriction on Public Activities and the Optimizing the COVID-19 Command Post at Village and Sub-district Levels for the Handling of COVID-19 Spread <<https://drive.google.com/file/d/1r0EjScOQkeNFwBSDC5Hu7QWi0nXAtiPH/view>> accessed 11 October 2021.

⁵³ DKI Jakarta Governor Decision No. 959 Year 2020 on Large Scale Social Restrictions to Manage Covid-19 in the Province of DKI Jakarta (11 September 2020); DKI Jakarta Governor Regulation No. 88 Year 2020 on Amending Governor Regulation 33/2020 on Large Scale Social Restrictions (11 September 2020).

⁵⁴ Minister of Home Affairs Instruction No. 1 Year 2021 on Restriction of Activities to Manage the Spread of Covid-19 (6 January 2021).

⁵⁵ Law No. 6 of 2018 on Health Quarantine, art 1(6).

⁵⁶ *Ibidem* art 1(8).

⁵⁷ *Ibidem* art 1(9).

⁵⁸ *Ibidem* art 1(10).

⁵⁹ *Ibidem* art 1(11).

⁶⁰ Minister of Health Circular Letter No. HK/02.01/MENKES/202/2020 on Protocols for Self-Isolation to Handle Covid-19, point 2 <https://covid19.kemkes.go.id/download/SE_MENKES_202_2020_protokol_isolasi_diri_COVID.pdf> accessed 11 October 2021.

⁶¹ Minister of Health Decision No. HK.01.07/Menkes/413/2020 (13 July 2020) 33, 38 <<https://covid19.go.id/storage/app/media/Regulasi/2020/Jul/KMK%20No.%20HK.01.07-MENKES-413-2020%20ttg%20Pedoman%20Pencegahan%20dan%20>

decision also specified the possibility of carrying out mass quarantines for high-risk areas.⁶² As of March 2021, Quarantines may also be lowered to 5 days if a negative COVID-19 test is obtained from the sample gathered on the 5th day of the quarantine, which applies both to international travel (COVID-19 Task Force) and close contacts as part of contact tracing (Ministry of Health).⁶³

The Government is also conducting the 3Ts (tracing, tracking and treatment) through a mobile application. On April 6, 2020, the Minister of Communication and Informatics issued a Ministerial Decree No. 171 of 2020 to launch the PeduliLindungi mobile application. This health surveillance application provides features for tracing, tracking, warning and fencing, and is designated to be used only during the pandemic. However, due to the lack of technology and communication infrastructure in Indonesia and the concern of users' privacy protection,⁶⁴ not many people installing this application. The regional governments are also taking active part in increasing local participation in conducting tracing and tracking for the COVID-19 infected cases by involving volunteers to monitor when there are active cases in the neighbourhood, for example, the

Jogo Tonggo program as introduced by the Central Java government.⁶⁵

The GoI's general database for health protocols can be found in their main COVID-19 response website,⁶⁶ which contains regulations and protocols related to COVID-19 response. These health-related protocols have most recently included general guidelines for dealing with COVID-19 patients lastly updated in February 2021, mental health support protocols for medical personnel issued January 2021, hospital protocols as well as local language guides for adaptive behaviour.⁶⁷

5.3. Stay-Home Policies

Changes to working protocols in various government-run or affiliated bodies are implemented by the overseeing government agency, such as state-owned companies or workplaces,⁶⁸ various ministries,⁶⁹ and the courts.⁷⁰ All ministries make working adjustments to policies.

On July 20, 2021, the Minister of Home Affairs enacted Ministerial Instruction No. 22 of 2021 on the Implementation of Level 4 Corona Virus Disease 2019 Restriction of Public Activities in Java and Bali.⁷¹ Under this Instruction, people who live in the

Pengendalian%20COVID-19.pdf> accessed 11 October 2021.

⁶² *Ibidem* 116.

⁶³ Ministry of Health, 'Handbook for Contact Tracing for Covid-19 Cases' (*Kementerian Kesehatan Republik Indonesia*, 16 March 2021) 6 <<https://infeksiemerging.kemkes.go.id/document/download/9m5rVEG6Ml>> accessed 23 October 2021; Doni Monardo, 'Covid Task Force Circular Letter No. 2 of 2021 on Health Protocol for International Travel during Covid-19 (14 January 2021) paras F.1.j and k <<https://covid19.go.id/storage/app/media/Regulasi/2021/Januari/surat%20edaran%20Nomor%202%20Tahun%202021%20tentang%20Protokol%20Kesehatan%20Operjalanan%20internasional%20dalam%20mas%20pandemi%20corona%20virus%20disease%202019.pdf>> accessed 11 October 2021.

⁶⁴ Yuyun Wahyuningrum *et al.*, 'Open Letter to Kominfo Requesting for Strong User Privacy Protections in the PeduliLindungi App' (27 July 2020) Institute for Policy Research and Advocacy <<https://www.article19.org/wp-content/uploads/2020/06/Open-Letter-PeduliLindungi-ENG.pdf>> accessed 23 October 2021.

⁶⁵ Government of Central Java, 'JogoTonggo II, Volunteer Participation in 3T Process Online' *Dinas Kominfo Jateng* (8 January 2021) <<https://jatengprov.go.id/publik/jogo-tonggo-jilid-ii-libatkan-relawan-dalam-proses-3t/>> accessed 11 October 2021.

⁶⁶ Covid Task Force, *Homepage* <<https://covid19.go.id>> accessed 11 October 2021.

⁶⁷ Covid Task Force, *Protocols* <<https://covid19.go.id/p/protokol>> accessed 11 October 2021.

⁶⁸ Minister of State-Owned Companies Circular Letter No. SE-1/MBU/03/2020 on Increasing Awareness of the Spread of COVID-19 State-Owned Company Ministry (3 March 2020); Minister of Manpower Circular Letter No. M/3/HK.04/III/2020 on Protection for Workers and Business Sustainability to Prevent and Manage Covid-19 (17 March 2020) <https://covid19.hukumonline.com/wp-content/uploads/2020/04/surat_edaran_menteri_ketenagakerjaan_nomor_m_3_hk_04_iii_2020_tahun_2020-2.pdf> accessed 11 October 2021.

⁶⁹ Minister of Education and Culture Circular Letter No. 2 of 2020 on Prevention and Management of Covid-19 at the Ministry of Education and Culture (9 March 2020); Minister for State Apparatus and Bureaucratic Reform Circular Letter No. 19 of 2020 on adjustment of working arrangements for civil servants during COVID-19 State Apparatus and Bureaucratic Reform Ministry (16 March 2020) <https://covid19.hukumonline.com/wp-content/uploads/2020/04/surat_edaran_menteri_pendayagunaan_aparatur_negara_dan_reformasi_birokrasi_nomor_19_tahun_2020-2.pdf> accessed 11 October 2021.

⁷⁰ Supreme Court Circular Letter No. 1 of 2020 on Guidance for Duties during Covid-19 within the Supreme Court and other Lower Courts (23 March 2020) <<https://www.mahkamahagung.go.id/media/7294>> accessed 11 October 2021.

⁷¹ Minister of Home Affairs Instruction No. 22 of 2021 on the Implementation of Level 4 Covid-19 Restriction of Public Activities in Java and Bali (21 July 2021) <<https://covid19.go.id/p/regulasi/instruksi-menteri-dalam-negeri-nomor-22-tahun-2021>> accessed 11 October 2021.

area with the highest level, Level 4, must observe the strict Stay-Home Policy. This Policy includes several critical elements: (a) enforcing online schooling; (b) implementing 100% work from home requirements for non-essential business sectors; (c) implementing activities with a maximum of 50% capacity for essential business sectors (for example, financial and banking services oriented toward physical interaction with customers); (d) allowing a full capacity or 100% for business classified as critical category (for example hospitals, disaster management, basic utilities, etc.); and (e) ceasing the operation of malls and shopping centres. Restrictions are initially for 2 weeks but can be extended based on each area's level and situation.

5.4. Travel Bans

Domestic and international travels were also regulated during the Covid-19 pandemic. The protocol for international travelers depended on their countries' destination and arrivals. All passengers and vessel crew members must be in healthy condition and implementing COVID-19 protocols, such as using masks, washing hands with water or hand sanitizer, physical distancing, using face masks, and implementing clean and healthy living guidelines.⁷²

The travel ban in Indonesia is going through series admission changes for foreign nationals in response to the discovery of the new variant of the Covid-19 strain which is updated regularly. International travellers must reconfirm their eligibility to enter the country at an Indonesian Embassy before entering Indonesia. These decisions and requirements are regulated through the Covid-19 Task Force Circular Letters⁷³ and are

assessed parallel to domestic social distancing guidelines.⁷⁴

The travel ban policy set by GoI is the large-scale mobility policy that taken around the end of Ramadan on 24 – 31 May 2020. Around this national holiday period, large numbers of Indonesians travel back to their hometowns and families to celebrate Eid A-Fitr.

There was initial uncertainty in 2020 whether such travel would be allowed during the pandemic, but on 23 April 2020, the Minister of Transportation ruled that transportation of persons with private cars, motorcycles, buses, trains, ships, ferries, and flights would be banned from entering and leaving areas where large scale social restrictions or otherwise restricted travel are imposed,⁷⁵ which on 27 April 2020 included at least two provinces and 22 regencies/cities. International travel was unaffected, and exclusions applied to logistical transport and other necessary services.

In 2021, the decision was made before the start of Ramadan, on 9 April 2021, to impose a similar ban on transportation between 6 May – 17 May 2021 (the Islamic lunar calendar loses 11-12 days per year compared to the Gregorian).⁷⁶ The Minister of Transportation stated that based on internal surveys, this policy aimed to prevent up to 81 million persons from travelling home, with 27 million persons projected to flout the travel bans.⁷⁷

The Government extended the temporary closure of entry of foreign nationals to Indonesia until 25 February 2021. The extension was contained in the Circular of the National Task Force for Handling COVID-19 Number 2 of 2021 concerning the International Travel Health Protocol during the COVID-19 Pandemic.⁷⁸ The travel ban was partially lifted on 14 October 2021, when

⁷² See for example, COVID-19 Task Force Circular Letter No. 8 Year 2021 on health protocols for international travel during the COVID-19 pandemic (9 February 2021).

⁷³ See for example, COVID-19 Task Force Circular No. 8 of 2021 on Health Protocol for International Travel during the COVID-19 Pandemic Period (9 February 2021) <<https://kemlu.go.id/copenhagen/en/read/health-protocol-for-international-travel-during-the-covid-19-pandemic-period-new-circular-no-8-year-2021/1347/importation-information>> accessed 23 October 2021.

⁷⁴ German-Indonesian Chamber of Industry and Commerce, 'Covid-19 Developments in Indonesia [as updated 29 March 2021]' (EKONID Insight, 22 October 2021) <<https://indonesien.ahk.de/en/infocenter/news/news-details/covid-19-developments-in-indonesia>> accessed 23 October 2021.

⁷⁵ Minister of Transportation Regulation No. 25 of 2020 on Transportation Control during Eid-al-Fitr Mudik Period of Hijra Year 1441 to Manage the Spread of Covid (23 April 2020) arts 1, 2 and 3

<https://peraturan.bpk.go.id/Home/Download/141439/PM_25_TAHUN_2020.pdf> accessed 11 October 2021.

⁷⁶ Ministry of Transportation, 'Regulation to Control Transportation during Eid al-Fitr Issued' (8 April 2021) <<http://dephub.go.id/post/read/permenhub-pengendalian-transportasi-selama-masa-idul-fitri-telah-diterbitkan#:~:text=Jakarta%20%2D%20Kementerian%20Perhubungan%20telah%20menerbitkan,Rangka%20Pencegahan%20Penyebaran%20Covid%2D19.&text=Serta%20datur%20juga%20ketentuan%20mengenai%20pengedalian%20transportasi%20di%20wilayah%20aglomerasi>> accessed 23 October 2021.

⁷⁷ Hari Darmawan, 'Minister of Transport Issues Regulation 13/2021, Bans on Transport Operations Start on 6 May' *Tribun News* (8 April 2021) <<https://www.tribunnews.com/bisnis/2021/04/08/terbitkan-pm-no-13-tahun-2021-kemhub-larang-operasional-transportasi-berlaku-6-mei?page=all>> accessed 23 October 2021.

⁷⁸ *Ibidem*.

Indonesia reopened Bali, Batam and Bintan to foreign travellers from 19 countries.⁷⁹

While the COVID-19 Task Force stipulates the top regulations on such entry, other government agencies are involved in carrying out such policies.

To give an idea of differing scopes of implementation, some relevant regulation from different ministries are provided below:

1) Law and Human Rights Ministry Regulation No. 03 Year 2020 on the temporary ban on free pass visitor visas, visas, and long-term visas for Chinese citizens Law and Human Rights Ministry;

2) Law and Human Rights Ministry Regulation No. 07-11 Year 2020 on the temporary ban on foreign visitors to Indonesia, visas and long-term stays in relation to COVID-19 Prevention Law and Human Rights Ministry;

3) Transport Ministry Regulation No. 18 Year 2020 on transportation control during COVID-19 Transport Ministry;

4) Information Letter from Civil Servant and Bureaucratic Reform Ministry No. 36 Year 2020 on banning domestic travel for civil servants, and Civil Servant and Bureaucratic Reform Ministry Circular Letter No. D/00663/03/2020/64 from the Foreign Affairs Ministry on additional policies regarding the transboundary movement of people into and out of Indonesia Ministry of Foreign Affairs; and Circular Letter No.14 Year 2020 from Director-General of ocean transportation on Guidelines for the management of ship safety to reduce the spread of COVID-19 Transportation ministry.

6. Government's Responsibility and Social Assistance Towards its People During the Covid-19 Pandemic

The GoI holds responsibility for guarding the economic stability of the country. Most of

Indonesia's social protection measures have their legal basis in the 31st March 2020 COVID-19 Financial Policy Interim Emergency Regulation,⁸⁰ further implemented by Presidential Regulation No. 54/2020 which changed details of the state budget for 2020. The emergency legislation was subsequently affirmed as an act by the DPR by Act No 2/2020 on 18 May 2020 (COVID-19 Financial Policy Act).

In guarding economic stability, GoI policies are carried out through various regulations from the Bank of Indonesia, Industrial and Trade Ministry, and Financial Services Authority on exports, imports, international currency, Giro, regular banking, *Syariah* banking, stock exchange, etc.⁸¹ Concerning COVID-19, this includes export credits, providing alternative ways of conducting corporate actions for public companies, payments made by the government for export fees, import credit for productive goods, L/C, credits for small and medium enterprises, or other types of credits approved by the central bank of Indonesia.⁸²

Aside from the above, the GoI also provides social assistance in the form of:

a) The GoI's Family Hope Program (*Program Keluarga Harapan* or PKH), which provides conditional cash transfers to disadvantaged families. This began as a pilot project in 2007,⁸³ has been expanded considering the COVID-19 pandemic. Its newer legal basis is the Minister of Welfare Regulation No. 1 of 2018.⁸⁴ It is a central government program, implemented by local authorities and was expanded horizontally (recipient) and vertically (value of goods) during the pandemic. Between July-December 2020, the PKH program also received additional in-kind (rice)

⁷⁹ Jeffrey Hutton, 'Indonesia reopens Bali to foreign visitors, but Covid-19 rules threaten to keep them away' *The Straits Times* (14 October 2021) <<https://www.straitstimes.com/asia/se-asia/indonesia-reopens-bali-to-foreign-visitors-as-quarantine-rules-weigh-on-traffic>> accessed 23 October 2021.

⁸⁰ Government Regulation in Lieu of Law No. 1 of 2020 on State Financial Policy and Stability of Financial Systems for the Management of COVID-19 and/or Encounter the Threat that Endangers National Economy and/or Stability of Financial System (31 March 2020) <<https://peraturan.bpk.go.id/Home/Details/135060/perpu-no-1-tahun-2020>>-<https://cfoclubindonesia.co.id/wp-content/uploads/2020/06/Perpu-No-mor-1-Tahun-2020.ENG_.pdf> [English translation] accessed 23 October 2021.

⁸¹ Law No. 2 Year 2020 Affirming Interim Emergency Regulation No. 1 of 2020 (16 May 2020); Interim Emergency Regulation No. 1 Year 2020 on State Financial

Policy and Stability to handle Covid-19 and/or to Face Threats to the National Economy and/or Stability of the Financial System (31 March 2020).

⁸² Government Regulation No. 21 Year 2020 on Large Scale Social Restrictions to Expedite Covid-19 Management (31 March 2020), art 2[2].

⁸³ See generally World Bank, *PKH Conditional Cash Transfer: Social Assistance Program and Public Expenditure Review* 6 (2012) 10, 13 <<https://openknowledge.worldbank.org/bitstream/handle/10986/26697/673090WP00PUBL0Background0Paper0060.pdf?sequence=1&isAllowed=y>> accessed 11 October 2021.

⁸⁴ Ministry of Welfare Regulation No. 1 of 2018 on Hopeful Families Programs (8 January 2018) <<https://peraturan.bpk.go.id/Home/Download/120868/PERMENSOS%20NOMOR%20%201%20TAHUN%202018.pdf>> accessed 11 October 2021.

benefits.⁸⁵ Recipients are required to have a Social Security Card, which one could request from the local neighbourhood association (RT/RW), which will then be forwarded and assessed by the Village Head and subsequently the Municipal Social Services. It is given for individual families, through banks, and the amount provided depends on the number of qualifying members in that family.

b) The Ministry of Welfare created two new national programs to give aid during COVID-19 through Decision No. 54/2020,⁸⁶ to be carried out by the Directorate General for Social Protection and Welfare. Local governments at the provincial, regency and municipal levels are to carry out report the distribution of aid to the directorate.

First, staple goods benefits were given to disadvantaged persons in the Jakarta Capital District and surrounding areas of Bogor, Depok, Tangerang, South Tangerang and Bekasi, through the Ministry of Welfare. Second, a direct cash transfer was also implemented for the rest of Indonesia by the Ministry of Welfare.⁸⁷

The new programs drew some controversy in public and from Parliament regarding the form (cash or goods) and amount of assistance given, as well as the large number of differing programs which simultaneously exists.⁸⁸ The Government's

position, as voiced by the Minister of Finance, is that a cash transfer of a set amount is the simplest solution which avoids the most confusion.⁸⁹

c) The Ministry of Finance issued regulations concerning direct cash transfer to Village Funds,⁹⁰ which authorizes village heads to disburse the funds to qualifying families in their jurisdiction.⁹¹

This is an expansion to the financial and governing autonomies given to Villages as per the Village Law 2014.⁹² Qualifying families are those considered poor or unable to provide themselves, and which are not recipients of the pre-employment cards or any of the other direct cash transfer programs.

d) The Ministry of Energy and Natural Resources, which provides free electricity subsidies which depends on the type of scale of electricity usage.⁹³

e) The Ministry of Cooperatives and Small and Medium Businesses provides direct cash transfers for micro, small and business holders, in the sum of IDR 2.4 million⁹⁴ per recipient, so long as they are not currently receiving capital credit or investments from banks, and are not civil servants, police/armed forces or an employee of state-owned enterprises.⁹⁵ Subsequently, the sum was halved to IDR 1.2 million (US\$82.41) per recipient.⁹⁶

⁸⁵ Ugo Gentilini, Mohamed Almenfi and Pamela Dale, 'Social Protection and Jobs Responses to COVID-19: A Real-Time Review of Country Measures' (2020) 264 <<http://hdl.handle.net/10986/33635>> accessed 23 October 2021.

⁸⁶ Ministry of Welfare No. 54 of 2020 on Aid in Goods and Direct Cash Aid to Manage Covid-19 Effects (16 April 2020) <<https://jdih.kemsos.go.id/pencarian/www/storage/document/Kepmensos%20No.%2054-HUK-2020.pdf>> accessed 11 October 2021.

⁸⁷ Ahmad Dzulfaroh, 'Aid for 10 million persons disbursed January-April 2021 and how to claim' *Kompas* (3 January 2021) <<https://www.kompas.com/tren/read/2021/01/03/123100565/cair-januari-april-2021-untuk-10-juta-orang-ini-cara-cek-penerima-bansos-rp>> accessed 23 October 2021.

⁸⁸ CNN Indonesia, 'Finance Minister S. Mulyani responds to pros and cons of social aid as criticized by Ridwal Kamil [Governor of West Java]' *CNN Indonesia* (8 May 2020) <<https://www.cnnindonesia.com/ekonomi/20200508194633-532-501483/sri-mulyani-respons-pro-kontra-bansos-keluhan-ridwan-kamil>> accessed 23 October 2021.

⁸⁹ *Ibidem*.

⁹⁰ Ministry of Finance Regulation No. 222 of 2020 -on- Management -of -Village- Funds- (20--December 2020) <<https://jdih.kemenkeu.go.id/download/f2457490-1ec2-487a-8a08-a57fe71e257b/222~PMK.07~2020P.er.pdf>> accessed 11 October 2021.

⁹¹ Rosmha Widiyani, 'Requirements for Village Fund Aid for 2021' *Detik Finance* (5 March 2021) <<https://finance.detik.com/berita-ekonomi-bisnis/d-5481802/cara-dan-syarat-daftar-blt-dana-desa-2021-disalurkan-hingga-akhir-tahun>> accessed 23 October 2021.

⁹² Law No. 6 of 2014 on Villages <https://www.dpr.go.id/dokjdih/document/uu/UU_2014_6.pdf> accessed 11 October 2021.

⁹³ Anissa Suharsono and Lucky Lontoh, 'Indonesia's Energy Policy Briefing' (2020) <<https://www.iisd.org/system/files/2020-08/indonesia-energy-policy-briefing-july-2020-en.pdf>> accessed 23 October 2021.

⁹⁴ Eddy Satriya, 'Digitalization: Making Indonesia's Micro, Small and Medium Enterprises Dance with COVID-19 for New Normal' (26th Small and Medium Enterprises Ministerial Meeting, Malaysia, 23 October 2020) <http://mddb.apec.org/Documents/2020/MM/SMEMM/20_smemm_017.pdf> accessed 23 October 2021.

⁹⁵ Yuliana Hema, '5 Fakta BLT UMKM 2021: Dana Rp1,2 Juta, Cara, Daftar, Cek status Penerima' (10 June 2021) <<https://ekonomi.bisnis.com/read/20210610/9/1403734/5-fakta-blt-umkm-2021-dana-rp12-juta-cara-daftar-cek-status-penerima>> accessed 23 October 2021.

⁹⁶ Dzulfiqar Rahman, 'Micro enterprises aid halved for this year, but coverage to be expanded' (*The Jakarta Post*, 8 April 2021) <<https://www.thejakartapost.com/news/2021/04/07/micro-enterprises-aid-halved-for-this-year-but-coverage-to-be-expanded.html>> accessed 23 October 2021.

f) The Ministry of Labour has introduced national wage subsidies for private employees making less than IDR 5 million/month (does not discriminate between contract and full-time employees) who are active in the Employment BPJS (national health insurance).⁹⁷

This aid amounts to IDR 600,000 per month and begins in September 2020 and ran for 4 months and reaching around 12,244,169 persons.⁹⁸ In 2021, the monthly benefit was changed to a direct cash transfer of IDR 3.5 million,⁹⁹ with the Minister of Labour stating that their focus in 2021 was to concentrate on the unemployed through the pre-employment cards.¹⁰⁰

The issue here is that this aid will not target informal workers, who make up a large percentage of Indonesia's workforce, who may not be active in the Employment BPJS list.

g) Indonesia's national food assistance program, previously known as BPNT, was expanded vertically and horizontally in 2020 from 15.2 million to 20 million low-income households, covering around 30% of the population, with a budget of IDR 43.6 trillion.¹⁰¹ For January 2021-December 2021, this program is targeted to 18,8 million households with a budget of IDR 45,12 trillion, with each household receiving IDR 200,000/month worth of food assistance (up from IDR 150,000/month).¹⁰²

h) As of December 2020, the Ministry of Public Works and Housing provides new cash-for-work programs, targeting 530,000 workers. Village funds were also given allocation for cash-for-work programs targeting another 59,000 works. Other Ministries (transport, agriculture, marine and

fisheries, and environment and forestry) will also link many of their programs with cash for work.¹⁰³

7. Funding for Measures and Budget Allocation to Combat Covid-19

The main sources for financing of COVID-19 measures are the Annual National Budget and the Annual Regional Budgets.

The key obstacle faced in using these budgets is the fact that most of the funds have already been earmarked for anticipated events. Since COVID-19 was not anticipated, the national and local governments can only draw from the "spare budget", which is allocated for unplanned activities, to finance the measures for combatting COVID-19.

However, this spare budget allocation is small and likely insufficient for COVID-19 activities.

Hence, the national and local governments need to revise their current budgets as soon as possible to be able to tap into more funds to finance COVID-19 measures¹⁰⁴.

To redirect funds to finance COVID-19 measures, the Ministry of Finance has enacted Regulation No.19/PMK.07/2020 on Allocation of 2020 Budgets in Relation to COVID-19.¹⁰⁵ This regulation stipulates that tobacco taxes are reallocated for healthcare measures, and income from oil and gas sales are channelled towards activities for COVID-19 prevention and management.

In the financial sector, the main COVID-19 regulation is the Emergency Regulation in Replacement of Law (PERPU) No. 1 Year 2020 on State Financial Policy and Stability of Financial Systems to Manage COVID-19.¹⁰⁶ This regulation

⁹⁷ Vina Mukaromah, 'Checking your Employment BPJS Aid' *Kompas* (15 August 2020) <<https://www.kompas.com/tren/read/2020/08/15/203100965/cara-mengecek-penerima-bantuan-rp-600.000-di-bpjs-kenagakerjaan>> accessed 23 October 2021.

⁹⁸ Barratut Rafie, 'Direct cash wage subsidy disbursement and requirements in 2021' *Kontan* (22 February 2021) <<https://nasional.kontan.co.id/news/blt-subsidi-gaji-bakal-segera-cair-di-2021-simak-syaratnya?page=1>> accessed 23 October 2021.

⁹⁹ Barratut Rafie, 'Wage subsidies cancelled in 2021, replaced with IDR 3.5 million' *Kontan* (10 February 2021) <<https://nasional.kontan.co.id/news/subsidi-gaji-tak-di-lanjutkan-di-2021-diganti-bantuan-rp-35-juta?page=2>> accessed 23 October 2021.

¹⁰⁰ Barratut Rafie, 'Direct cash wage subsidy disbursement and requirements in 2021' *Kontan* (22 February 2021) <<https://nasional.kontan.co.id/news/blt-subsidi-gaji-bakal-segera-cair-di-2021-simak-syaratnya?page=1>>-accessed 23 October 2021.

¹⁰¹ Ugo Gentilini, Mohamed Almenfi and Pamela Dale, 'Social Protection and Jobs Responses to COVID-19: A Real-Time Review of Country Measures' (2020) 264

<<http://hdl.handle.net/10986/33635>> accessed 23 October 2021.

¹⁰² Chandra Asmara, 'List of Social Aid Disbursed In March 2021' *CNBC Indonesia* (1st March 2021) <<https://www.cnbcindonesia.com/news/20210301103618-4-226831/lengkap-deretan-bansos-jokowi-yang-bakal-cair-maret-2021>> accessed 23 October 2021.

¹⁰³ Ugo Gentilini, Mohamed Almenfi and Pamela Dale, 'Social Protection and Jobs Responses to COVID-19: A Real-Time Review of Country Measures' (2020) 264 <<http://hdl.handle.net/10986/33635>> accessed 23 October 2021

¹⁰⁴ Covid-19, Kementerian Keuangan, Republik Indonesia <<https://www.kemenkeu.go.id/covid19>> accessed 02 November 2021.

¹⁰⁵ Ministry of Finance Regulation No. 19/PMK.07/2020 on Allocation of 2020 Budget in Relation to COVID-19 (16 March 2020) <<https://www.kemenkeu.go.id/media/14785/pmk-no-19-th-2020.pdf>> accessed 23 October 2021.

¹⁰⁶ Government Regulation in Lieu of Law No. 1 of 2020 on State Financial Policy and Stability of

enables the Government to widen the budget deficit to 3% of Gross Domestic Product, relocate mandatory spending, shift budgeted funds between institutions, authorize procurement, and use available finances within the State budget. Evidently, the Gol has made every effort to shoulder the heavy financial burden brought about by the COVID-19 pandemic.

8. Enforcement

Enforcement of COVID-19 policies is split by reliance on legal basis. New crimes chargeable with imprisonment may only be issued through a Law, of which no new instruments have been issued during the pandemic. Instead, criminal sanctions rely primarily on the Health Quarantine Law and police powers based on an interpretation of the Criminal Code.¹⁰⁷ Newer sanctions are those typically issued by local governments enforcing large scale social distancing.

The Health Quarantine Law sets out imprisonment and fines for various activities which would break or hinder quarantine or isolation for transportation providers, individuals and corporations, as regulated in Articles 90-94. These range up to 10 years imprisonment of IDR 15 billion. Crimes under this Act are to be investigated by the Police as well as specialized Civil Service Investigators with jurisdiction in health-related crimes as per Article 84.

The Indonesian police meanwhile rely on an interpretation of existing criminal code regulations.

The Indonesian police force is one of the law

enforcers in Indonesia (aside from the judges, prosecutors, and lawyers) having the obligation to implement regulations enacted by the Government¹⁰⁸. The primary regulation connecting police authority, COVID-19 and the criminal code is the National Police Chief Decree of 2020,¹⁰⁹ which broadly decreed among others that:

a) Public events be barred if they cause mass congregations. This includes social, cultural, religious, music, sports, entertainment, protests, and other activities. In cases of necessity such events should follow relevant guidelines.

b) The public follow information and formal recommendations from the government.

c) Avoid stockpiling excess necessities¹¹⁰

d) The public to not be influenced or create fake news.

Administrative sanctions for non-compliance with COVID-19 protocols differ from between provinces, with some not adopting sanctions at all. For example, in Jakarta, the fine for not wearing a mask in public spaces or facilities include a written reprimand, community service wearing a special vest, and a fine of up to IDR 250,000.¹¹¹ In West Kalimantan, the sanctions include a verbal or written reprimand, 15 minutes community service, fines of up to IDR 200,000 and a forced quarantine until a PCR swab result is present.¹¹² The police is patrolling and try to apprehend people who stock piling necessities (rice, sugar, etc), and the Gol through the police and local police are trying their best to stop people congregating for any reasons, however they are still struggling on handling fake news and hoax on the media¹¹³.

Financial Systems for the Management of COVID-19 and/or Encounter the Threat that Endangers National Economy and/or Stability of Financial System (31 March 2020) <<https://peraturan.bpk.go.id/Home/Details/135060/perpu-no-1-tahun-2020>>-<https://cfoclubindonesia.co.id/wp-content/uploads/2020/06/Perpu-Nomor-1-Tahun-2020.ENG_.pdf> [English translation accessed 23 October 2021.

¹⁰⁷ Indonesian Criminal Code (*Wetboek van Strafrecht*) <<https://m.hukumonline.com/pusatdata/detail/lt4c7b7fd88a8c3/wetboek-van-strafrecht-wvvs>> accessed 11 October 2021.

¹⁰⁸ National Police Chief Decree No. Mak/2/III/2020 on Compliance with Government Regulation to Manage Covid-19 Spread (19 March 2020) <<https://humas.polri.go.id/download/maklumat-kepala-kepolisian-negara-republik-indonesia-nomor-mak-2-iii-2020-maklumat-kepala-kepolisian-negara-republik-indonesia-nomor-mak-2-ii-2020/>> accessed 11 October 2021.

¹⁰⁹ *Ibidem*.

¹¹⁰ Previous experience has shown that irresponsible parties would use crisis as a chance to create a shortage of basic necessities. Strong police enforcement is

implemented to guard basic necessities stockpiles in warehouses, and so far the stockpile is stable and well-guarded. See Devina Halim, 'Tugas Polri dalam Penanganan Covid-19: Imbau Warga Jaga Jarak hingga Tindak Penimbun Sembako' (*Kompas*, 20 March 2020) <<https://nasional.kompas.com/read/2020/03/20/23012531/tugas-polri-dalam-penanganan-covid-19-imbau-warga-jaga-jarak-hingga-tindak>> accessed 23 October 2021.

¹¹¹ Jakarta Governor Regulation No. 41 of 2020 on Sanctions for Violations of Large Scale Social Restrictions in DKI Jakarta (30 April 2020) art 4(1) <https://jdih.jakarta.go.id/uploads/default/produkhukum/PERGUB_NO._41_TAHUN_202011.pdf> accessed 11 October 2021.

¹¹² West Kalimantan Governor Regulation No. 110 of 2020 on Disciplinary Action and Legal Enforcement of Covid-19 Health Protocols (24 August 2020) art 16(2)(a) <<http://data.kalbarprov.go.id/dataset/93bf1b81-cc3a-4c9d-814b-fc2e2a2f80c2/resource/20490741-5562-4370-9969-59ac9ea41c95>> accessed 11 October 2021.

¹¹³ National Police Chief Decree No. Mak/2/III/2020 on Compliance with Government Regulation to Manage Covid-19 Spread (19 March 2020).

9. Vaccination

As part of the effort in combating COVID-19, according to the Ministry of Health Indonesia's website, Indonesia started vaccination programs in January 2021. The first phase took place from January to April 2021. It was dedicated to 1.3 million medical staff, 17.4 million civil servants, and 21.5 million senior citizens. The second phase was scheduled from April 2021 – March 2022. This second phase was dedicated for 63.9 million vulnerable community (in 'red' zones) and 77.4 million community (clustering and based on vaccine availability).¹¹⁴

The President has set a target for 180 million Indonesians with 30,000 vaccinators to vaccinated 30 persons/day and it is expected that the whole Indonesian population will all be vaccinated in less than 1 year. Realistically, due to health resources (number of vaccines, number of vaccinators per region), the Ministry of Health's vaccination efforts will be finished by March 2022 (15 months). Only 5 provinces will be able to vaccinate within 1 year time span: Jakarta, Aceh, Yogyakarta, North Kalimantan, and Bangka Belitung.¹¹⁵

The central Government, under President Regulation No. 14 of 2021¹¹⁶ and the Minister of Health Regulation No. 10 of 2021,¹¹⁷ renewed with Minister of Health Regulation No.18 of 2021, has set the target recipients for the COVID-19 vaccine inoculation. The initial vaccine delivery is allocated to health workers and older people, followed by public service workers, persons with vulnerability which is determined based on the geospatial, social, and economic sectors and the general public.

Every person who is listed and eligible to get the vaccine must join the program and those who refuse are subject to administrative sanctions in the form of (a) a delay or stoppage of social assistance programs; (b) a delay or stoppage of government administrative services; and/or (c) a penalty¹¹⁸.

Further, the people who reject the vaccine and also those obstructing efforts in preventing the spread of COVID-19 is subject to a criminal sanction

with a maximum of one year imprisonment and/or a fine with a maximum of one million Rupiah (Rp1.000.000, -) as set in Article 14 (1) Law No. 4 of 1984 on Epidemics.

Since the first injection of the COVID-19 vaccines, the Chairman of the National Committee on Adverse Events Following Immunization (*Komite Nasional Kejadian Ikutan Pasca Imunisasi* or Komnas KIPI) addressed that there are only five adverse events per 10,000 injections. Based on reports and studies from 22 Indonesian provinces, Komnas KIPI concluded that the effects of the COVID-19 vaccination in Indonesia were the same as in other countries.¹¹⁹ If there is an adverse vaccine reaction, the central Government will provide compensation for disability or death as set in Article 37 Minister of Health Regulation No. 10 of 2021.

10. Conclusion

The legal framework for combatting COVID-19 is already in place in Indonesia. There are many laws and regulations that are available, including the Constitution, presidential, governmental and ministerial regulations. However, overlaps and inconsistencies are rampant, and these make the situation more dire for the people of Indonesia. We can see the confusion between governmental offices and institutions, and between central, regional, and local governments. These inconsistencies should be resolved quickly by the Government, because it is confusing for the people on the ground.

Pandemic governance is also the obligation of the 'other' branches of government: the legislature and the judiciary. So far, during the pandemic, very little is done by these two branches of government. The legislature is doing business as usual because the current legal framework used is already present and no need for legislative approval. Approving budgets and very little pandemic activity

¹¹⁴ Asian Development Bank, *Report and Recommendation of the President to the Board of Directors: Proposed Loan PT Bio Farma (Persero) Responsive COVID-19 Vaccines for Recovery Project under the Asia Pacific Vaccine Access Facility (Guaranteed by the Republic of Indonesia)* (Project No. 54425-001, 2021).

¹¹⁵ Indonesian Government, 'Vaksinasi Covid-19' <<https://covid19.go.id/vaksin-covid19>> accessed 02 November 2021.

¹¹⁶ President Regulation No. 14 of 2021 on Amendment of Government Regulation No. 99 of 2020 on the Procurement and Vaccine Inoculation to Fight COVID-19 (9 February 2021) art 13A(2), (4), and-13B

<<https://peraturan.bpk.go.id/Home/Details/161210/pepres-no-14-tahun-2021>> accessed 11 October 2021.

¹¹⁷ Ministry of Health Regulation No. 10 of 2021 on Vaccine Inoculation to Fight COVID-19 (24 February 2021) art 14 <<https://covid19.go.id/p/regulasi/peraturan-menteri-kesehatan-republik-indonesia-nomor-10-tahun-2021>> accessed 11 October 2021.

¹¹⁸ Presidential Regulation No.14 of 2021, Art 13A (4).

¹¹⁹ Petir Bhwana, 'Minor to Severe Side Effects after COVID-19 Vaccination; Authority Explains' *Tempo* (24 February 2021) <<https://en.tempo.co/read/1435961/minor-to-severe-side-effects-after-covid-19-vaccination-authority-explains>> accessed 23 October 2021.

monitoring is done.¹²⁰ The judiciary is trying to stay afloat by organizing e-court or hybrid court, which is already taken all of their resources, considering most courts in the rural areas are not equipped with sufficient IT network. Litigation also has been business as usual, no cases on pandemic or pandemic governance is listed in Indonesia's courts.¹²¹ Inviting these two branches to be more active to work for the betterment of the Indonesian people can be done through various thing, including budgetary based on performance, public pressures through media, etc.

The fact that Indonesia is an epicentre for COVID-19 because of the highest amount of fatalities in the country shows that there are massive governance problems needed to be addressed quickly. First, the coordination and communication problems between governments, and between the government and pandemic

stakeholders. Clear, concise and consistent communication and coordination are needed. Second, governance by all branches of government, including the parliament and judiciary. Third, information flow. There are so many hoax, fake news, and post truth information floating in the country, and this adds up to the confusion. The Government needs to flood the information channels with verified information, to make sure that the people will read verified information rather than the hoax. Fifth, we need to have community awareness on the fact that we can only win the battle against COVID-19, together. There is no need to shut of people infected with COVID-19 because they can be treated. As long as the people understand to keep the health protocol, although the fight against the pandemic is still steep, but the probability is high for all of us to win the war.

¹²⁰ Amalinda Savirani and Linda Y Sulistiawati 'the Malady of ignorance? Indonesian parliament during the Covid-19 Pandemic' *New Mandala* (6 April 2021).

¹²¹ Egi Adyatama, 'Jokowi Minta Ada Transformasi Peradilan Saat Pandemi Covid-19' *Tempo* (17 February

2021) <<https://nasional.tempo.co/read/1433765/jokowi-minta-ada-transformasi-peradilan-saat-pandemi-covid-19/full&view=ok>> accessed 02 November 2021.

Government Responses During Covid 19: A Study from India

Uday Shankar and Shubham Pandey

Abstract. From the beginning of 2020 onward, the Government of India was faced with an unprecedented challenge to control the spread of the Covid-19 pandemic and manage the health crisis that was rapidly growing. By the time lockdown was imposed on 24 March 2020, the number of cases of positive Covid-19 patients was steadily rising, within India's the borders. In order to curb the rapid growth of the disease and prevent community spread, the Ministry of Home Affairs (MHA), Government of India, published the official notification and invoked lockdown under relevant provisions of the law. This gave overarching powers to the government to enforce stringent lockdown measures, suspend all transport services, and the closing of government offices, commercial and industrial establishments. Exceptions were specially crafted for services, like police and emergency services, essential services like electricity, water and sanitation, postal, banking and insurance services, manufacture, sale and transportation of essential goods such as food, medicines, telecommunication and internet services including print and electronic media. The paper examines the Government of India (GoI) responses during Covid-19. It identifies the legal basis of the measures adopted by the government to contain the pandemic and highlights the steps taken up by the executive to deal with crisis.

Keywords: COVID-19, Pandemic, Horizontal Federalism, Epidemic, Disaster Management, Government Response, Migrant Labors, Health

1. Introduction

The Government of India was faced with an unprecedented challenge to control the spread of epidemic Covid-19 and manage the health crisis that was growing at a rapid pace. At the time when the Pandemic first hit Indian shores, there were hardly few reported cases in the Month of January and February 2020. By the time lockdown was imposed on 24th March 2020, the cases had grown to 500 positive Covid-19 patients within the borders of India. In order to curb the rapid growth of the disease and prevent the community spread, the Prime Minister of India, Mr Narendra Modi announced a national lockdown for a period of 21 days. He announced that "a total ban be imposed on people, from stepping out of their houses for a period of 21 days."¹

The Ministry of Home Affairs (MHA) published the official notification and invoked lockdown under section 6 of the Disaster Management Act.² This gave overarching powers to the government to enforce stringent lockdown measures, suspend all transport services, closing of government offices, commercial and industrial establishments. Exceptions to activities, like police and emergency services, essential services like electricity, water and sanitation, postal, banking and insurance services, manufacture, sale and transportation of essential goods such as food, medicines, telecommunication and internet services including print and electronic media, were granted. Under the order of the Ministry of Home Affairs, any person who was found to be violating the norms of containment or lockdown measures were held liable under the provision of the Disaster

¹ Press Information Bureau, Government of India, 'PM calls for complete lockdown of entire nation for 21 days' (PIB Delhi, 24 March 2020) <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1608009>> accessed 20 September 2021.

² Ministry of Home Affairs, Government of India, 'Government of India issues Order prescribing lockdown for containment of Covid-19 Epidemic in the Country' (PIB Delhi, 24 March 2020) <<https://www.pib.gov.in/PressReleasePage.aspx?PRID=1607997>> accessed 20 September 2021.

Management Act, 2005, with an imprisonment of up to 2 years, with or without fine.

The paper examines the government responses during Covid 19. It identifies the legal basis of the measures adopted by the government to contain the pandemic. The paper highlights the steps taken up by the executive to deal with crisis.

2. Legal Responses to Covid: Law of Lockdown

The Constitution of India provides for exercise of right to free movement and assemble peacefully in the territory of India under Article 19(1)(b) and (d)³. This right however can be restricted, under Article 19(3)⁴ and Article 19(5)⁵ respectively, in order to maintain public order and in the interest of general public of India. In India, there are laws under which the Union Government has the power to impose 'lockdowns' and 'curfew' and enforce 'quarantine' and 'isolation'. However the terminology so used do not find mention anywhere in any statute, but the essence is captured under various different laws. Let us first have a quick glance over what the respective terms means and later locate where they find legal authority.

2.1. Lockdown, Curfew, Quarantine and Isolation

'Lockdown' The term is used by government officials and others to describe a situation where free movement of goods is restriction, with only essential items, as declared by the Union Government, are allowed. Such restriction is imposed under section 2 and 2A of the Epidemic Diseases Act, 1897 (EDA). Under EDA power is

granted to State and Union Government to take necessary steps to control the outbreak of pandemic. Also under the Indian Penal Code 1860, provisions similar to enforcement of lockdowns are provided under section 188 (disobedience of the directions given by a public servant)⁶, section 269 (negligent act likely to spread infection of diseases dangerous to life) and section 270 (malignant act likely to spread infection of disease dangerous to life).

'Curfew' The term is used to denote the executive power, available to District Magistrate, Sub-divisional Magistrate or any other executive magistrate under section 144 of Code of Criminal Procedure, 1973. The executive authorities are empowered by law to issue orders under section 144 to prevent imminent threat to human life, health or safety, disturbance of public tranquility, or a riot or an affray. The major difference between lockdown and curfew is that under curfew, the executive authorities like police or magistrates, can detain and/or arrest the person for violating the norms whereas in cases of lockdown, there is no such powers of arrest and detention.

'Quarantine' means separating and restricting the movement of people who were exposed to contagious disease to see if they become sick.⁷ It is further defined as a restraint upon the activities or communication of persons or the transport of goods designed to prevent the spread of disease of pests.⁸ 'Isolation' means separating sick people with a contagious disease from people who are not sick.⁹ This is done to ensure that disease is not spread and the chain of infection is broken at the early possible stage.

³ The Constitution of India, 1950, Art. 19(1): All citizens shall have the right (b) to assemble peacefully and without arms; (d) to move freely throughout the territory of India.

⁴ The Constitution of India, 1950, Art. 19(3): Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause.

⁵ The Constitution of India, 1950, Art. 19(5): Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

⁶ S. 188, *The Indian Penal Code*, 1960: Disobedience to order duly promulgated by public servant.—Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, disobeys such direction, shall, (A) if such disobedience

causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and (B) if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

⁷ Centers for Disease Control and Prevention, 'Quarantine', Covid-19, Centre for Disease Control (CDC) <<https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>> accessed 20 September 2021.

⁸ Merriam Webster Dictionary, 'Quarantine' <<https://www.merriam-webster.com/dictionary/quarantine>> accessed 20 September 2021.

⁹ Centers for Disease Control and Prevention, 'Isolation', Covid-19, Centre for Disease Control (CDC) <<https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>> accessed 20 September 2021.

Though these words are not defined anywhere in the law, there are seminal provisions in the Disaster Management Act and Epidemic Disease Act which give effect to such actions.

2.2. The Epidemic Disease Act, 1896

The law of Epidemic Diseases was enacted to prevent the spread of bubonic plague in erstwhile Bombay, in the year 1896, which forced people to migrate out of the city. It is the shortest Act with only four provisions. Section 2 of the Act empowers the State government to take necessary steps, if it is satisfied that there is a real or imminent threat or an outbreak of dangerous epidemic disease, in any part of that state, and that the ordinary provisions of the law for the time being in force are insufficient to prevent the outbreak of such disease or the spread.¹⁰ The government then by issuing a public notice, may take measures and prescribe regulations for inspection of persons travelling by railway or otherwise, and the segregation and temporary accommodation of persons suspected by the inspecting officer of being infected with any such disease (quarantine and isolation).¹¹ Similar power is extended to the Central Government under section 2A of the Act, if there is a real or imminent threat of an outbreak of dangerous epidemic disease in India or any part thereof. The Central government also has power to detain persons of vessels, if it is necessary to give effect to the provisions of the law.¹²

The Act also provides for concurring penalty on any person who disobeys any regulation or order made under this Act, similar to that of an offence punishable under section 188 of IPC, 1860.¹³ The Epidemic Disease Act of 1897 is an archaic law that

was curated to encompass the urgent demands of late 19th century. The law grants sweeping powers to both the State and Central government to take necessary steps to control the spread of epidemic disease. However the law on Epidemic Diseases fails to define what is an 'Epidemic Disease' or 'Dangerous Epidemic Disease' and leaves it entirely on the Government of such determination. The government also has not furnished any list of diseases that are considered as Epidemic, neither it has laid down any criteria for determining the same. In absence of such standards, there is a possibility of the law to be misused or wrongly used by the governments. Further, the law bars any legal proceedings or suits against such persons who act in good faith, to implement the provisions of said Act and prevent the spread of disease.¹⁴ The absence of judicial review makes the judgments of official of the government machinery opaque and raises issues of accountability and transparency in the system. In the ensuing situation, the Epidemic Disease Act has been used in tandem with the Disaster Management Act 2005, which provides for lockdown, containment measures, contact tracing, testing and isolation guidelines¹⁵, restrictions on travel, prohibition on gathering and various other measures to contain the outbreak.

2.3. The Disaster Management Act 2005

The Act provides for administrative framework, rules and regulations, providing measures to deal with the disasters.

The term Disaster has a wide amplitude of meaning which covers any catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or

¹⁰ S. 2, *The Epidemic Diseases Act*, 1897, Act No. 3 of 1897: Power to take special measures and prescribe regulations as to dangerous epidemic disease.—(1) When at any time the State Government is satisfied that the State or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the State Government, if it thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof.

¹¹ S. 2(b), *The Epidemic Diseases Act*, 1897, Act No. 3 of 1897.

¹² S. 2A, *The Epidemic Diseases Act*, 1897, Act No. 3 of 1897: Powers of Central Government.—When the Central Government is satisfied that India or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law for the time being in force are insufficient to prevent the outbreak of

such disease or the spread thereof, the Central Government may take measures and prescribe regulations for the inspection of any ship or vessel leaving or arriving at any port in 2[the territories to which this Act extends] and for such detention thereof, or of any person intending to sail therein, or arriving thereby, as may be necessary.

¹³ S. 3, *The Epidemic Diseases Act*, 1897, Act No. 3 of 1897: Penalty.—Any person disobeying any regulation or order made under this Act shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code (45 of 1860).

¹⁴ S. 4, *The Epidemic Diseases Act*, 1897, Act No. 3 of 1897: Protection to persons acting under Act.—No suit or other legal proceeding shall lie against any person for anything done or in good faith intended to be done under this Act.

¹⁵ Directorate General of Health Services, Ministry of Health and Family Welfare, Government of India, 'Guidelines for Home Quarantine' (*EMR Division*) <<https://www.mohfw.gov.in/pdf/Guidelinesforhomequarantine.pdf>> accessed 20 September 2021.

negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area.¹⁶

The Act provides for integrated process of planning, organising, coordinating and implementing measures which are necessary for preventing disaster situations, mitigating harms¹⁷ and capacity building.¹⁸ The term capacity building implies identification of existing resources and acquiring or creating such resources. It also includes organisation and training of personnel and coordination of such training for effective management of disasters.¹⁹

The intent of the makers of the statute was to include natural calamities, like cyclones, tsunamis, heat waves, landslides, urban floods, earthquakes & floods, and man-made hazards, like chemical, biological or nuclear. The Act did not provide for disease like pandemics or epidemics. However, due to lack of any other law, for the time being in force, the Union Home Ministry was compelled to notify the Coronavirus outbreak in 2020 as a 'disaster' thus bringing into effects the provisions of the Disaster Management Act.²⁰ Declaration of Covid-19 pandemic as a 'notified disaster' was one of a kind measure taken by the government to ensure quick administrative actions and decisions to fight the disease. Despite lacking the necessary

frameworks and guidelines, to control the pandemic, the governments at both the State and Union level had to take unprecedented steps, like the lockdown, to stop the spread of the pandemic, which do not find any legal backing.

The Ministry of Home Affairs (MHA) published the official notification and invoked lockdown under section 6 of the Disaster Management Act.²¹ The Home Secretary issued several guidelines for lockdown under section 10 of the Disaster Management Act, as the Chairman of the National Executive Committee constituted under section 8 of the Act. In furtherance of the nation-wide lockdown, the MHA issued guidelines under section 10(2)(I) of the Disaster Management Act²² to restrict all types of transport services (air, train and road travel), commercial and private activities. Activities like educational institutions, industrial activities, hospitality services, cinema halls, social/political/sports/entertainment/academic/cultural/religious functions and gathering, place of worship were closed during the period of lockdown, except the essential services like ration-shops, medical shops, banks, ATMs, media and telecommunication services, which were up and running.²³ The order also provided for punishment and penalties in case of violation of lockdown, under section 51 to 60 of the Disaster Management Act, 2005.²⁴

There is no comprehensive framework in India to combat with the pandemic of this nature. The

¹⁶ S. 2(d), *The Disaster Management Act, 2005 Act No. 53 of 2005: Disaster*.

¹⁷ S. 2(i), *The Disaster Management Act, 2005 Act No. 53 of 2005: Mitigation means measure aimed at reducing the risk, impact or effects of a disaster or threatening disaster situation*.

¹⁸ S. 2(e), *The Disaster Management Act, 2005 Act No. 53 of 2005: Disaster Management activities includes: (i) prevention of danger or threat of any disaster; (ii) mitigation or reduction of risk of any disaster or its severity or consequences; (iii) capacity building; (iv) preparedness to deal with any disaster; (v) prompt response to any threatening disaster situation or disaster; (vi) assessing the severity or magnitude of effects of any disaster; (vii) evacuation, rescue and relief; (viii) rehabilitation and reconstruction*.

¹⁹ S. 2(b), *The Disaster Management Act, 2005 Act No. 53 of 2005: Capacity building*.

²⁰ The Economic Times, 'India declares Covid-19 a 'Notified Disaster' (*Economic Times*, 14 March 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/india-declares-covid-19-a-notified-disaster/articleshow/74631611.cms>> accessed 20 September 2021.

²¹ Ministry of Home Affairs, Government of India, Order No. 40-3/2020, 'Guidelines on the measure to be taken by Ministries/Departments of Government of India, State/Union Territory Governments and

State/Union Territory Authorities for containment of Covid-19 Epidemic in the Country' (*MHA*, 24 March 2020) <https://www.mohfw.gov.in/pdf/Annexure_MHA.pdf> accessed 20 September 2021.

²² S. 10(2)(I), *The Disaster Management Act, 2005 Act No. 53 of 2005: The National Executive Committee may lay down guidelines for or give direction to, the concerned Ministries or Departments of the Government of India, the State Government and the State Authorities regarding measure to be taken by them in response to any threatening disaster situation or disaster*.

²³ Ministry of Home Affairs, Government of India, Order No. 40-3/2020-DM-I(A), Lockdown measures (*MHA*, 15 April 2020) <https://www.mha.gov.in/sites/default/files/MHA%20order%20dt%2015.04.2020%2C%20with%20Revised%20Consolidated%20Guidelines_compressed%20%283%29.pdf> accessed 20 September 2021.

²⁴ *The Disaster Management Act, 2005 Act No. 53 of 2005: The punishment includes punishment for obstruction (s.51), punishment for false claims (s.52), punishment for misappropriation of money or materials, etc (s.53), punishment for false warning (s.54), offences by departments of the Government (s.55), failure of officer in duty or his connivance at the contravention of the provisions of this Act (s.56), offence by companies (s.58).*

laws on Disaster Management and Epidemic Diseases do not provide for methodological and operative framework to tackle the spread of present and future pandemics.

3. Executive Responses to COVID-19

3.1. Surveillance

The Government of India launched the Integrated Disease Surveillance Programme (IDSP) which aimed at strengthening/maintaining a decentralised model of laboratory based, IT-enabled, disease surveillance system.²⁵ This system was implemented in epidemic-prone areas to monitor disease trends, detect and respond to outbreaks during the early phases. This was done with the help of the Rapid Response Teams (RRTs), who were trained to execute such purpose.

To ensure integrated response to the growing threat of pandemic, the Government established decentralised surveillance units at the Centre, State and District levels. The State Surveillance Officers, District Surveillance Officers, RRT's and other Medical and Paramedical staff were trained to administer quick response to the disease through a three-tiered training model. The State and District Surveillance Officers and RRT members were trained at recognised National Institutes. The Medical Officers and District Lab Technicians were trained by Master Trainers at the State level. The Health Workers and Lab Technicians/ Assistants at peripheral institutions were trained by District Surveillance Officer/Medical Officers at the District Level.

The government ensured that information and communication technology (ICT) was optimally used for collection, collation, compilation, analysis and dissemination of data. Under the IDSP, data was collected from epidemic prone areas on a weekly basis. The weekly data provided relevant information about the disease trends, its seasonality, the rapidity of its spread and the total infected people in the district or state. On the basis of the data, wherever the trends related rising of illness, additional resources along with RRTs were deployed in the area to control the spread.

Regular monitoring and data analysis were undertaken by the respective State/District Surveillance Units.

3.2. Active Surveillance

For active surveillance, the Government of India issued Guidelines on Containment plans for large outbreaks of novel Corona Virus Disease (Covid-19) on 16th May 2020.²⁶ As per the guidelines, the residential areas were divided into sectors, each covering 50-100 households. Each sector was allotted to field workers coming from ASHAs/Anganwadi Workers/ANMs to perform active house-to-house surveillance, daily in the containment zone. All influenza like illness (ILI)/severe acute respiratory illness (SARI) cases were reported to the supervisory officer, who in turn conducted house visit to confirm that the diagnosis made is as per the required norms and ensure that the suspect cases are shifted to the nearby designated treatment facility. The supervisory officer also was duty bound to collect data from the health workers under him/her, and provided daily updates to the respective control rooms, for further updating in the IDSP system. This data was used State officials for policy formulation and actions.

In addition to collection of Covid related data, record of potential co-morbidities, antenatal history as well as immunisation was maintained during the surveillance process. Advisories were issued to all pharmacists and single practitioners to share data about customers and patients who were purchasing medicines related to ILI or fever. List of such case were forwarded to respective Primary Health Centre (PHCs) for framing quarantine and isolation guidelines in respective areas. Also such data was used for better understanding of infection trends and ensuring the availability of medical facilities in the territory.

3.3. Contact Tracing

The Government of India guidelines also provided for tracing and tracking those individuals who had been in touch with the laboratory confirmed case/suspected case of Covid-19.²⁷ All Covid-19 confirmed and suspected cases were listed, tracked and kept under surveillance at home for 28 days, by designated field worker. The supervisory officer was entrusted with the duty to inform the Control room about all the contacts and their residential addresses, and keep surveillance of all the primary and secondary contacts, with the help of field

²⁵ National Centre for Disease Control, Directorate General of Health Services, Ministry of Health and Family Welfare, Government of India, 'Integrated Disease Surveillance Programme' <<https://idsp.nic.in/index4.php?lang=1&level=0&linkid=313&lid=1592>> accessed 20 September 2021.

²⁶ Ministry of Health and Family Welfare, Government of India, 'Updated Containment Plan for

Large Outbreaks Novel Coronavirus Disease 2019 (COVID-19)' (*MoHFW*, 16 May 2020) 3, 7 <<https://www.mohfw.gov.in/pdf/UpdatedContainmentPlanforLargeOutbreaksofCOVID19Version3.0.pdf>> accessed 20 September 2021.

²⁷ Containment Plan n. 26.

workers. In case the residential address of the contact lay outside the jurisdiction of the a particular district or state, then the officer informed the IDSP to relay the necessary information to concerned supervisory officer of that district or state. The follow-up of contact were done for a period of 14 days, by a dedicated health worker.

The Government of India also launched a Covid-19 dedicated mobile application that had features which enabled for early identification of potential risk of infection and contact tracing.²⁸ Individual states also developed their contact tracing protocols on the basis of data collected from PHCs and IDSP and in-depth interviews with the patients.

3.4. Containment Zone/ Cluster Management

The Government of India recommended the States to evolve/develop a strategic approach for containing the spread of Covid cases and manage the existing cases. To achieve effect containment and management of Covid, the Government laid down several element that the State were obliged to follow: (a) Inter-ministerial coordination group for Centre-State co-ordination. (b) Early detection through Point of Entry (PoE) screening of passengers, coming from Covid affected territories, on airports, ship ports, land crossing. (c) Surveillance and contact tracing through IDSP of those affected with influenza like illness. (d) Early diagnosis and testing through network of laboratories certified by Indian Council of Medical Research (ICMR). (e) Creating buffer stock of Personal Protective Equipment (PPEs) including N-95 masks, surgical gloves and full body protective suits. (f) Creating awareness among the citizens of the risks associated with Covid-19 and how to avoid them.

Treatment facilities for Covid related cases were readied in the district and many private hospitals were designated as Covid dedicated hospitals. Along with free-of-cost Institutional quarantine centres, several paid Institutional quarantine

centres were developed on the basis of public-private partnership (PPP) model. The District Administration took various positive steps to ensure that people living in hotspot areas and containment zones do not face scarcity of essential items including food and medicinal supplies. E-passes were issued to food and medicine suppliers to carry on with their routine business and door-step distribution services were set-up for delivery of essential supplies.

3.5. Testing and Isolation Management

The Government of India issued in the guidelines a series of tests for routine surveillance and monitoring of Covid-19 in containment zones and other point of entry screening.²⁹ These test included a Rapid Antigen Test, RT-PCR, TruNat or CBNAAT test, to be conducted in order of priority, for all symptomatic cases and asymptomatic contact cases of individuals with high risk. A provision for testing on demand was introduced, which was monitored by the respective State governments. All the testing was done free-of-charge, and the charges were borne out by the Government. In the State of Gujarat, help from specialists were sought to train laboratory personnel on identification of virus. The Ahmedabad Municipal Corporation deployed mobile testing vans across the city for frequent testing and monitoring of the citizens.³⁰ In the State of Jharkhand, TruNat testing machines were installed in Community Health Centres (CHCs) across the state, which made the centres self-sufficient for detection of Covid-19.³¹ This has made local testing quick, easy and reliable for emergency and serious cases.³² The State of Uttar Pradesh also has employed a similar TruNat and antigens detection assay, in all the PHCs and CHCs for quick, easy and reliable testing of Covid-19. King George Medical University, Lucknow has applied the principle of pooled sampling, which has led to

²⁸ Ministry of Human Resource Development, Government of India, 'Aarogya Setu App' (MHRD, 3 April 2020) <<https://www.mohfw.gov.in/pdf/DOSecyHRD.pdf>> accessed 20 September 2021.

²⁹ Ministry of Health and Family Welfare, Government of India, 'Updated Containment Plan for Large Outbreaks Novel Coronavirus Disease 2019 (COVID-19)' (MoHFW, 16 May 2020) Version 3, Chapter

8. <<https://www.mohfw.gov.in/pdf/UpdatedContainmentPlanforLargeOutbreaksofCOVID19Version3.0.pdf>> accessed 20 September 2021.

³⁰ Ranjan Kumar Ghosh and others, 'Management of the COVID-19 Pandemic in Gujarat' (IIM Ahmedabad, 24 July 2020) <https://www.iima.ac.in/c/document_li

brary/Gujarat%20Covid%20Response%20Report-2020.pdf> accessed 20 September 2021.

³¹ National Disaster Management Authority, Coalition for Disaster Resilient Infrastructure (CDRI), 'Response to Covid-19, Jharkhand' <<https://ndma.gov.in/sites/default/files/PDF/covid/Jharkhand-eng.pdf>> accessed 20 September 2021.

³² National Disaster Management Authority, Government of India, 'COVID-19 Case Studies' <<https://ndma.gov.in/covid/Covid-19CaseStudies>>; Government of Sikkim, 'Best Practices by Sikkim for COVID-19 Management and Mitigation' (Sikkim Herald, 15 May 2020) Vol. 63, No. 27 <https://sikkim.gov.in/uploads/SikkimHerald/May_15_0_20200515.pdf> accessed 20 September 2021.

reduction of cost by one-third and an increase in laboratory testing capacity by three times.³³

The Government of India also issued various isolation modalities for Covid-19 positive patients, depending upon the resource availability in each State and Districts.³⁴ The positive patients were ideally to be shifted to individual isolation wards or accommodated with others in a single ward with good ventilations. Similarly, all the suspected cases were to be accommodated in a separate wards for constant monitoring and medication purposes. In the State of Chhattisgarh, Railway bogies were converted into Covid isolation and care wards for accommodating hundreds of patients. In the city of Raipur, an Indoor stadium was converted into self-sufficient isolation-cum-treatment facility with a capacity of at least 3,000 patients.³⁵

3.6. Boosting of Health Infrastructure and Medical Supplies

a. Health Infrastructure

The Government of India in its guidelines provided for three-tier arrangement for managing suspect/confirmed cases will be implemented.³⁶ For mild and very mild cases, temporary makeshift hospital facilities were made as Covid Care Centres by repurposing hotels/hostels/guest houses/stadiums near a Covid hospital. For moderate to serious cases, dedicated Covid Health Centres were created in existing hospitals. These Centres were equipped with isolation beds with oxygen support from managing moderate cases. For severe cases requiring intensive/critical care, the Government determined Dedicated Covid Hospitals which were equipped with oxygen support and ventilator systems for treatment of severe cases.

The State of Gujarat presented a unique model of Public Private Partnership in terms of management of suspect/confirmed Covid-19 cases.³⁷ In every District of Gujarat there was at least one hospital which was dedicated for treatment of Covid patients. A two part-pricing arrangement, was adopted in the municipality of Ahmedabad, between the private hospitals and the government for augmenting health infrastructure in the State. Half of the beds in the private hospitals were blocked by the government for providing treatment and care to government referred patients. The cost of treatment was borne, totally by the State government at negotiated rates. In case the designated beds remained vacant or unoccupied at any stage, the Government compensated the hospitals by paying a fixed sum of money to the hospitals. The remainders of 50% of beds in the private hospitals were available to the hospitals at their disposal, to be given to patients, on a payment basis, the upper ceiling limit of which was specified by the Government, under the Essential Commodities Act, 1955.³⁸ The private hospital employees were designated as Covid employees under the Epidemic Act, and they were not allowed to leave their jobs during the said period. Their service conditions could not be changed adversely and their salaries and allowance were increased proportionally for the services they rendered during such period.

b. Medical Supplies

Several State governments took it upon themselves to ensure that free flow of essential medical supplies is maintained even in times of surged demands. In the State of Goa, during the National lockdown period,³⁹ liquor manufacturers were

³³ Government of Uttar Pradesh, 'COVID-19 Management and Mitigation in Uttar Pradesh' (Covid-19 Prevention, Control and Treatment) <http://dgmhup.gov.in/documents/Compedium_DOMHFW.pdf> accessed 20 September 2021.

³⁴ Ministry of Health & Family Welfare, Government of India, 'Updated Containment Plan for Large Outbreaks Novel Coronavirus Disease 2019 (COVID-19) (MoHFW, 16 May 2020) Chapter 13 <<https://www.mohfw.gov.in/pdf/UpdatedContainmentPlanforLargeOutbreaksofCOVID19Version3.0.pdf>> accessed 20 September 2021.

³⁵ Department of Health and Family Welfare and Medical Education, 'Covid-19 Management and Mitigation in Chhattisgarh, Best Practices' <<http://www.cghealth.nic.in/cghealth17/>> accessed 20 September 2021.

³⁶ Ministry of Health & Family Welfare, Government of India, 'Updated Containment Plan for Large Outbreaks Novel Coronavirus Disease 2019 (COVID-19)' (MoHFW, 16 May 2020) Chapter 19

<<https://www.mohfw.gov.in/pdf/UpdatedContainmentPlanforLargeOutbreaksofCOVID19Version3.0.pdf>> accessed 20 September 2021.

³⁷ Ranjan Kumar Ghosh and others, 'Management of the COVID-19 Pandemic in Gujarat' (IIM Ahmedabad, 24 July 2020) <https://www.iima.ac.in/c/document_library/Gujarat%20Covid%20Response%20Report-2020.pdf> accessed 20 September 2021.

³⁸ National Disaster Management Authority, Government of India, 'COVID-19 Case Studies, State of Maharashtra and Odisha' (NDMA) <<https://ndma.gov.in/covid/Covid-19CaseStudies>> accessed 20 September 2021.

³⁹ Ministry of Home Affairs, Government of India, 'Government of India issues Orders prescribing lockdown for containment of Covid-19 Epidemic in the country' (PIB Delhi, 24 March 2020) <<https://pib.gov.in/PressReleaseDetail.aspx?PRID=1607997>> accessed 20 September 2021.

permitted to produce hand sanitizers to full-fill the local demands. Other Government departments like the health, police and disaster management were given the task of ensuring that there is a free flow of distributions without any illegal activities of hoarding and black-marketeering in the State. The surplus of production was exported to other State to full-fill their own demands.

Similarly in Uttar Pradesh, the Government tasked itself of providing safety equipment's like mask, sanitizers and gloves, to its ASHAs/Anganwadi Workers/ANMs field workers. The demand was estimated at two re-usable masks and a bottle of hand sanitizer for every field worker in the State.⁴⁰ The Uttar Pradesh State Rural Livelihood Mission along with National Health Mission, played instrumental role in manufacturing and distribution of masks and sanitizer to not only the field workers but also the community members. In West Bengal, the State government took the onus of manufacturing and providing Personal Protective Equipment (PPE) to its hospital staff and medical workers. It entered into a partnership with the leading textile manufacturer under the West Bengal State Handloom Weavers Cooperative to reconfigure the existing textile machinery, and manufacture PPE kits at the required scale to fulfill the surging demands.⁴¹

3.7. Medical Waste Management

Apart from the growing pandemic in the country, one the biggest cause of concerns was the handling, treatment and disposal of waste generated during the treatment/diagnosis/quarantine of Covid-19 patients. The Government of India issued guidelines for treatment of such waste in accordance with the

Biomedical Waste Management Rules.⁴² The Central Pollution Control Board provided extensive guidelines for segregation of bio-medical waste, which included installing separate colour-coded bins/bags/containers in every Covid ward.⁴³ The State administrative bodies also issued specific directions to every household in their jurisdiction to store medical waste like strings, masks, gloves, medicines, tissues as well as other item that could be contaminated with virus, in a separate bin.⁴⁴ The State Pollution Control Board further laid down guidelines for handling, collection, transportation, treatment and disposal of bio-medical waste generated from potential or confirmed Covid cases.⁴⁵ The waste is then collected by door-to-door waste collection services provided by the civic body and sent to Common Bio-Medical Waste Treatment facility. In order to ensure stricter implementation of the rules, a nominal fine of \$7 has been imposed.⁴⁶

3.8. Delivery of Essential Services

The Government of India issued recommendation to the State to establish dedicated teams within the State and each District to ensure availability of Covid and non-Covid essential services to the citizens.⁴⁷ In its recommendations the GoI laid impetus on (a) Mapping all the existing health facilities, including all private and public and not-for-profit institutions within the States. (b) Determine their level of preparedness for dealing with the Covid outbreak and allocate essential resources to them, where necessary. (c) Create dedicated first-level 24*7 hospital emergency units at suitable CHCs/Sub-District Hospitals to provide for non-Covid care, including provision for obstetric

⁴⁰ Swaniti Initiative, 'COVID-19 Best Practices Manual for Parliamentarians' <<http://www.swaniti.com/wp-content/uploads/2020/08/COVID-19-Best-Practices-List.pdf>> accessed 20 September 2021.

⁴¹ Anil Urs, 'Central Government shares 8 best practices followed by States to tackle Coronavirus outbreak' (*The Hindu Business Line*, 2 April 2020) <<https://www.thehindubusinessline.com/news/central-government-shares-8-best-practices-followed-by-states-to-tackle-coronavirus-outbreak/article31233171.ece>> accessed 20 September 2021.

⁴² Central Pollution Control Board, Ministry of Environment, Forest & Climate Change, Government of India, 'Revision 1: Guidelines for Handling, Treatment and Disposal of Waste Generated During Treatment/Diagnosis/Quarantine of COVID-19 Patients' (CPCB, 25 March 2020) <<https://www.mohfw.gov.in/pdf/63948609501585568987wastesguidelines.pdf>> accessed 20 September 2021.

⁴³ Central Pollution Control Board, Ministry of Environment, Forest & Climate Change, Government of

India, Revised Guidelines for Common Bio-medical Waste Treatment and Disposal Facilities' (CPCB, 21 December 2016) <<https://jspcb.nic.in/upload/uploadfiles/files/Guidelines%20for%20CBWTF.pdf>> accessed 20 September 2021.

⁴⁴ National Disaster Management Authority, Government of India, 'COVID-19 Case Studies, State of Maharashtra' (NDMA) <<https://ndma.gov.in/covid/Covid-19CaseStudies>> accessed 20 September 2021.

⁴⁵ National Disaster Management Authority, Government of India, 'COVID-19 Case Studies, State of Telangana' (NDMA) <<https://ndma.gov.in/covid/Covid-19CaseStudies>> accessed 20 September 2021.

⁴⁶ *Ibidem*.

⁴⁷ Ministry of Health & Family Welfare, Government of India, 'Guidance Note for Enabling Delivery of Essential Health Services During the COVID 19 Outbreak' (MoHFW, 13 April 2020) <<https://www.mohfw.gov.in/pdf/EssentialservicesduringCOVID19updated0411201.pdf>> accessed 20 September 2021.

services. (d) Provide for Mobile Medical Units for delivery of services, especially services related to care for reproductive, maternal, new born and child health service, chronic communicable and non-communicable diseases. (e) Patients requiring medical facilities like immunisation, antenatal care, non-communicable disease etc must be encouraged to take prior appointment telephonically, and make visit to peripheral facilities (SHCs/PHCs/UPHCs/HWCs/Urban Health Posts) at the designated time/place to prevent contact with other Covid infected patients. (f) States were encouraged to deploy field workers (ASHAs/ANMs/Anganwadi workers) to pay home visits for providing follow-up care to all beneficiaries. (g) Ministry of Health and Family Welfare (MoHFW) under the GoI issued guidelines for augmenting health workforce availability in the States, by expeditiously filling up existing vacancies, redeploying staff from non-affected areas or facilities, utilising the services of fit retired personnel for non-Covid serves and utilising Human Resource from non-profit organisations and institutions.⁴⁸

In pursuance of the guidelines issued by GoI, many of the Sates took positive steps in the same regard. In the State of Gujarat, the Ahmedabad Municipal Corporation (AMC) developed the concept of providing non-Covid essential health services to the doorsteps of the people in the city (Dhanwantari Rath).⁴⁹ The concept proved fruitful, as majority of hospitals in the city were dedicated to the treatment of Covid, hence the State devised the idea of utilising mobile vans for delivering non-Covid essential services, like those, related to diabetes, bold pressure, cardiac ailments, for people who cannot visit hospital at this time. Some Sates also initiated home delivery services of drugs and other essential non-Covid items to the citizens under National Health Programmes like NTEP, NACP.⁵⁰

3.9. Digital Health

The GoI sought amendment to the telemedicine practice guidelines which enabled registered Medical practitioners to provide healthcare using

telemedicine.⁵¹ The purpose of the telemedicine guidelines was to restructure and re-model the existing structure of health care services in the country and to encourage the doctors as well as other health care members to use telemedicine services as a part of their routine activity. The guidelines aim to (a) Assist the medical practitioner in delivering effective and safe medical care to the patients in need over the telephone and other virtual mediums. (b) To utilize the full potential of latest advancements in the field of Heath care related technologies.

The guidelines also provide for norms and regulations relating to physician-patient relationship, mitigating issues of liability and negligence, timely evaluation and treatment, prior-informed consent, continuity of care over virtual mediums, virtual referrals for emergency services, digital generation of medical records, maintaining patient's privacy and security during exchange of records and information, online reimbursements, health education and counselling.

The guidelines further providing relevant information of how to integrate latest technologies to provide health care services. These technologies should be used in conjunction with other clinical standards, protocol, policies and procedures established by the government. Various other modalities of appropriateness, safety and effectiveness of telemedicine are also laid down in the guidelines, so that the practitioners feel confident about using them in their day to day practice..

3.10. Welfare of Labours, Migrant Worker and other Vulnerable Groups

Migrant workers are the most marginalised groups of the society who live on daily wages for their subsistence and living. During the time of lockdown, as the industrial establishments were shut and other avenues of income also ceased, the migrant workers faced immediate crisis related to food, shelter, loss of wages, healthcare, concerns of the family, fear of getting infected or spreading the infection. This called for urgent social protection measure to reduce the hardships faced by the

⁴⁸ Department of Health and Family Welfare, Ministry of Health and Family Welfare, Governemnt of India (20 April 2020) <<https://www.mohfw.gov.in/pdf/MeasuresUndertakenToEnsureSafetyOfHealthWorkersDraftedForCOVID19Services.pdf>> accessed 20 September-2021.

⁴⁹ Ministry of Health & Family Welfare, Government of India, 'Dhanwantari Rath: Taking Non-COVID Healthcare Services to Peoples Doorsteps in Ahmedabad' (MoHFW, 4 July 2020) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1636359>> accessed 20 September 2021.

⁵⁰ Government of Sikkim, 'Centralised Information System for Covid-19' <<https://www.covid19sikkim.rog>> accessed 20 September 2021.

⁵¹ Board of Governors In Supersession of the Medical Council of India, 'Telemedicine Practice Guidelines, Enabling Registered Medical Practitioners to Provide Healthcare Using Telemedicine' (25 March 2020) <<https://www.mohfw.gov.in/pdf/Telemedicine.pdf>> accessed 20 September 2021.

migrant workers. The GoI issued recommendations for addressing the psycho-social issues faced by the Migrants during the Covid-19 pandemic.⁵² The basic requirement listed by the government included (a) Establishing community shelter and kitchens for migrant workers by the respective state governments where they are located. (b) Providing adequate relief materials to them along with emphasising the need for social distancing. (c) Identify Covid-19 suspected and infected cases and take appropriate steps for mitigating the same, as per the protocols issued by the government. (d) Install mechanism for migrant workers to connect with the family member in distress through means of telephone or video call services.

The Ministry of Labour and Employment issued an advisory appealing to all employers' association not to terminate their employees or cut wages of its workers in view of the lockdown.⁵³ The advisory also stated that all employers of public/private establishments must extend their cooperation to the governments by not terminating their employees, particularly casual or contractual workers or reduce their wages during the entire period of lockdown. However, the Supreme Court of India allowed the employers to negotiate with the employees on the payment of wages.⁵⁴

All the State government took upon themselves to provide protection and adequate services to the migrant workers living in their jurisdiction or domiciled in the state but have migrated to other State for subsistence. The State Government of Odisha was the first state to announce that it will take care of migrant workers living in its jurisdiction and provide services free of cost during Covid-19.⁵⁵ The Odisha government announced a comprehensive welfare package of Rs. 2,200 crores to address the food and security issues of Migrant

labours and other vulnerable sections of the society. The measures included distribution of free ration for a three-month period, advance payment of pension under various social security schemes as well as, special financial assistance for construction workers in the State. The State Government of Assam implemented several initiatives for migrant labours returning to Assam, like issuance of job cards, supply of food rations for three months (free of cost), enhancement of daily wages from Rs. 182 to Rs. 202 under the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), allocating 5 kg rice per month to poor families living in the State without a ration card.⁵⁶ The State of Chhattisgarh implemented the scheme of providing free ration of rice, gram, jaggery and salt, during the entire period of lockdown, to Below Poverty Line (BPL) households and highly subsidised ration to Above Poverty Line (APL) households in the State.⁵⁷ The State of Gujarat distributed free food grains to migrant labours without ration cards under the Anna Brahma Yojana, whereas those labours and migrant workers who possessed ration cards received Direct Benefit Transfers under the Mukhya Mantri Garib Kalyan Yojana.⁵⁸

4. Critical Evaluation of Efforts of the Government

From the beginning of 24th March, India saw one of the severest lockdowns in the world, which was imposed on 1.3 billion people.⁵⁹ The first phase of the lockdown was followed by more phases of lockdown, continuing up till 31st May 2020. After that, the government gradually allowed opening of economic, social, cultural and political activities, during the phase of 'unlock'.⁶⁰ In this period, people were allowed limited economic activities of sale and

⁵² Ministry of Health & Family Welfare, Government of India, 'Psychosocial Issues Among Migrants During Covid-19' <https://www.mohfw.gov.in/pdf/Revised_PsychosocialissuesofmigrantsCOVID19.pdf> accessed 20 September 2021.

⁵³ Ministry of Labour and Employment, Government of India (20 March 2020) <https://labour.gov.in/sites/default/files/Central_Government_Update.pdf> accessed 20 September 2021.

⁵⁴ See *Ficus Pax Private Ltd. and Ors v. Union of India*, Writ Petition No. 10983 of 2020 <https://main.sci.gov.in/supremecourt/2020/10983/10983_2020_36_1502_2_2526_Judgement_12-Jun-2020.pdf> accessed 20 September 2021.

⁵⁵ National Disaster Management Authority, Government of India, 'COVID-19 Case Studies, State of Odisha' (NDMA) <<https://ndma.gov.in/en/media-public-awareness/covid-19-case-studies.html>> accessed 20 September 2021.

⁵⁶ Government of Assam, 'Best Practices for Covid-19 Management and Mitigation' <<https://nhm.assam.gov.in/portlet-innerpage/covid-19->

[documents-govt-of-assam](#)> accessed 20 September 2021.

⁵⁷ Department of Health and Family Welfare and Medical Education, 'Covid-19 Management and Mitigation in Chhattisgarh, Best Practices' <<http://www.cghealth.nic.in/cghealth17/>> accessed 20 September 2021.

⁵⁸ Ranjan Kumar Ghosh and others, 'Management of the COVID-19 Pandemic in Gujarat' (*IIM Ahmedabad*, 24 July 2020) <https://www.iima.ac.in/c/document_library/Gujarat%20Covid%20Response%20Report-2020.pdf> accessed 20 September 2021.

⁵⁹ Partha Chatterjee, Soma Dey and Shweta Jain, 'Lives and Livelihood: An Exit Strategy from Lockdown' (*Economic and Political Weekly*, 30 May 2020) 55(22) <<https://www.epw.in/journal/2020/22/special-articles/lives-and-livelihood.html>> accessed 20 September 2021.

⁶⁰ Ministry of Home Affairs, Government of India, 'New Guidelines to fight Covid-19 to be effective from 1st June 2020' (*PIB Delhi*, 30 May 2020)

purchase, based on the guidelines of 'social distancing' issued by the government on the basis of this assessment of the local Covid-19 situation.

Despite the relaxation in the restrictions, travel and economic activities remained dormant in the months following the 'unlock'. The impact of complete lockdown was devastating for both human beings and the economy. The consumption of electricity went down to 30% below the normal, in the entire region of India, till August, highlighting the intensity of the lockdown.⁶¹ The Pandemic had unprecedented effects on public health, livelihood, economy and or ways of living. These effects were exacerbated by the lockdown measures. The Government hastily announced the lockdown, only in the evening before it was to be announced. With the announcement of lockdown and subsequent shutting of economic activities, the government poor mismanagement came to the front and also exposed the vulnerabilities of the working class. From haphazard suspension on of transportation, to mismanagement of information with regards to lockdown, poorly funded public health facilities and inadequate fiscal stimulus packages, it was the 'responses of the government' or 'the governmentality associated with the pandemic' has been at the heart of challenges initiated by the lockdown.⁶² Let us look at some of the consequences of the responses of the government.

4.1. Migrant Crisis

The most visible impact of the sudden announcement of the nation-wide lockdown was the migrant labour crisis that began in the early months of the lockdown. Due to complete restrictions on the economic activities, daily wagers especially migrants, were rendered jobless overnight. A survey among migrant workers conducted in the month of April-May 2020, revealed that 90% of them did not receive wages from their employers, in various states; 96% did not

get rations from the government outlets; and 70% did not get cooked food during lockdown 1.0.⁶³ The lack of government security compelled the workers to leave their places of work and return to their villages, in order to obtain social security. They however, found themselves in the lurch, as all the means of transport were temporarily shut and there was no alternative arrangements put in place, immediately after the commencement of lockdowns. This led the Migrant labours to undertake long and arduous journeys, on foot, back to their homes. This unexpected eventuality highlighted the vulnerabilities of the working class of the society.⁶⁴ The Migrant crisis arose mainly due lack of foresight on part of the GoI which had announced lockdown without any prior deliberation with the States or the employers. It affected the livelihood of around 4 crores internal migrants and around 104 lakh migrant workers had to move from urban areas to rural areas, via means of Shramik trains, busses, trucks and walking thousands of kilometers.⁶⁵ Many of whom lost their lives in the process.

In order to mitigate the effects of loss of livelihood of the labours and workers, the government issued relief measure such as the Pradhan Mantri Garib Kalyan Yojana. Under this Yojana, the people who had Jan Dhan accounts were entitled to receive Rs. 500 and Rs. 333 to migrant labours & women and pensioners respectively, per month. However this measure taken by the Finance Ministry was severely criticised by many as sheer tokenism and mockery of the poor.⁶⁶ In fact, with the rise in inflation during the period of lockdown and high cost of essential commodities, the amount was meager which did not adequately provided for labours from unorganised sectors, small and medium enterprises, pregnant and lactating women and those suffering from critical ailments.⁶⁷ This was in addition to the frequent inclusion and exclusion errors in the official databases, regarding the Public Delivery System (PDS) and Direct Benefit Transfer

<<https://pib.gov.in/PressReleasePage.aspx?PRID=1627965>> accessed 20 September 2021.

⁶¹ Editorial, 'Pandemic in the Eyes of the World Bank and the IMF' (*Economic and Political Weekly*, 31 October 2020) 55(44) <<https://www.epw.in/journal/2020/44/editorials/pandemic-eyes-world-bank-and-imf.html>> accessed 20 September 2021.

⁶² Abraham Samuel, Gorky Chakraborty and K. J Joy, 'Emerging Governmentality and Bio-politics of Covid-19 in India' (*Economic and Political Weekly*, 12 September 2020) 55(37) <<https://www.epw.in/journal/2020/37/commentary/emerging-governmentality-and-biopolitics-covid-19.html>> accessed 20 September 2021.

⁶³ Vibhuti Patel and others, 'Reverse migration of labourers amidst Covid-19' (*Economic and Political Weekly*, 8 August 2020) 55(32-33) <<https://www.epw.in/journal/2020/32-33/commentary/reverse-migration-labourers-amidst-covid-19.html>> accessed 20 September 2021.

⁶⁴ S. Irudaya Rajan, 'Covid-19 led migrant crisis: A critique of Policies' (*Economic and Political Weekly*, 5 December 2020) 55(48) <<https://www.epw.in/journal/2020/48/commentary/covid-19-led-migrant-crisis.html>> (accessed 20 September 2021).

⁶⁵ *Ibidem*.

⁶⁶ Sangeeta Ghosh, 'Examining the Covid-19 relief packages for MSMEs' (*Economic and Political Weekly*, 30 May 2020) 55(22) <<https://www.epw.in/journal/2020/22/commentary/examining-covid-19-relief-package-msmes.html>> accessed 20 September 2021.

⁶⁷ *Ibidem*.

(DBT) mode. The inadequacies in official database have been highlighted time and again. The Economic Survey of 2016-17, showed in respect to MGNREGA, that two-fifth of bottom 40% of the population was still not registered as beneficiary for the PDS.⁶⁸ As per the Periodic Labour Force Survey (PLFS), there were nearly 55 million construction workers in 2017-18, out of which 20 million workers were left out of the benefits entitled to them under the DBT mode.⁶⁹ It is not far-fetched to assume, that the same trend also caught-up several thousands of migrant labours and workers who were not registered as beneficiaries of the DBT and PDS benefits, even after being qualified for the same.

4.2. Impact on Livelihoods and Economic Shutdown

The impact of pandemic and the subsequent lockdowns has inestimable effect on the jobs and livelihood of small and medium enterprises resulting in job losses. In one of the Survey conducted on assessing the impact of Covid-19 on vulnerable workers, it was found that more than 43% of the national workforce was severely affected.⁷⁰ The follow up survey, which was taken again after six months, showed 20% of those who lost their jobs during lockdown were still unemployed.⁷¹ The study also picked up the trend in rising self-employment and casual labour (informal) among the previously salaried workers, who were returning to the labour market.⁷² According to the study, the most affected were women and younger workers, who lost their jobs very easy and were less likely to recover.⁷³

Along with the adverse impacts on livelihoods, the economy also slowed down due to lockdown. In the first half of the year 2020, from Jan- June, the economy shrunk by 15.7% due to closure and shutdown of industries and other economic

activities.⁷⁴ This slowing down of economy, however had un-equal effects on different sections of the society. With the lockdowns, there has been a rise in savings inequalities among the higher income households and lower income households. Households of higher income groups have seen their income protected and saving rates forced up during the lockdown, ensuring long term future consumption security. Meanwhile the households of lower income groups have witnessed permanent hit to jobs and incomes, leading to degradation in long term future consumption.⁷⁵

In the midst of this crisis, the financial stimulus rolled out by the Finance Ministry has not been able to curb the crisis and restore equilibrium in the market. In fact the GoI did not acknowledge the millions of job losses in both, the informal and formal, sectors and also failed to mention about the plight of migrant workers in their budgets speech in the Parliament.⁷⁶ On the contrary, there has been a cut down upon the overall subsidies by 43% and for the outlay of MGNREG employment programme has been cut by 34.5% from the previous budget.⁷⁷

4.2. Public Health

Public health in India falls under the jurisdiction of individual states rather than under the central government, yet the Central Government unilaterally imposed lockdown on the grounds of placing 'life' and 'health' over 'livelihood' and other economic or legal concerns. The model adopted by India in the initial days of the pandemic comprised of macro-lockdown with micro-testing, which was bound to fail to impose a check on the spreading of the disease. In a report published by the World Bank, it was shown that the total number of infection in India, by the end of September 2020, as meander by total Covid-19 cases per million people

⁶⁸ Ajit Jha, 'Covid-19 relief package: Will central largesse help construction workers?' (*Economic and Political Weekly*, 25 April 2020) 55(17) <<https://www.epw.in/journal/2020/17/commentary/covid-19-relief-package.html>> accessed 20 September 2021.

⁶⁹ *Ibidem*.

⁷⁰ Amit Basole, 'Labour, livelihood and employment in the 2021-22 Union Budget' (*Economic and Political Weekly*, 27 February 2021) 56(9) <<https://www.epw.in/journal/2021/9/budget-2021-22/labour-livelihoods-and-employment-2021-22-union.html>> accessed 20 September 2021.

⁷¹ Mahesh Vyas, 'Job losses in white and blue collar workers' (*Centre for Monitoring Indian Economy Pvt. Ltd*, 2020) <<https://www.cmie.com/kommon/bin/sr.php?kall=warticle&dt=2020-09-14%2021:47:53&msec=416>> accessed 20 September 2021.

⁷² *Ibidem*.

⁷³ M. Govinda Rao, 'A budget for pandemic times: Implementations Question' (*Economic and Political Weekly*, 24 February 2021) 56(9) <<https://www.epw.in/journal/2021/9/budget-2021-22/budget-pandemic-times.html>> accessed 20 September 2021.

⁷⁴ *Ibidem*.

⁷⁵ Sajjid Chinoy and Toshi Jain, 'Fiscal policy and growth in a post Covid-19 world' (*Economic and Political Weekly*, 27 February 2021) 56(9) <<https://www.epw.in/journal/2021/9/budget-2021-22/fiscal-policy-and-growth-post-covid-19-world.html>> accessed 20 September 2021.

⁷⁶ Editorial, 'A bonanza for corporates' (*Economic and Political Weekly*, 6 February 2021) 56(6) <<https://www.epw.in/journal/2021/6/editorials/bonanza-corporates.html>> accessed 20 September 2021.

⁷⁷ *Ibidem*.

was 4,574 while it was only 2,207 in Bangladesh, 2,670 in Nepal and 1,416 in Pakistan.⁷⁸

What could India have done instead was, that, it could have emulated the South Korean model of mass testing, tracing and isolating without a lockdown.⁷⁹ Or it could have developed a sui-generis model, like the Kerala State model, of region specific micro level lockdown with aggressive health measures to control the spread.⁸⁰

The public health delivery system is severely starved with resources and investments, which became amply clear during the pandemic 2020. Even after more than seven decades of Independence, the Centre and States have not been able to co-operate effectively with themselves to establish a robust public health infrastructure in the country. It would not be appropriate to put the entire blame on any one respective government and especially not the one who is in majority during the pandemic. The responsibility of not improving public health standards in India has to be attributed on all the preceding government, who has not done their share of works when they were in the majority. In all this, the most pertinent question that is raised is whether 'public health' be made a responsibility of the centre alone or should the responsibility be shared between the Centre and States, so that the uniformity in health care services are to be maintained.⁸¹

As we have witnessed, in the preceding year that public health emergencies have the potential to bring down national and global economies, and imposing long-term lockdown and other emergency responses cannot be a standard way or the only way to deal with them.⁸² India needs to re-think its legal-economic-political responses towards future pandemic and make efforts to develop and improve the public health infrastructure.

4.3. Fabric of Federalism

Apart from exposing the vulnerability of the weaker and marginalised sections of the society, the Covid-

19 pandemic has brought to light the GoI's lack of communication and consultation with the State on matters pertaining to legislative competence of the State, (i.e. public health which falls under List II of the Constitution). The situation was made worse by lack of communication amongst the States also, which has aggravated the sufferings of the common people.

There exists a strong vertical relationship between the Centre and the States, which allows the Centre to collaborate with the States in order to pursue a common objective. For instance, in the current pandemic of 2020, the GoI had announced several guidelines to curb the epidemic and had left the substantive part on the state to strategize and develop means to fight the pandemic. However, owing to the nature of pandemic (it spreads rapidly and across borders), it requires a horizontal collaborative and cooperative effort between the states to effectively contain the spread and effectively deal with the existing cases of Covid-19. The question then arises, how can the horizontal relationship between the States be strengthened? Is there any institutional arrangement given by the Constitution of India to deal with issues amongst the States? Can these arrangements be used to contain the epidemic and also create a new governance model for the country?

The horizontal model of Federalism envisages a strong relationship between the constituent units, i.e. the States, with the supervisory power of the Central Government. This framework facilitates effective coordinating between the states on matters of common economic-social-political importance.

The makers of the Constitution of India envisaged the possibility of differences and subsequent dialogue between the States with the support of the Centre. They carved an institutional framework of Inter-State Council, provided under Article 263 of the Constitution of India.⁸³ The design of Inter-State Council was borrowed from section 135 of the Government of India Act 1935 which was

⁷⁸ Rajan, n.64.

⁷⁹ Editorial, 'A dilemma for the government' (*Economic and Political Weekly*, 13 June 2021) 55(24) <<https://www.epw.in/journal/2020/24/editorials/dilemma-government.html>> accessed 20 September 2021.

⁸⁰ *Ibidem*.

⁸¹ Uday Shankar, Shubham Pandey and Simi Mehta, 'New India? A case for urgent transfer of public health from State to concurrent list' (*Counterview*, 29 April 2020) <<https://www.counterview.net/2020/04/new-india-case-for-urgent-transfer-of.html>> accessed 20 September 2021.

⁸² Editorial, 'Covid-19 Crisis and the centre-state relations' (*Economic & Political WEEKLY*, 24 April 2021) 56(17) <<https://www.epw.in/journal/2021/17/editorials/covid-19-crisis-and>

<[centre-state-relations.html](#)> accessed 20 September 2021.

⁸³ The Constitution of India, 1950, Art. 263: If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of —(a) inquiring into and advising upon disputes which may have arisen between States; (b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

known as Inter-Provincial Council, which was responsible for inter-governmental consultations on matters of agriculture, forestry, education, etc.⁸⁴ The Constitutional body is provided with the powers to inquire and advise upon issues relating to inter-state disputes, investigate and discuss among States and Centre the issues of common importance, and make recommendations for better coordination of policy and action with respect to such subject, among the States and Centre.

The Inter-States Council remained dormant until 1990, i.e. for four-decades since the Constitution of India came into force, and only came into existence on the recommendations of Sarkaria Commission.⁸⁵ Today the Council consists of the Prime Minister along with Union Ministers and the Chief Ministers of all States. The Council has also framed guidelines and identified issues to be deliberated upon. It precludes topics that fall under the purview of National Development Council, Finance Commission, and other areas that related to the statutory or constitutional responsibility of the Union. It has further not been assigned the responsibility to resolve disputes, as envisaged

under Article 263(a). These normative guidelines have severely restricted and weakened the functioning and autonomy of the Council, which has been time and again also re-iterated by various Commissions.⁸⁶

The Council is one such body that ensures meaningful participation of the States in order to coordinate and develop policy and actions. The Standing Committees notification on re-composition of Inter-State Council suggests that invitations must be extended to experts in the domain, on the issues of vital importance which requires technical guidance and expertise.⁸⁷ The Council has huge potential to deal with the problem posed by the pandemic, with require co-ordinate policy efforts and cooperative actions to deal with the same. The futuristic approach of the provisions of the Council provides for a strong alternative forum for collective consideration, deliberations and discussion with the heads of Centre and States, to resolve the problem of large magnitudes, such as the one presented to us in the form of pandemic.⁸⁸

⁸⁴ Uday Shankar, 'Strengthening Horizontal Federalism in India: Role of the Inter-State Council' (*Bar and Bench*, 13 June, 2020) <<https://www.barandbench.com/columns/strengthening-the-horizontal-federalism-in-india-need-of-the-hour>> accessed 20 September 2021.

⁸⁵ Government of India, 'Sarkaria Commission' (*Inter-State Council Secretariat, Ministry of Home Affairs*) <<http://interstatecouncil.nic.in/sarkaria-commission/>> accessed 20 September 2021.

⁸⁶ Inter-State Council Secretariat, Ministry of Home Affairs, Government of India, 'Punchhi Commission' (The Punchhi Commission has stressed that functional independence is must for effective and efficient discharge

of roles and responsibilities. The Inter-State Council, being a constitutional body, must be conferred necessary attributes so that it may take up matters of national and urgent importance and engage vibrantly on policy development and conflict resolution) <<http://interstatecouncil.nic.in/punchhi-commission/>> accessed 20 September 2021.

⁸⁷ Ministry of Home Affairs, Government of India, 'Standing Committee, Inter-State Council' (*MHA*) <<http://interstatecouncil.nic.in/standing-committees/>> accessed 20 September 2021.

⁸⁸ See Uday Shankar (2020) note 89.

Legal and Regulatory Measures and Responses to Prevent and Control COVID-19 in Uganda

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Abstract. Uganda adopted different legal and regulatory approaches to prevent and control the COVID-19 pandemic. Measures included Presidential Directives, Ministry of Health rules, guidelines and the responses, establishment of institutions such as the National Task Force (NTF) and District Task Forces (DTF) Force, and allocation of funds. These measures are included indifferent instruments such as statutory instruments, which empower government institutions to contain the COVID-19 situation in Uganda. They also set out conditions to be complied with by individuals and institutions. This article aims at mapping out the legal and institutions' approaches and assesses their effectiveness in preventing and controlling COVID-19 in Uganda.

Keywords: COVID-19, Legal, Regulatory, Measures, Rules, Directives, Uganda

1. Introduction

The 2019 COVID-19 outbreak in Wuhan, China became a threat to international public health.¹ The World Health Organization declared the outbreak a Public Health Emergency of International Concern on 30th January 2020 and a pandemic on 11th March 2020.² Countries adopted both 'soft and hard'³ response measures after the COVID-19 was declared a pandemic.⁴ Consequently, on 18 March 2020, the government of Uganda issued an institutional quarantine order for everyone returning to the country. Likewise, it ordered closure of academic institutions and a total lockdown across the country starting on 20 March 2020.⁵ Shortly thereafter, Uganda reported its first case of COVID-19 on 21 March 2020.⁶ A number of regulatory and legal measures were adopted to try to prevent and control the spread of the COVID-19.

These included closing entry points, banning public gatherings and the use of public transport, closing schools and places of worship, and declaring a national lockdown and curfew.⁷

This article analyses the effectiveness of the legal and regulatory approaches to prevent and control COVID-19 in Uganda. The article is structured into six parts. The first and second parts provide the introduction and an overview of COVID-19 situation in Uganda. The third, analyses the setup and mandate of institutions preventing and controlling COVID-19 respectively. The fourth reviews soft and hard legal and regulatory measures that have been developed in response to COVID-19. The fifth part points out challenges in implementing legal and regulatory measures and responses to prevent and control COVID-19 in Uganda. The final section concludes with a general summary of the criticisms to the legal and

¹ Wu Yi-Chia, Chen Ching-Sunga and Chan Yu-Jiuna, 'The outbreak of COVID-19: An overview' (March 2020) 83, 3 Journal of the Chinese Medical Association 217, 220.

² World Health Organisation <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>> accessed 30 September 2021.

³ Hard response refers to what is legally binding whereas soft response refers to what is advisory.

⁴ Musa Njabulo Shongwe, 'Eswatini's legislative response to COVID-19: Whither human rights?' (2020) 20 African Human Rights Law Journal 412, 435 <<http://dx.doi.org/10.17159/1996-2096/2020/v20n2a3>> accessed 30 September 2021.

⁵ 'Museveni orders closure of schools, suspends religious gatherings over coronavirus' *Daily Monitor* (Kampala, 18 March 2020) <<https://www.monitor.co.ug/uganda/news/national/museveni-orders-closure-of-schools-suspends-religious-gatherings-over-coronavirus-1881126>> accessed 30 September 2021.

⁶ 'Uganda confirms first coronavirus case' *Daily Monitor* (Kampala, 22 March 2020) <<https://www.monitor.co.ug/uganda/news/national/uganda-confirms-first-coronavirus-case-1881726>> accessed 30 September 2021

⁷ Refer to part 4 of this paper.

regulatory approaches as well as giving recommendations.

2. Overview of the COVID-19 Situation in Uganda

Currently, Uganda has confirmed over 96,497 COVID-19 cases, 94,039 recoveries and 2,856 deaths out of 1,515,178 samples tested for COVID-19.⁸ It is one of the lowest reported statistics in the world.⁹ In August 2020, a Lancet Commission report presented at the 75th United Nations General Assembly ranked Uganda among the ten countries that had achieved suppression of the pandemic.¹⁰ By 17 June 2021 Uganda had 1,217,352 samples tested, many of which were repetitive tests on the same people.¹¹ Ordinary people cannot afford the cost of testing, making the actual number of infections not ascertainable.

Regarding COVID-19 vaccination, Government has vaccinated a total of 748,676 people across the country; 712,681 people with the first dose and 35,995 with second dose of AstraZeneca vaccine out of 964,000 doses first received.¹² On 16 June 2021, Uganda received an additional 175,200 doses of the AstraZeneca COVID-19 vaccine donated by the French government through the COVAX facility.¹³ Uganda is also undertaking clinical trials for a COVID-19 treatment drug-UBV-01N.¹⁴ It is a therapeutic drug currently being developed under the Presidential Initiative on Epidemics with homegrown scientists from Ministry of Health Uganda, Makerere University School of Public Health, and Mulago National Referral Hospital, among other stakeholders.¹⁵

3. Institutional Setup for COVID-19 Prevention and Control

The Government of Uganda has setup an institutional framework for the prevention and control of the disease. At the national level, the institutional framework starts with the President who issues directives to fight COVID-19.¹⁶ The President established a multi-sectoral national task force coordinated by the Prime Minister.¹⁷ The multi-sectoral national task force reports directly to the President of Uganda.¹⁸ It is mainly composed of government ministries, departments, and agencies, including Health, Tourism, Security, Works and Transport, Information and National Guidance, Kampala Capital City Authority, Foreign Affairs, Internal Affairs and private sector.¹⁹ Further, the President established a National Response Fund to COVID-19, comprised of 15 members with representatives from Government, public and private sectors.²⁰ The mandate was to take responsibility for mobilizing resources to tackle the pandemic and enable relief measures for gravely persons affected by the pandemic.²¹ The committee collected donations in form of cash, motor vehicles, food stuffs, medical equipment and others. The COVID-19 Fund's goals were to raise 170 billion shillings to be utilized by the Ministry of Health for test kits, personal protection equipment (PPEs), ten motor vehicles for each district and other needs of the Ministry of Health and the Government of Uganda.²² It is important to note that there are reported accountability gaps when it comes to how

⁸ Ministry of Health, *Uganda* <<https://www.health.go.ug/covid/>> accessed 20 October 2021.

⁹ *Ibidem*.

¹⁰ Jeffrey D. Sachs, Richard Horton et al. 'Lancet COVID-19 Commission study report - presentation to the 75th United Nations General Assembly' (2020) *The Lancet* <[https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(20\)31494-X.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)31494-X.pdf)> accessed 30 September 2021.

¹¹ See footnote n° 8.

¹² *Presidential Address on COVID-19 resurgence and current status of the pandemic in the country Nakasero* (6 June 2021).

¹³ 'Uganda receives an additional 175,000 COVID-19 vaccine doses' *The Independent* (17 June 2021) <<https://www.independent.co.ug/uganda-receives-an-additional-175000-COVID-19-vaccine-doses/>> accessed 20 October 2021.

¹⁴ Eastern African Consortium for Clinical Research, *Uganda Successfully Launches Trials For Coronavirus Drug* <<https://eaccr.org/uganda-successfully-launches-trials-coronavirus-drug>> accessed 30 September 2021.

¹⁵ Uganda Virus Research Institute, *Uganda Successfully Joins Trials Race For Coronavirus Drug*

<<https://uvri.go.ug/news/uganda-successfully-joins-trials-race-coronavirus-drug>> accessed 14 October 2021.

¹⁶ Ministry of Health, *Presidential Address on Corona Virus* <<https://www.health.go.ug/covid/document/presidential-address-on-corona-virus/>> accessed on 14 October 2021.

¹⁷ ThinkWell and Ministry of Health Uganda, *Case Study: The Initial COVID-19 Response in Uganda* <https://thinkwell.global/wp-content/uploads/2020/09/Uganda-COVID-19-Case-Study-_18-Sept-20201.pdf> accessed 30 September 2021.

¹⁸ *Ibidem*.

¹⁹ Republic of Uganda, *COVID-19 Response Info Hub - Coordination Structure* <<https://covid19.gou.go.ug/coordination.html>> accessed 20 October 2021.

²⁰ Office of the Prime Minister, *The COVID-19 fund press release* (3 May 2020) <<https://www.ucc.co.ug/wp-content/uploads/2020/05/Press-Release-Covid.pdf>> accessed 20 October 2021.

²¹ *Ibidem*.

²² *Ibidem*.

it was utilized.²³ According to the Ministry of Health, UGX 23.9Bn out of the UGX 29Bn COVID-19 response donation funds were used to purchase double cabin pickup cars for surveillance, transportation of laboratory samples and follow ups.²⁴ The choice to purchase double cabin pickup cars over essential requirements such as test kits, PPEs, ventilators, oxygen and beds, received public discontent.²⁵

The Parliament of Uganda is another institution that plays a pivotal role in the response to the COVID-19 pandemic. It enacts specific laws alongside playing an oversight role over government implementation strategies towards prevention and control of COVID-19²⁶. Article 164(3) of the Ugandan Constitution mandates Parliament to oversee and monitor public funds expenditure.²⁷ For instance, to address the COVID-19 pandemic, Parliament approved a supplementary budget of UGX 304 billion.²⁸ Further, a Parliamentary Technical Taskforce on COVID-19 was created to monitor government response to the pandemic.²⁹ Parliament allocated UGX 10 billion to the Parliamentary Commission for Members of Parliament to supposedly assist in the fight against the pandemic, which raised criticism and discussion about its justification amidst scarcity in the most essential requirements such as test kits and personal protection equipment (PPEs).³⁰ The court in *Gerald Karuhanga & Jonathan Odur v. Attorney General*,³¹ ordered Parliamentarians to return this money.³²

The Ministry of Health (MOH) is another institution at the national level that is responsible for the COVID-19 response measures and implementation. The Ministry plays a prominent role in case management, surveillance and laboratory; strategic information, research and innovation; and risk communication and logistics operation.³³ It is also responsible for providing daily results of COVID-19 tests, cases, recoveries and deaths.³⁴ The Ministry has constituted a Scientific Advisory Committee and Vaccine Advisory Committee,³⁵ comprised of eminent scientists including physicians, public health, laboratory, and policy experts to advise the National Task Force and the Ministry of Health on evidence-based interventions to guide national response and COVID-19 vaccination.³⁶ The Minister is responsible for providing policy guidance and strategic directions which have been used to legitimize the Presidential directives and other guidelines.³⁷ Within the Ministry there is an Incident Management Teams and a subcommittee that deal with case management, infection prevention and control, clinical management, surveillance, contact tracing, and management of quarantine centers.³⁸

At the district level, the District Task Force (DTF) Committee and related subcommittees were established to implement and oversee the COVID-19 response at districts and lower levels.³⁹ These support central government's containment of COVID-19. They are also in charge of implementing

²³ Parliament of Uganda, *COVID-19 funds mismanaged-Auditor General* (11 March 2021) <<https://www.parliament.go.ug/news/5019/COVID-19-funds-mismanaged-auditor-general>> accessed 14 October 2021.

²⁴ <<https://twitter.com/MinofHealthUG/status/1415969269813239811>> accessed 30 September 2021.

²⁵ Nelson Kiva, 'Activists are faulting government on the procurement of over 280 double cabin pick-ups using donation money' *NewVision* (22 July 2021) <<https://www.newvision.co.ug/article/details/109693>> accessed 14 October 2021.

²⁶ Article 79 of the 1995 Constitution of the Republic of Uganda.

²⁷ 1995 Constitution of the Republic of Uganda.

²⁸ See <<https://pesacheck.org/true-ugandas-parliament-allocates-itself-ush10-billion-of-the-covid-19-budget-8f0e04be7316>> accessed 30 September 2021.

²⁹ Joselyn Esiana, 'Parliament Institutes COVID-19 Task Force to Monitor Govt Response' *The Observer* (30 June 2021) <<https://observer.ug/news/headlines/70358-parliament-institutes-covid-19-task-force-to-monitor-govt-response>> accessed 14 October 2021.

³⁰ *Ibidem*.

³¹ *Gerald Karuhanga & Jonathan Odur v. Attorney General* (29 April 2020).

³² *Ibidem*.

³³ 'National Corona Virus Disease: Resurgence plan' (Ministry of Health, June 2021 - June 2022) <<https://www.health.go.ug/cause/national-corona-virus-disease-2019-resurgence-plan/>> accessed 30 September 2021.

³⁴ The results are available at <<https://www.health.go.ug/covid/rersources/>> accessed 30 September 2021.

³⁵ Ministry of Health, *The One Year Journey of the National COVID-19 Response* <<https://www.health.go.ug/cause/the-one-year-journey-of-the-national-covid-19-response/>> accessed 30 September 2021.

³⁶ *Ibidem*.

³⁷ *Ibidem*.

³⁸ Republic of Uganda, *COVID-19 Response Info Hub - Coordination Structure* <<https://covid19.gou.go.ug/coordination.html>> accessed 30 September 2021.

³⁹ Wilson W. Muhwezi, Jonas Mbabazi *et al.*, 'The Performance of the COVID-19 District Task Forces in Uganda: Understanding the Dynamics and Functionality' (Kampala, 2020) ACODE Policy Research Paper Series 101 <<https://www.acode-u.org/uploadedFiles/PRS101.pdf>> accessed 30 September 2021.

strategies regarding case management, surveillance, health promotion, resource mobilization, enforcement of standard operating procedures and continued delivery of basic services.⁴⁰ The COVID-19 guidelines designated the Resident District Commissioners (RDCs) to lead the response team at the district level, with the support from the District Health Officers (DHOs) and district chairmen under the DTF.⁴¹ At the community level, the local council chairman (LC.1) is responsible for managing the village populations and ensuring compliance with national regulations.⁴²

There are also committees and sub-committees formed both at the districts, Municipalities, Town Councils, Sub-counties and Villages.⁴³ These are in charge of risk communication, psychosocial support, case management, testing and the logistics, with Local Council 1 and Village Health Teams being instrumental.⁴⁴ Research shows that there was a lack of coordination in communications sent to Local Governments from the Central Government Ministries and Agencies.⁴⁵ Most districts did not have response plans and budgets in place, and were not able to equip the health facilities with hand washing equipment, personal protective gear, creating isolation and quarantine centers.⁴⁶

The structure at the district level has several challenges. First, since COVID-19 is a pandemic, it can be regulated under the Disaster Preparedness and Management Policy (2011) which designates the District Chairperson to head such Task Forces.⁴⁷ Therefore, the RDC to chair the District Task force is not consistent and a clear source of conflict. The distortion of this institutional structure created role conflicts in some districts which affected the performance of the Task Forces.⁴⁸ Second, there is an inadequate infrastructure to effectively respond to COVID-19. For instance, the Isolation and Quarantine Centers are ill-equipped, and in some districts they do not even exist. Additionally, there are inadequate medical supplies at existing

health facilities, including Personal Protective Equipment for health workers. This puts health workers at risk of contracting the deadly virus.⁴⁹ Third, COVID-19 Guidelines are unclear as to the structure and roles of DTF members. As a result, the constitution or membership of COVID-19 district taskforces is not uniform across all districts.⁵⁰ Fourth, some cases of corruption and lack of transparency and accountability by the COVID-19 District Task Forces have been reported in some districts.⁵¹ The most reported cases are on extortion and inequity of food distribution.⁵² Finally, there are some cases of human rights violations perpetrated by the Police and Local Defence Unit (LDU) personnel such as using excessive force to enforce the COVID-19 measures, including beating, shooting, and arbitrarily detaining people across the country.⁵³

4. COVID-19 Legal and Regulatory Measures

A number of soft and hard regulatory and legal measures and approaches have been adopted to try to prevent and control the spread of the COVID-19 cases in Uganda. Soft measures are guidelines that would not be binding, whereas hard measures include legal instruments issued by the Minister of Health under the Public Health Act and other existing pieces of legislation applicable to the COVID-19 situation as elaborated below.

4.1. Soft Regulatory Measures

The President announced measures in a form of directives, and different institutions across the country issued guidelines that contained measures to prevent and control the spread of COVID-19. These measures did not have legal force because there were never enacted as legal instruments. However, some of them got legal force through statutory instruments enacted by the Ministry of

⁴⁰ *Ibidem*.

⁴¹ *Ibidem*.

⁴² *Ibidem*.

⁴³ Africa Freedom of Information Centre (AFIC), *Local Governments' Response in the Fight Against COVID-19: A Case of Selected Districts in Uganda* (September 2020) <<https://www.dgf.ug/sites/default/files/resrcr/Covid%2019%20Report.pdf>> accessed 30 September 2021.

⁴⁴ *Ibidem*.

⁴⁵ *Ibidem*.

⁴⁶ *Ibidem*.

⁴⁷ Republic of Uganda, *The National Policy for Disaster Preparedness and Management* (2011) 28 <file:///C:/Users/YK154EU/Downloads/UNDPUG2014-National%20Disaster%20Policy%20Nov%202013_FINAL.pdf>-accessed 30 September 2021.

⁴⁸ *Ibidem*.

⁴⁹ *Ibidem*.

⁵⁰ *Ibidem*.

⁵¹ *Ibidem*.

⁵² Wilson W. Muhwezi, Jonas Mbabazi et al., 'The Performance of the COVID-19 District Task Forces in Uganda: Under-standing the Dynamics and Functionality' (Kampala, 2020) ACODE Policy Research Paper Series 101 <<https://www.acode-u.org/uploadedFiles/PRS101.pdf>> accessed 30 September 2021.

⁵³ *Ibidem*. Human Rights Watch, *Uganda: Respect Rights in COVID-19 Response* (2 April 2020) <<https://www.hrw.org/news/2020/04/02/uganda-respect-rights-COVID-19-response>> accessed on 30 October 2021.

Health that replicated the measures and also acted retrospective the presidential directives.

a. Presidential Directives

The President of Uganda has issued a number of directives regarding COVID-19 via national television, radio and Newspapers. It is important to note these directives would be enforced by security agencies and government departments as laws without legal basis as would be required.

The first directives were issued on 18 March 2020. During the presidential speech several measures were announced to impose a partial lockdown.⁵⁴ These included: (i) closure of all educational institutions, (ii) suspension of communal prayers in mosques, churches or in Stadia, and other open air venues, (iii) stopping all public political rallies, cultural gatherings or conferences, (iv) banning Ugandans from moving to or through category one (I) countries that had had a large number of corona cases by that time, (v) allowing returning citizens/residents to undergo mandatory quarantine at their cost, (vi) advised on nutrition to strengthen the body defense system, (vii) allowing the non-agricultural gathering points, (viii) allowing burials of up to 10 people, (ix) suspending weekly or monthly markets, and (x) allowing public transportation provided they follow COVID-19 guidelines.⁵⁵ The directive suspended discos, dances, bars, sports, music shows, cinemas and concerts, advised hygiene behavior such as no coughing or sneezing in public, no spitting, washing hands with soap and water or using sanitizers, regularly disinfecting surfaces such as tables, door handles, etc., and not touching one's eyes, nose or mouth with contaminated and unwashed hands.⁵⁶

The second directive was issued by the President on 21 March 2020, following the

country's first registered case of corona virus detected upon arrival of a Ugandan from Dubai on the very day.⁵⁷ The President issued directives on the border closure in and out from Uganda, limiting transport by land, air and sea to cargo; only cargo, officially authorized and U.N. planes were exempted.⁵⁸ This directive that came into effect 24 hours after the address closed a number of Ugandans abroad as well as foreigners present in Uganda at the time.⁵⁹

The third directive was issued on 25 March 2020, suspending public transport and non-food markets for two weeks.⁶⁰ The directive-maintained border closures for all passengers coming into Uganda either by air, land or water; affecting incoming flights, buses, taxis and boats; and prohibited cross-border pedestrians crossing.⁶¹

The fourth directive included the first total lockdown in Uganda and was issued on 30 March 2020. The directive included: (i) prohibition movement by everybody including use of private vehicles, boda-bodas, tuk-tuks; (ii) prohibition of gatherings of more than 5 persons, (iii) imposed a curfew across the country effective from 19:00hrs to 06:30hrs; (iv) super-markets had to operate with restrictions on a numbers of customers that enter and leave at a given time and the handling of trolleys; (v) maintained closure of all the non-food shops (stores); (vi) closed saloons, lodges and garages; (vii) factory owners had to arrange for the crucial employees to quarantine around the factory area for the 14 days, and (viii) construction sites had to continue if they could quarantine their workers for 14 days.⁶² The directive only allowed provision of essential services such as the medical, veterinary, telephones, banks, private security companies, cleaning services, garbage collection, fire-brigade, petrol stations and the national water and sewerage departments.⁶³

⁵⁴ Government of Uganda, *Presidential Address on the Corona Virus (COVID-19) Guidelines on the Preventive Measures* (18 March 2020, State House – Entebbe) <<https://kampala.diplo.de/blob/2315822/0468d91d79744d29cf6f2e8ce200da0d/corona-address-to-the-nation-data.pdf>> accessed 22 July 2021.

⁵⁵ *Ibidem*.

⁵⁶ *Ibidem*.

⁵⁷ Government of Uganda, Ministry of Health, *Uganda Confirms 1st Case Of COVID-19* (21 March 2020) <<https://www.health.go.ug/covid/2020/03/23/uganda-confirms-1st-case-of-COVID-19-saturday-21-march-2020/>> accessed 25 October 2021.

⁵⁸ Government of Uganda, Embassy of Uganda in Japan, *Additional Guidelines On The COVID-19 (Corona Virus) Preventive Measures* (2020) <<http://www.uganda-embassy.jp/>> accessed 30 September 2021.

⁵⁹ 'Uganda approves return of citizens stranded abroad over COVID-19' *Xinhua News Agency* (28 May 2020) <<https://newsaf.cgtn.com/news/2020-05-28/Uganda-approves-return-of-citizens-stranded-abroad-over-COVID-19-QQr7hldmla/index.html>> accessed 30 September 2021.

⁶⁰ Government of Uganda, *President's address on COVID19 & new guidelines* (State House PPU, 25 March 2020) <<https://www.statehouse.go.ug/media/news/2020/03/25/presidents-address-covid19-new-guidelines>> accessed 30 September 2021.

⁶¹ *Ibidem*.

⁶² Government of Uganda, Ministry of Foreign Affairs, *4th Presidential Address On COVID-19 Pandemic* (14 April 2020) <<https://www.mofa.go.ug/data/dnews/681/4th%20presidential%20address%20on%20covid-19%20pandemic.html>> accessed 30 September 2021.

⁶³ *Ibidem*.

The subsequent Presidential speeches provided updates on matters of the pandemic, easing the lockdown. On May 4th 2020 while easing the lockdown, the President maintained compulsory mask wearing by those who went outside their homes, whole sellers, ware houses, restaurants, and hardware shops were allowed to open, shops ordered not operate air-conditioning; with insurers and lawyers also added on the list of essential workers.⁶⁴

In sum, the President issued COVID-19 control and prevention directives that included: the predominant mandatory wearing of face masks in public places, social-distancing and provision for washing hands or using sanitizers. ⁶⁵ These directives aimed at slowing down the virus' transmission rate. Public control measures also included a two-week institutional quarantine for all returnees, closure of all academic institutions (with a phased opening of schools), and a total ban on public and private transport except for essential workers in the area of operating ambulances, in security, the health workers, bankers, and journalists, among others.⁶⁶ The directives were also focused on humanitarian assistance, such as the distribution of free face masks countrywide starting with the most affected areas.⁶⁷ These also included the procurement and distribution of food to vulnerable population during the lockdown, especially the urban poor.⁶⁸

Following an increase in COVID-19 cases and deaths in May 2021, what was term as a 'second wave', the President issued additional directives equivalent to a second total lockdown. The directives included banning all public and private transport except tourist, emergency vehicles, police and army vehicles, and essential workers vehicles.⁶⁹ Curfew time was pulled forward effective 19:00hrs to 05:30hrs. The President ordered the closure of all schools and high learning institutions (that had since resumed) for 42 days effective 7 June 2021.⁷⁰ The President also ordered all teachers to get

vaccinated before returning to schools. ⁷¹ The President suspended communal prayers in Mosques, Churches (that had also since resumed) or in Stadia, and other open-air, venues for 42 days.⁷² There was also suspension of public and cultural gatherings or conferences, except for the Cabinet, Legislature and Judiciary.⁷³ Travel from India was also suspended.⁷⁴ Wedding ceremonies, parties, burials, vigils and funerals were limited to a maximum of 20 people under strict observance of COVID-19 guidelines. ⁷⁵ All public transport between and across districts was also suspended for the same period except within the Kampala Metropolitan, for cargo trucks, registered tourist vehicles and the essential and Emergency Services vehicles, among others.⁷⁶

On 30 July 2021, following a consistent decrease in daily confirmed cases, hospital admissions of severe and critically ill patients, and deaths, the President revisited the lockdown measures as follows: (i) malls, arcades and other business centers to open subject to compliance with the SOPs; (ii) places of worship remained closed for more 60 days; (iii) International and local accredited sports events were allowed under strict observance of SOPs (no spectators).⁷⁷ Furthermore, Kikuubo, a business hub, was opened under strict rules; restaurants, food markets and salons were allowed to operate under strict observance of SOPs; Ministries, Departments and Agencies (MDAs) and other formal sectors i.e. lawyers, auditors etc. to operate at a maximum of 30% in a rotational manner.⁷⁸ Public transport was able to operate at 50% capacity following strict SOPs. ⁷⁹ Schools remained closed until sufficient vaccination of eligible population and children aged 12-18 years old was reached, and virtual learning was encouraged.⁸⁰ The Ministry of Finance working with the Bank of Uganda mobilized low cost credit for Micro, Small and Medium Enterprises (MSMEs), and the government raised UGX 200 Billion through

⁶⁴ Government of Uganda, *Latest Updates On Matters Regarding Corona Virus (COVID-19)* (State House Nakasero, 4 May 2020) <<https://statehouse.go.ug/sites/default/files/files/presidential-statements/address-corona-virus-4-may-2020-converted.pdf>> accessed 30 September 2021.

⁶⁵ Government of Uganda, Ministry of Health, *Presidential Speeches Archives - COVID-19* <<https://www.health.go.ug/covid/document-category/presidential-speeches/>> accessed 25 October 2021.

⁶⁶ *Ibidem*.

⁶⁷ *Ibidem*.

⁶⁸ *Ibidem*.

⁶⁹ Government of Uganda, *Yoseweri Kaguta Museveni Museveni Address on COVID-19 Pandemic Resurgence* (State House, 18 June 2021).

⁷⁰ *Ibidem*.

⁷¹ *Ibidem*.

⁷² *Ibidem*.

⁷³ *Ibidem*.

⁷⁴ *Ibidem*.

⁷⁵ *Ibidem*.

⁷⁶ *Ibidem*.

⁷⁷ Government of Uganda, *Address by Yoweri Kaguta Museveni President of the Republic of Uganda to the Nation on COVID-19 pandemic response as of 30th July, 2021* (Nakasero) <https://ambkampala.esteri.it/ambasciata_kampala/resource/doc/2020/05/address_on_corona_virus_4_may_2020-converted.pdf> accessed 30 September 2021.

⁷⁸ *Ibidem*.

⁷⁹ *Ibidem*.

⁸⁰ *Ibidem*.

Budget Rationalization, and participating Financial Institutions.⁸¹

b. Ministry of Health Guidelines

The Ministry of Health developed several guidelines to support individuals and institutions to prevent and control the spread of COVID-19. The first sets of guidelines were the National Guidelines for Quarantine in context of COVID-19, addressed to all ministries, departments and agencies.⁸² They focused on implementing home, institutional and geographic quarantine measures for individuals in the context of the current COVID-19 outbreak.⁸³

These Guidelines were of three types: (i) home quarantine for exposed persons, who had to quarantine individually at home, (ii) institutional quarantine for exposed persons who quarantined in a monitored group setting, and (iii) geographic quarantine for quarantining across a village, district, region, or country.⁸⁴ Moreover, the Ministry of Health issued guidelines on the use of masks.⁸⁵ These guidelines categorised masks into medical masks (N95, KN95 and surgical masks) and non-medical masks (made out of fabric – cloth – preferably double layered cotton masks with a filter material).⁸⁶ The guidelines provided that all adults and children aged six years and above had to wear masks while in public.⁸⁷ The guidelines also gave information on how to use the masks properly as well as how to care for masks such as the reusable ones.⁸⁸

c. Guidelines regarding Educational Institutions

The Ministry of Education issued National Guidelines for the reopening phase under COVID-19 Standard Operating Procedures.⁸⁹ The purpose

of the guidelines was to provide an actionable assistance for safe reopening and running of education institutions through effective implementation of Standard Operating Procedures for institutions of learning during the COVID-19 pandemic.⁹⁰ The main themes of these guidelines were setting up standard operating procedures for institutions of learning such as social distancing of at least two meters in classes, provision for temperature screening, and provision of hand washing; creating a model for a phased re-opening of education institutions as a mechanism for maintaining social distancing.⁹¹

The guidelines also addressed reopening of international schools, guidelines for staff transportation, creating safe education institutions operations, ensuring effective utilization of school facilities, and reorganization of school programmes.⁹² Staff management and capacity building such as having a health worker on staff, training of other staff on COVID-19 management by the District Task Force, and having only full time staff; provision of facilities for implementation of the Standard Operating Procedures; and charging flexible school fees arrived at after engaging the parents as well as accepting payment in installments, were also spelt out.⁹³

Separate institutions also came up with particular guidelines. For example Makerere University one of the oldest and most prestigious Universities in Africa, and Government owned issued guidelines on reopening teaching and research, majorly through online teaching and a laid out phased staggered programme to allow physical presence at the university.⁹⁴ On 6th June 2021, the University came up with specific guidelines for the 42 days closure ordered by the presidential directive.⁹⁵ The University maintained all online

⁸¹ *Ibidem*.

⁸² Government of Uganda, Ministry of Health, *National Guidelines For Quarantine In Context Of COVID-19* (2020) <<https://www.health.go.ug/cause/national-guidelines-for-quarantine-in-context-of-COVID-19/>> accessed 25 October 2021.

⁸³ Government of Uganda, Ministry of Health, *National Guidelines for Quarantine in Context of COVID-19* (2020) <<https://www.health.go.ug/cause/national-guide-lines-for-quarantine-in-context-of-COVID-19/>> accessed 25 October 2021.

⁸⁴ *Ibidem*.

⁸⁵ Government of Uganda, Ministry of Health, *Guidelines for the use of Masks* (2020) <<https://www.health.go.ug/covid/document/guidelines-for-the-use-of-masks/>> accessed 18 October 2021.

⁸⁶ *Ibidem*.

⁸⁷ *Ibidem*.

⁸⁸ *Ibidem*.

⁸⁹ Government of Uganda, Ministry of Education, *Guidelines for reopening of education institutions and implementation of COVID-19 Standard Operating Procedures* (September 2020) <<https://www.education.go.ug/wp-content/uploads/2020/09/Guidelines-and-SO-PS-for-Re-opening-Education-Institutions-During-Covid-19.pdf>> accessed 19 October 2021.

⁹⁰ *Ibidem*.

⁹¹ *Ibidem*.

⁹² *Ibidem*.

⁹³ *Ibidem*.

⁹⁴ Makerere University, *Academic calendar* <<https://www.mak.ac.ug/current-students/academic-calendar>> accessed 19 October 2021.

⁹⁵ Mark Wamai, 'University Closure Guidelines in Compliance With Presidential Directive on COVID-19' *Mak News* (20 March 2020) <<https://news.mak.ac.ug/2020/03/university-closure-guidelines-in-compliance-with-presidential-directive-on-covid-19/>> accessed 30 September 2021.

electronic platforms, including the Makerere University E-Learning Environment (MUELE) and electronic resources under the University Library, to be accessible during the closure period.⁹⁶ The university allowed staff and students with ongoing research activities to continue and meet their research teams and supervisors online.⁹⁷ Moreover, staff undertaking research involving perishable laboratory materials that were already acquired the university guidelines were allowed to register with their Unit Heads to be included in the permitted 30% physical presence on the campus to continue their research activities.⁹⁸ Staff with research activities that required inter-district travel (which was banned) was directed to reschedule their field research activities.⁹⁹ Other institutions also adopted similar measures such as on-line teaching and reduction of staff.¹⁰⁰

d. Ministry of Internal Affairs Guidelines

In the wake of COVID-19, the Ministry of Internal Affairs issued interventions and actions directing all citizenship passports applications as well as work permits, special passes, dependent passes and other immigration facilities to online platforms.¹⁰¹ All passport applicants that were required to appear before authorities for enrolment, interviews or to pick up passports had to undergo body temperature tests and hand washing or sanitizing.¹⁰² They must also keep a one-meter distance apart before and after access is granted.¹⁰³

e. Guidelines for the Judiciary

The Judiciary also issued guidelines on justice administration during the COVID-19 pandemic. On 19 March 2020 the then Chief Justice issued a

document that contained guidelines for the courts during the 32 days of the lockdown.¹⁰⁴ Some of these guidelines included suspension of all court hearings and appearances for 32 days, and written submissions were preferred.¹⁰⁵ During this period prisoners on remand were not to appear before courts but the proceedings were conducted using video links.¹⁰⁶ All execution proceedings were suspended for the same period except where attachment had already taken place.¹⁰⁷

Certificates of urgency together with plea taking for serious crimes and bail application were allowed.¹⁰⁸ However, only the applicant and their lawyer, or in the case of bail application, the sureties were allowed in court.¹⁰⁹

On 7 June 2021, the current Chief Justice issued a revision of the guidelines.¹¹⁰ These included: (i) immediate scale down of operations to 30% physical presence in all courts and departments and ensuring that only critical staff remain to attend to court business;¹¹¹ (ii) court registries remained open to allow case filing;¹¹² (iii) suspension of court hearings, appearances and execution proceedings;¹¹³ (iv) urgent matters were conducted in court halls or open spaces; and (v) the use of e-mail for written submissions, audio-visual hearings, and on-line delivery of judgements was emphasized.¹¹⁴ The Anti-Corruption Division was temporarily closed up to 18 June 2021.¹¹⁵

Article 133(1)(b) of the Constitution gives the Chief Justice general powers to issue orders and directions to the courts necessary for the proper and efficient administration of justice.¹¹⁶ The Chief Justice in the exercise of such powers should have been mindful of timely delivery of justice and enforcement of human rights, as well as commercial interests; a development of online filing, hearing, and delivery of judgements would have been a

⁹⁶ Makerere University, Office of the Vice-Chancellor, *Letter to All Staff & Students concerning 'University closure guidelines in compliance with the presidential directive to close institutions of higher learning as a preventive measure to curb the spread of the Coronavirus (8 June 2021)* <<https://news.mak.ac.ug/wp-content/uploads/2021/06/Makerere-University-Closure-Guidelines-8thJun2021.pdf>> accessed 30 September 2021.

⁹⁷ *Ibidem*.

⁹⁸ *Ibidem*.

⁹⁹ *Ibidem*.

¹⁰⁰ Kyambogo University, *Press briefing Monday 9th august 2021* <<https://kyu.ac.ug/press-briefing-monday-9th-august-2021/>> accessed 30 October 2021.

¹⁰¹ Ministry of Internal Affairs, *Interventions and actions in the wake of COVID-19 by the Ministry of Internal Affairs* <<https://immigration.go.ug/media/interventions-and-actions-wake-COVID-19-ministry-internal-affairs>> accessed 30 September 2021.

¹⁰² *Ibidem*.

¹⁰³ *Ibidem*.

¹⁰⁴ Supreme Court of Uganda, Chambers of the Chief Justice, *Circular on Administrative and contingency measures to prevent and mitigate the spread of Coronavirus (COVID-19)* <<http://judiciary.go.ug/files/downloads/Chief%20Justice%20Circular%20on%20COVID-19.pdf>> accessed 19 October 2021.

¹⁰⁵ *Ibidem*.

¹⁰⁶ *Ibidem*.

¹⁰⁷ *Ibidem*.

¹⁰⁸ *Ibidem*.

¹⁰⁹ *Ibidem*.

¹¹⁰ Owiny-Dollo (Chief Justice); *Revised contingency measures by the Judiciary to prevent and mitigate the spread of COVID-19* [CJ/C.7, 7 June 2021].

¹¹¹ *Ibidem*.

¹¹² *Ibidem*.

¹¹³ *Ibidem*.

¹¹⁴ *Ibidem*.

¹¹⁵ *Ibidem*.

¹¹⁶ 1995, Constitution of the Republic of Uganda.

much better viable solution at the time. It is important to note that these orders have since been challenged and await hearing and determination.¹¹⁷

Guidelines for Insurance

The Insurance Regulatory Authority issued industry guidelines on business affairs during the surge of COVID-19,¹¹⁸ under section 12 (1) (b) of the Insurance Act¹¹⁹. This provision allows it to establish standards for business in the insurance sector and to issue such guidance as it considers it appropriate.¹²⁰ These guidelines included: (i) suspension of all exclusions relating to pandemics under general insurance policies;¹²¹ (ii) a directive that insurers suspend all deadlines for claim intimation;¹²² (iii) ensuring communication with policyholders via contact detail, e-mail addresses, and display of services on insurers' websites;¹²³ and (iv) a waiver of all late premium payment penalties/fees.¹²⁴

Guidelines for the Elections

Uganda's electoral calendar coincided with a pandemic.¹²⁵ The activities on the electoral

roadmap were actually first extended to cater for preparatory measures as well as to do enough consultation on the best way to hold them.¹²⁶ Since the country did not declare a state of emergency no extension of Parliament was enacted.¹²⁷ Notwithstanding the above, the Chairman of the Electoral Commission revamped the electoral roadmap with activities like nomination, campaigning given a shorter duration.¹²⁸

The Electoral Commission also came up with guidelines on how to conduct the process.¹²⁹ The Commission banned political rallies, campaigns were restricted to two hundred people with standard operating procedures such as wearing of masks, hand washing, sanitizing and social distancing.¹³⁰ These however were violated by many politicians across the political divide as they defied the guidelines and conducted mass rallies and processions.¹³¹

The Electoral Commission also went as far as suspending campaigns in major districts and towns prior to the election.¹³² It cited Section 12 (1)(h) of the Electoral Commission Act; Section 21 (1) and (2) of the Presidential Elections Act, 2005; Section 20(1) of the Parliamentary Elections Act, 2005; and Section 172 of the Local Governments Act to assert

¹¹⁷ Michael Odeng, 'Mabirizi sues Gov't over court closure' *NewVision* (11 June 2021) <<https://www.newvision.co.ug/article/details/105797>> accessed 30 September 2021.

¹¹⁸ *Insurance Industry Guidelines on the Conduct of Business During the Corona Virus Disease* (IRA/CIR/04/20/575).

¹¹⁹ 2017, The Insurance Act.

¹²⁰ Section 12 (1) (b) 2017, The Insurance Act.

¹²¹ *Guideline 6, Insurance Industry Guidelines on the Conduct of Business During the CoronaVirus Disease*, (IRA/CIR/04/20/575).

¹²² *Guideline 10, Insurance Industry Guidelines on the Conduct of Business During the CoronaVirus Disease*, (IRA/CIR/04/20/575).

¹²³ *Ibidem* no.12.

¹²⁴ *Ibidem* no.9.

¹²⁵ With South Korea has emerged as a model for having organized a highly successful electoral process, while protecting the health of its population; Ethiopia, Serbia and Dominican Republic among others postponing elections (European Parliament) <[https://www.europa.europa.eu/ReData/etudes/BRIE/2020/652017/EPRS_BRI\(2020\)652017_EN.pdf](https://www.europa.europa.eu/ReData/etudes/BRIE/2020/652017/EPRS_BRI(2020)652017_EN.pdf)> accessed 20 October 2021.

¹²⁶ Electoral Commission of Uganda, *Resumption of Electoral Activities under the Revised Roadmap for 2020/2021 General Elections* <<https://www.ec.or.ug/news/resumption-electoral-activities-under-revised-roadmap-20202021-general-elections>> accessed 20 October 2021.

¹²⁷ Article 77 (4) of The 1995 Constitution of the Republic of Uganda.

¹²⁸ Electoral Commission of Uganda, *Resumption of Electoral Activities under the Revised Roadmap for 2020/2021 General Elections* <<https://www.ec.or.ug/news/resumption-electoral-activities-under-revised-roadmap-20202021-general-elections>> accessed 21 October 2021.

¹²⁹ Electoral Commission of Uganda, *Standard Operating Procedures (SOPs) During Elections of Special Interest Groups (SIGs) Committees* (2020) <<https://www.ec.or.ug/info/standard-operating-procedures-sops-during-elections-special-interest-groups-sigs-committees>> accessed 21 October 2021.

¹³⁰ Electoral Commission of Uganda, *Resumption of Electoral Activities under the Revised Roadmap for 2020/2021 General Elections* <<https://www.ec.or.ug/news/resumption-electoral-activities-under-revised-roadmap-20202021-general-elections>> accessed 21 October 2021.

¹³¹ Electoral Commission of Uganda, *Press Statement on Observations and the Conduct of Candidates during Campaigns for 2021 general elections* (Adm72/01) <<https://www.ec.or.ug/sites/default/files/press/Press%20Statement%20on%20Conduct%20of%20Candidates%20During%20Campaigns%2011.11.20.pdf>> accessed 23 October 2021.

¹³² Election Commission of Uganda, *Press Statement on Suspension of general election campaign meetings in specified areas of the country* (Adm72/01) <<https://www.ec.or.ug/sites/default/files/press/Press%20Statement%20on%20Suspension%20of%20General%20Election%20Campaign%20Meetings%20in%20Specified%20Areas.pdf>> accessed 21 October 2021.

its power on how to guide the manner of campaign.¹³³ The suspension was unsuccessfully challenged in court.¹³⁴ The applicant argued that the directive was illegal, irrational and violated his right to a fair hearing as he was not consulted before its issuance, as one of the candidates for the Capital City Lord Mayor position and who was among those affected by the decision.¹³⁵ Justice Sekaana in his ruling reasoned that under Section 50 of the Electoral Commission Act, the Electoral Commission has special powers in case of any emergency to suspend the election campaigns.¹³⁶ He noted that the decision of Electoral Commission is premised on the increased numbers of infections of COVID-19 and this is uncontested and supported by the worldwide spike of a new wave of coronavirus infection.¹³⁷ The Court reasoned that due to the pandemic it would not have been possible to hold a hearing for the applicant and all affected political players because of the urgency with which the administrative action needed to be taken by Electoral Commission.¹³⁸

4.2. Hard Legal Regulatory Measures

a. Constitutional emergency powers

Article 110 of the Ugandan Constitution provided for a State of Emergency in situations that threaten public safety.¹³⁹ The President in consultation with cabinet issues a proclamation of State of Emergency.¹⁴⁰ Such proclamation must stay in place for 90 days.¹⁴¹ During this time, the President issues regular reports to Parliament and the Parliament is in charge of enacting necessary laws for enabling effective measures during the State of Emergency.¹⁴² The President of Uganda did not

apply his powers to declare state of emergency; and this decision deprived the Parliament of its constitutional mandate to monitor and balance the powers of the Executive in imposition of restrictions to rights and freedoms like freedom of movement, freedom to conduct business, among others.¹⁴³

Article 99 of the Constitution confers executive authority to the President and provides that the President can issue statutory instruments, but this must be exercised on matters upon which a specific law mandates and none was in presence.¹⁴⁴ In the absence of a specific law and a judicial decision, the question of legality of the presidential directives remains critical of the legality aspects in the Ugandan COVID-19 response (though no court has pronounced itself on the matter).¹⁴⁵

b. Public health measures

Public health measures are non-medical interventions used to reduce the spread of disease.¹⁴⁶ They include providing public education, conducting case and contact management, closing schools, limiting public gatherings, issuing travel restrictions and screening travelers.¹⁴⁷ These measures have been used to prevent and control the spreading of COVID-19 in Uganda as discussed below;

Under Sections 11 and 27 of the Public Health Act;¹⁴⁸ the Minister of Health is in charge of issuing rules regarding notification and prevention of the spread of any infectious disease.¹⁴⁹ Rules may include: (i) closing of schools or any place of public entertainment; and (ii) the establishment, maintenance, management and inspection of isolation hospitals, convalescent homes or other

¹³³ *Ibidem*.

¹³⁴ Lukwago Erias v Electoral Commission (Miscellaneous Cause 393, 2020).

¹³⁵ 'Lukwago loses bid to block ban on election campaigns' *The Independent* (11 January 2021) <<https://www.independent.co.ug/lukwago-loses-bid-to-block-ban-on-election-campaigns/>> accessed 21 October 2021.

¹³⁶ 'EC right to suspend election campaign meetings in 12 district, Court rules' *Daily Monitor* (11 January 2021) <<https://www.monitor.co.ug/uganda/news/national/ec-right-to-suspend-election-campaign-meetings-in-12-district-court-rules-3253864>> accessed 21 October 2021.

¹³⁷ *Ibidem*.

¹³⁸ 'Lukwago loses bid to block ban on election campaigns' *The Independent* (11 January 2021) <<https://www.independent.co.ug/lukwago-loses-bid-to-block-ban-on-election-campaigns/>> accessed 21 October 2021.

¹³⁹ Article 110 (1) Constitution of the Republic of Uganda (as amended).

¹⁴⁰ *Ibidem*.

¹⁴¹ *Ibidem* Article 110 (2) & (3).

¹⁴² *Ibidem* Article 110 (7).

¹⁴³ 'Uganda's de facto state of emergency to address the COVID-19 pandemic' *Avocats Sans Frontières* (2020) <<https://www.asf.be/blog/2020/06/11/ugandas-de-fac-to-state-of-emergency-to-address-the-COVID-19-pandemic/>> accessed 30 October 2021.

¹⁴⁴ Constitution of the Republic of Uganda (as amended).

¹⁴⁵ 'Uganda's de facto state of emergency to address the COVID-19 pandemic' *Avocats Sans Frontières* (2020) <<https://www.asf.be/blog/2020/06/11/ugandas-de-fac-to-state-of-emergency-to-address-the-COVID-19-pandemic/>> accessed 30 October 2021.

¹⁴⁶ Peterborough County-City Health Unit, *Public Health Measures' Pandemic Influenza Plan* <<https://www.longwoods.com/articles/images/PIP-6-public-health-measures.pdf>> accessed 25 October 2021.

¹⁴⁷ *Ibidem*.

¹⁴⁸ Public Health Act Chapter 281 Laws of Uganda.

¹⁴⁹ *Ibidem*.

institutions for the accommodation or treatment of persons suffering from or who have recently suffered from any infectious disease.¹⁵⁰ The provision also mandates the imposition and enforcement of quarantine or medical observation and surveillance.¹⁵¹ It is under these provisions that the Ministry of Health has issued a number of rules or instruments on the preventive and restrictive measures to curb the spread of the virus.¹⁵²

The Minister of Health has powers to notify or declare an infectious notifiable disease¹⁵³ under Section 10 of Public Health Act;¹⁵⁴ as well as making rules in form of instruments or orders as to response, prevention and control of the declared notifiable disease.¹⁵⁵ The first instrument issued was the 2020 Public Health (Control of COVID-19) Order.¹⁵⁶ Under this the Minister of Health declared COVID-19 a notifiable disease.¹⁵⁷

The second instrument was the Public Health (Prevention of COVID-19) (Requirements and Conditions of Entry into Uganda) Order.¹⁵⁸ The Order gives medical officers powers to examine any person arriving in Uganda using aircraft, vehicle or vessel,¹⁵⁹ to hold anyone infected with COVID-19 in isolation or quarantine,¹⁶⁰ to quarantine or observe persons arriving in Uganda for a specific period as directed by the medical officer, depending on their countries of departure and transit, and to disinfect any vehicle, aircraft or vessel with clinical signs of COVID-19 contamination.¹⁶¹ The order created criminal offences for contravening the requirements, obstructing any medical officer while performing his/her duties, failure or refusal to give any required information or giving false or misleading information.¹⁶² Punishments included imprisonment for up to 3 months in the case of authors, and imprisonment for up to 12 months for the operators of vehicles, aircrafts or vessels who commit any offence.¹⁶³

The third instrument was the Public Health (Prohibition of Entry into Uganda) Order,¹⁶⁴ which

prohibited any person's entry into Uganda, as well as the introduction of any animal, article or object at or through any border posts.¹⁶⁵ The Order exempted persons, animals, articles or objects belonging to the United Nations Organization and any humanitarian organization or cargo vehicle or aircraft.¹⁶⁶ The Order was set to expire on 23 April 2020, with an option of extension given to the Minister.¹⁶⁷

The fourth Instrument was the Public Health (Control of COVID-19) Rules,¹⁶⁸ which require every owner, person in charge, or occupier of premises, and every employer and head of a household, and any local authority, who is aware or suspects any person residing in his or her area to be suffering from COVID-19 to immediately notify a medical officer or practitioner or take that person for treatment upon becoming aware that any person residing in his or her premises or in his or her employment is suffering from COVID-19.¹⁶⁹ The Rules further gave medical officers or health inspectors powers to: (i) refer any patient suffering from COVID-19 to the nearest regional referral hospital, (ii) order all persons who have been in contact with an infected person to remain in the premises where they were infected, (iii) enter any premises in order to search for any case of COVID-19, (iv) decontaminate or cause the decontamination of any building or premises that have clinical signs of contamination with COVID-19, and (v) give directions on the disposal of bodies.¹⁷⁰ The medical officers also have powers to direct the examination and investigation of any person believed or suspected to be harboring the infection.¹⁷¹

The Rules also banned public gatherings of more than 10 people, including schools, bars, churches, and other ceremonies until 16 April 2020 or as may be specified by the Minister.¹⁷² These rules granted the Minister the power to declare any place to be an infected area and regulate activities that may be

¹⁵⁰ Public Health Act Chapter 281 Laws of Uganda.

¹⁵¹ *Ibidem*.

¹⁵² *Ibidem*.

¹⁵³ A notifiable disease is a disease or injury that health professionals are required to report to the Medical Officer of Health at the local public health unit. Michelle Kirian, 'Notifiable disease: public health' *Britannica* <<https://www.britannica.com/science/notifiable-disease>> accessed 26 October 2021.

¹⁵⁴ Uganda Public Health Act Chapter 281.

¹⁵⁵ *Ibidem* Section 11.

¹⁵⁶ The Public Health (Notification of COVID - 19) Order SI. No. 45 2020.

¹⁵⁷ *Ibidem* Rule 2.

¹⁵⁸ The Public Health (Prevention of COVID-19) (Requirements and Conditions of Entry into Uganda) Order, 2020 S.I 2020 No. 46.

¹⁵⁹ *Ibidem* Rule 3.

¹⁶⁰ *Ibidem* Rule 4.

¹⁶¹ *Ibidem*.

¹⁶² *Ibidem* Rule 8.

¹⁶³ *Ibidem*.

¹⁶⁴ Public Health (Prohibition of Entry into Uganda) Order, 2020 (Statutory Instrument 53 of 2020)

¹⁶⁵ *Ibidem*.

¹⁶⁶ *Ibidem* Paragraph 3.

¹⁶⁷ *Ibidem* Paragraph 4.

¹⁶⁸ The Public Health (Control of COVID - 19) Rules, SI. No. 52 2020.

¹⁶⁹ *Ibidem* Rule 3.

¹⁷⁰ *Ibidem* Rules 4-8.

¹⁷¹ *Ibidem* Rule 12.

¹⁷² *Ibidem* Rule 9.

conducted in such areas to prevent the spread of or eradicate COVID-19.¹⁷³ Persons residing in a declared infected area shall undergo medical inspection or examination, and should remain under observation in a place selected by the medical officer for a period up to 28 days.¹⁷⁴ The offences under the Rules included holding gatherings or opening premises contrary to the Rules,¹⁷⁵ spitting in any public place,¹⁷⁶ and escaping or aiding the escape of a person from isolation or quarantine.¹⁷⁷ The penalty for committing these offences is imprisonment for up to 2 months.¹⁷⁸

The fifth Instrument was the Public Health (Control of COVID-19) (No.2) Rules 2020,¹⁷⁹ which imposed a curfew throughout Uganda from 1 April to 14 April 2020 starting at 19.00 hours and ending at 6.30 hours the following day.¹⁸⁰ The Rules also prohibited selling non-food items in markets and stores, the use of motor vehicles and engineering plants on any road, and required the closure of all shops and stores where non-food items were sold including, shopping malls, arcades, hardware shops, saloons, gymnasiums, massage parlours, hotels, lodging houses, motor repair garages and workshops during 1st April to 14th April 2020.¹⁸¹ Factories and construction sites were allowed to operate, provided that a factory or construction site accommodates for its employees.¹⁸² Moreover, employees were prohibited from leaving the factory or construction site until 14th April, 2020.¹⁸³

The Sixth Instrument was the Public Health (Control of COVID-19) No. 2 (Amendment No. 2) Rules, 2020 (the 'Rules') which amended the Public Health (Control of COVID-19) No. 2 Rules.¹⁸⁴ The order operationalized directives issued by the president on 4th May 2020.¹⁸⁵ The Rules eased restrictions on the closure of certain premises, movement and operation of services.¹⁸⁶ These included allowing lawyers under the Uganda Law Society to drive motor vehicles on any road during lockdown period for up to 30 vehicles on any given day, allowing factories and construction sites to operate provided they accommodate for their

employees and prohibiting the employees from leaving the site until 19th May 2020.¹⁸⁷ The conditions also included lifting the previous directive on closure of hardware shops, motor repair garages and workshops, and allowed carpentries, wood workshops and metal fabricators to operate.¹⁸⁸ Restaurants were able to operate but only to offer takeaway services.¹⁸⁹ Insurance services were also allowed to operate and time restrictions on motorcycle road users were decreased by allowing them to operate until 1700hrs.¹⁹⁰ Further, the Rules required every person to wear a face mask at all times while outside their place of residence.¹⁹¹ The penalty for noncompliance remained under the Public Health (Control of COVID-19) (No.2) Rules, 2020, and any person in contravention may be found liable and convicted to imprisonment for a period of up to three months.¹⁹² The duration of the lockdown was extended from 5 May 2020 to 19 May 2020.¹⁹³

Uganda got the second wave in May-June 2021 and as a result the President issued more directives that were implemented for 42 days.¹⁹⁴ Additional Rules, the Public Health (Control of COVID-19) Rules, 2021¹⁹⁵ were issued by the Minister of Health to legitimize the Presidential Directives.¹⁹⁶ The Rules gave medical officers powers to refer patients to the nearest hospital when becoming aware that the patient was suffering from COVID-19.¹⁹⁷ Likewise, they were able to immediately inform the head of the household or the occupier of the premises, or any person who has been in attendance on the deceased person, of the infectious nature of COVID-19 and of the precautions to be taken to prevent its transmission to other persons.¹⁹⁸ The health medical officer was also given power to disinfect premises where a building or premises had clinical signs of contamination with COVID-19, or where a health medical officer had information of contamination.¹⁹⁹

The medical officer or any health inspector, or person acting on written instructions of a medical officer were given powers to enter any premises in order to search for any case of COVID-19, or to

¹⁷³ *Ibidem* Rule 10.

¹⁷⁴ *Ibidem* Rule 13.

¹⁷⁵ *Ibidem* Rule 9 (2).

¹⁷⁶ *Ibidem* 10.

¹⁷⁷ *Ibidem* 11.

¹⁷⁸ *Ibidem*.

¹⁷⁹ Public Health (Control of COVID-19) Rules SI No. 2 2020.

¹⁸⁰ *Ibidem* Rule 3.

¹⁸¹ *Ibidem* Rules 4- 6.

¹⁸² *Ibidem*.

¹⁸³ *Ibidem* Rule 7.

¹⁸⁴ Public Health (Control of COVID-19) (Amendment No. 2) Rules, 2020 (Statutory Instrument 63 of 2020).

¹⁸⁵ *Ibidem*.

¹⁸⁶ *Ibidem*.

¹⁸⁷ *Ibidem*.

¹⁸⁸ *Ibidem*.

¹⁸⁹ *Ibidem*.

¹⁹⁰ The Public Health (Control of COVID-19) No. 2 (Amendment No. 2) Rules, 2020, Rule 6.

¹⁹¹ *Ibid*, Rule 8A.

¹⁹² *Ibidem*.

¹⁹³ *Ibidem* Rule 8 A (e).

¹⁹⁴ This was contained in the Presidential address of 19 June 2021.

¹⁹⁵ The Public Health (Control of COVID-19) Rules, No. 38 of 2021.

¹⁹⁶ *Ibidem*.

¹⁹⁷ *Ibidem*.

¹⁹⁸ *Ibidem* Rule 4.

¹⁹⁹ *Ibidem* Rule 6.

inquire whether there is or has been any case of COVID-19.²⁰⁰ During the search the health inspector or other person was required to notify the medical officer when they discovered any case of COVID-19.²⁰¹

The above rules (Public Health (Control of COVID-19) Rules, 2021)²⁰² created a responsibilities to presumed carriers of COVID-19; a 'carrier' of COVID-19 was defined to mean any person who, although he or she did not at the time present the clinical symptoms of COVID-19, but had been proved, or was believed, on reasonable grounds, to be harboring the infection of COVID-19 and consequently capable of spreading COVID-19.²⁰³ Such person was supposed to be examined and investigated at request of medical officer of health and to be detained in the hospital or place for such reasonable period as may be required for that purpose.²⁰⁴ The carrier was required at all times to observe and give effect to all reasonable instructions given to him or her by the medical officer in regard to the disposal of his or her infectious materials and the cleansing of articles used by him or her, and any other precautions for preventing the spread of infection.²⁰⁵ In case the carrier wished to change the place he or she was required within seven days before the change to inform the local authority and the medical officer of his or her intention to change his or her place of residence or work and of his or her intended new place of residence or work, which was restricted to only within the same district.²⁰⁶ Further, the Rules required that the bodies of all persons who die from COVID-19 be disposed of in conformity with the any directions of a medical officer of health.²⁰⁷

Furthermore, under the above Rules depending on the level of risk presented, some activities and places were allowed to operate with some restrictions, while others were temporarily or indefinitely suspended until 30th July 2021 as seen below: the premises and businesses that were allowed to operate with restrictions and following the COVID-19 guidelines were: (i) restaurants premised in hotels and restaurants located outside hotels to offer take-away services, (ii) retail shops outside shopping malls and shopping arcades, (iii) motor repair garages and metal fabricator workshops, (iv) food markets, (v) shops dealing with agricultural chemicals and seeds, veterinary drugs and detergents, (vi) pharmacies,

supermarkets and shops located inside shopping malls and shopping arcades, factories and construction sites and places of worship were only allowed up to 20 people per gathering, as well as wedding ceremonies, parties, vigils and funerals.²⁰⁸ Government meetings such as the meetings of the Cabinet, Parliament, and local governments and judicial proceedings were permitted according to their respective heads' guidelines.²⁰⁹

On the other hand, the places and activities that remained closed or suspended until 30 July 2021 included: (i) salons, schools and institutions of higher learning, (ii) sale of non-food items outside designated markets, (iii) house parties, (iv) political rallies and political meetings, (v) Kikuubo business center in Kampala Capital City, (vi) shopping arcades and shopping malls, and (vii) trading in live animals at places designated for this purpose by the local authorities.²¹⁰

Under these Rules, the following places and activities were closed and suspended indefinitely: (i) bars, night clubs, and cinema halls, (ii) prayers in open spaces, outside churches and mosques, (iii) seminars, workshops, conferences and culture-related meetings, (iv) indoor and outdoor concerts and indoor sports and sports events, and (v) gymnasiums and massage parlors.²¹¹

Motor vehicles were prohibited on any road from 2200 hours on 18 June 2021 until 30 July 2021.²¹² Exempted motor vehicles were: those used for medical services, including ambulance services, Uganda Police Force, Uganda Peoples Defence Force, those used for electricity services, media services, Uganda Revenue Authority, security-related services, and delivery services, where the vehicle did not carry more than two passengers (including the driver).²¹³ Similarly, vehicles used to transport tourists, where the vehicles shall not carry more than 50% of the allowed number of passengers, motor vehicles used to provide funeral related services, used by diplomats, used for garbage collection, for selected Government services, with particular permission by the Resident District Commissioner or a person authorized by the Resident District Commissioner, and motor vehicles or engineering plants permitted by the ministry responsible for transport were also exempt.²¹⁴ A motorcycle was permitted to carry

²⁰⁰ *Ibidem* Rule 5.

²⁰¹ *Ibidem* Regulation 5.

²⁰² The Public Health (Control of COVID-19) Rules, No. 38 of 2021.

²⁰³ *Ibidem* Rule 8.

²⁰⁴ *Ibidem*.

²⁰⁵ *Ibidem*.

²⁰⁶ *Ibidem*.

²⁰⁷ *Ibidem* Rule 9.

²⁰⁸ *Ibidem* Rule 13.

²⁰⁹ *Ibidem* Rule 15.

²¹⁰ *Ibidem* Rule 12.

²¹¹ *Ibidem* Rule 11.

²¹² *Ibidem* Rule 16.

²¹³ *Ibidem*.

²¹⁴ *Ibidem*.

cargo only and was not permitted to be used on any road in Uganda after 1700 hours each day.²¹⁵

The Rules required every person to wear a mask, at all times, while outside his or her place of residence.²¹⁶ Hawking, street vending and selling of non- food items in markets continues to be prohibited.²¹⁷ The above Rules also extended the curfew imposed throughout Uganda by S.I. 55 of 2020 to 1900 hours each day and ending at 0530 hours the following day until 30th July 2021.²¹⁸

The offences under these Rules included opening bars, night clubs, and cinema halls, holding prayers in open spaces, outside of churches and mosques, conducting, seminars, workshops, conferences and cultural related meetings, holding indoor and outdoor concerts and indoor sports and sports events, pre-primary schools and gymnasiums and massage parlors.²¹⁹ Furthermore, escaping or aiding the escape of a person from isolation or quarantine is also considered an offence.²²⁰ The penalty for committing these offences is imprisonment for up to 2 months.²²¹

The Rules give authority to police and local authorities to enter any place or premises and may inspect any motor vehicle or engineering plant for the enforcement of these rules.²²²

4.3. Use of Criminal Law to Prevent and Control COVID-19

Criminal Prosecution under the Penal Code Act²²³ has been used to prevent and control spread of COVID-19.²²⁴ Section 171 prescribes offences of negligent act likely to spread infection of disease as follows:

'Any person who unlawfully or negligently does any act which is and which he or she knows or has reason to believe to be likely to spread the infection

of any disease dangerous to life commits an offence and is liable to imprisonment for seven years.'²²⁵

Other penal provisions can be found under Section 20 of The Public Health Act,²²⁶ which lists additional offences and penalties for lack of compliance with public health precautions. It establishes that it constitutes an offence if a person suffering from an infectious disease willfully exposes himself/herself without proper precautions to avoid spreading the disease in any public place.²²⁷

The Public Health (Control of COVID-19) Rules,²²⁸ issued under the above Public Health Act, create several offences for aiding the escape from isolation or quarantine, and for conveying items into a place designated for isolation or quarantine with intent to facilitate the escape of a person.²²⁹ The punishment is imprisonment for two months.²³⁰ Another offence is allowing a prohibited public gathering to take place by persons in charge. The punishment is imprisonment for up to two months.²³¹ The rules also provide for a general criminal offence and penal sanction of imprisonment for a period not exceeding two months where no offence is provided for in the rules.²³²

A number of people have been charged under the Penal Code guidelines.²³³ For instance, Robert Kyagulanyi the National Unity Platform party presidential candidate was arrested in Luuka district for holding mass rallies. Likewise, the Forum for Democratic Change party presidential candidate Patrick Amuriat was also arrested for a similar charge.²³⁴ They were both charged under the Penal Code in relation violating the guidelines set out by the Electoral commission on holding mass rallies and later released on bail.²³⁵

The government intends to impose monetary sanctions for persons who flout the different

²¹⁵ *Ibidem*.

²¹⁶ *Ibidem* Rule 17.

²¹⁷ *Ibidem* Rule 18.

²¹⁸ *Ibidem* Rule 10.

²¹⁹ *Ibidem* Rule 9 (2).

²²⁰ *Ibidem* Rule 11.

²²¹ *Ibidem*.

²²² *Ibidem*, Rule 19- this rule possesses a conflict of rights.

²²³ Uganda Penal Code Act Chapter 120 of the Laws of Uganda.

²²⁴ *Ibidem*.

²²⁵ *Ibidem*.

²²⁶ The Public Health Act, Chapter 281 of the Laws of Uganda.

²²⁷ *Ibidem*.

²²⁸ Public Health (Control of COVID-19) Rules, Statutory Instrument 83 of 2020.

²²⁹ *Ibidem*.

²³⁰ Rule 8 of the Public Health (Control of COVID-19) Rules, Statutory Instrument 83 of 2020.

²³¹ *Ibidem* Rule 14.

²³² *Ibidem*.

²³³ Xinhua, 'Global Times, Uganda Arrests Over 2,000 People for Violation of COVID-19 Prevention Measures' (2 Jun 2021) <<https://www.globaltimes.cn/page/202106/1225154.shtml>> accessed 18 October 2021. The Independent (May 31, 2021); 'Thousands in spend weekend in custody in Kampala over flouting curfew' (31 May 2021) <<https://www.independent.co.ug/thousands-in-spend-weekend-in-custody-in-kampala-over-floutin-g-curfew/>> accessed 18 October 2021.

²³⁴ Editorial 'Be vigilant about personal safety during campaigns', (30 January 2021) <<https://www.monitor.co.ug/uganda/oped/editorial/be-vigilant-about-personal-safety-during-campaigns-3206594>> accessed 18 October 2021.

²³⁵ *Ibid. See:* In the Matter of an Application for a writ of Habeas Corpus AD Subjiciendum by Kyagulanyi Sentumu and another v Attorney General and 2 others (Miscellaneous Cause-2021/16) [2021].

guidelines on curbing the Coronavirus.²³⁶ This comes as a result of the overwhelming number of persons arrested in ignoring the guidelines. However, another significant aspect is that prisons and holding cells are becoming centers of the virus spread.²³⁷

4.4. Impact of Litigation on COVID-19 Regulatory Process

There has not been a lot of litigation on COVID-19 Regulatory measures in Uganda, the few that were litigated include matters brought by individuals as well as corporations as a mechanism to challenge decisions and seek courts' rulings on gaps found in the regulations and government response measures against COVID-19 as seen below; In *Mulumba & CEHURD V Ministry of Health & Ors*,²³⁸ the petitioners sued the Attorney General, the Medical and Dental Practitioners Council and the Minister of Health for failure to regulate medical service pricing as directed by law, causing medical facilities to charge exorbitant costs for treating COVID-19.²³⁹ The case was decided by way of a consent judgement where the parties agreed that the court make an order of Mandamus to compel the 2nd respondent (The Medical and Dental Practitioners Council) to make recommendations to the Minister of Health that would guide the making of Regulations as to what is reasonable fees chargeable for the persons seeking and accessing COVID-19 treatment in hospitals.²⁴⁰

The second case is *Center for Food and Adequate Living Rights V Attorney General*,²⁴¹ where the applicant challenged the respondent's failure and omission to regulate the food prices during the COVID-19 pandemic and offer guidance on food reserves in the Country, as mandated under the National Objectives and Directive Principles of State Policy No. XXII. Court entirely dismissed this application on the grounds that the Government was already taking up measures to address the concerns.²⁴²

The third case is *Centre for Public Interest Law Limited V Attorney General*,²⁴³ where the applicant claimed that the Minister of Energy had hurriedly made the Electricity (Establishment and Management of the Rural Electrification Fund) Instrument, S.I No. 62 of 2020 during the period when the country was under lockdown purposely to defeat the requirement of public consultation in making the Regulations. Court nullified the instrument made by the Minister during the lockdown as there was no consultation.²⁴⁴

The fourth case is *Hon. Zaake Francis V. Attorney General & Ors*,²⁴⁵ where the applicant a Member of Parliament was arrested, detained and tortured for distributing food to people without following the Ministry of Health COVID-19 Standard Operating Procedures. He sued for a declaration and damages to that effect. Court granted the declaration that the applicant's rights to personal liberty and freedom from torture had been violated and awarded damages of UGX 75 Million for the violations of rights.²⁴⁶

The fifth considered case is that of *Re: Uganda BAATI*,²⁴⁷ the company sought leave of court to convene and conduct the Annual General Meeting by electronic means following the Public Health (Control of COVID-19) Rules 2020 which banned public gatherings and meetings. Plaintiffs also invoked Public Health (Prohibition of Entry into Uganda) Order, 2020. However, the public listed companies had several members and some were stranded in other countries. Court granted the order Under Section 142 of the Companies Act to enable the company to execute most of its obligations in relation to meetings via electronic means including electronic meetings' notice delivery and associated documentation, electronic lodgment of proxies, electronic voting, and stakeholder engagement at online meetings.²⁴⁸

²³⁶ Government of Uganda, *Yoseweri Kaguta Museveni Museveni Address on COVID-19 Pandemic Resurgence* (State House, 6 June 2021).

²³⁷ Elias Biryabarema, 'Uganda's prisoner population surges, raising fears of COVID-19 outbreak' *Reuters* (7 August 2020) <<https://www.reuters.com/article/us-health-coronavirus-uganda-prisons-idUSKCN2531KA>> accessed 18 October 2021.

²³⁸ *Mulumba & CEHURD v Ministry of Health & Ors* (High Court- Miscellaneous Cause 198/ 2021).

²³⁹ *Ibidem*.

²⁴⁰ *Ibidem*.

²⁴¹ *Center for Food and Adequate Living Rights V Attorney General* (Miscellaneous Cause 75/ 2020).

²⁴² *Ibidem*.

²⁴³ *Centre for Public Interest Law Limited V Attorney General* (Miscellaneous Cause 91/2020).

²⁴⁴ *Ibidem*.

²⁴⁵ *Hon. Zaake Francis V. Attorney General & Ors* (Miscellaneous Cause 85 of 2020).

²⁴⁶ *Ibidem*.

²⁴⁷ *Re: Uganda BAATI*, (Miscellaneous Cause 2020/ 228).

²⁴⁸ *Ibidem*. Also see: *Re: Stanbic Uganda Holdings Limited* (Miscellaneous Cause 2020/108); *Re: British American Tobacco (Uganda) Limited* (Miscellaneous Cause 2020/107); *Re: Uganda Clays Limited* (Company Cause-2020/16); *Re: Uganda Institute Of Banking And Financial Services* (Miscellaneous Cause 2020/120).

4.5. Challenges for Implementing Legal and Regulatory Measures and Responses to Prevent and Control COVID-19 in Uganda

There are several challenges that have affected the implementation of the legal and regulatory measures and responses to prevent and control COVID-19 in Uganda. The first one is the confusion regarding the use of titles for the legal and regulatory measures. In most cases the title of the measures used is 'standard operating procedures (SOPs) for COVID-19 prevention and control.' WHO has defined an SOP as a document which describes the regularly recurring operations to ensure that the operations are carried out correctly (quality) and always in the same manner (consistency).²⁴⁹ This implies that SOPs are developed to provide clear guidance on the processes that should be followed to ensure coordination and timely response. The premise underpinning these SOPs is that a coordinated early warning system leads to a timely and effective response COVID-19 to prevent transmission and reduce its spreading and its social and economic consequences. In Uganda, the term SOPs is interchangeably used to mean guidelines, rules and measures, but not standard responses to prevent and control COVID-19.²⁵⁰ In fact, Uganda has no COVID-19 SOPs and as result this has limited effective response to COVID-19²⁵¹. In some cases it has led to improper implementation of legally enforceable rules.²⁵²

The second challenge refers to the institutional framework regarding implementation of legal and regulatory measures and responses to prevent and control COVID-19 in Uganda. There is no clear distinction between the roles of the Ministry of Health and those of the Office of the Prime Minister, Ministry of Local Government and other actors.²⁵³

In addition, there structure, guidelines and roles of the National and District Task Force Members that conflict in areas of isolation and quarantine centers; provision of personal protective equipment; and resource management.²⁵⁴ The roles of the different Task Force members are not well understood by some members, stakeholders and the general public.²⁵⁵ As a result, the constitution of COVID19 district taskforces was not uniform across all districts. This in some cases resulted in role-conflict amongst appointees and locally elected leaders. This posed challenges for mobilization of the community, making decisions, and accountability for resources.²⁵⁶ Moreover, the Task Forces and enforcement officers have limited capacity to enforce permits and approvals, inspections and enforcement and sometimes this increased the spreading of COVID-19.

The third challenge refers to fundamental human rights concerns, especially violation of the right to liberty, freedom of movement, and freedom of association and assembly and torture.²⁵⁷ Security forces in Uganda beat, extort, shoot, and arrest people for allegedly failing to comply with the government's COVID-19 restrictions.²⁵⁸ Freedom of movement was restricted due to transport ban and a night long curfew was imposed; most people were not able to move as they required permission from their Resident District Commissioners.²⁵⁹ Such measures did not adequately address the needs of women seeking sexual and reproductive health services such as antenatal services, family planning services and ARVS for HIV patients.²⁶⁰ Foreign travel and border movement was banned and travel from category one countries was only allowed once measures were relaxed.²⁶¹ This led to loss of business and breach of contractual obligations.²⁶²

²⁴⁹ WHO, *Standard Operating Procedures for Coordinating Event Preparedness and Responses in the WHO African Region* (2014).

²⁵⁰ E.g., the Ministry of Education and Sport, *Guidelines For Reopening Of Education Institutions And Implementation Of Standard Operating Procedures For Education Institutions During COVID-19* (September 2021).

²⁵¹ In Uganda SOPs are implemented by non-trained and professional people such as security guards and as a result it does not have serious impact.

²⁵² *Ibidem*.

²⁵³ Wilson Winstons Muhwezi, Jonas Mbabazi *et al*, 'The Performance of the COVID-19 District Task Forces in Uganda: Understanding the Dynamics and Functionality, Kampala' (2020) 101 ACODE Policy Research Paper Series 16 <<https://www.acode-u.org/uploadedFiles/PRS101.pdf>> accessed 15 October 2021.

²⁵⁴ *Ibidem*, 116.

²⁵⁵ *Ibidem*, 115.

²⁵⁶ *Ibidem*, 115.

²⁵⁷ Human Rights Watch, *World Report- 2021: Uganda Events of 2020* <<https://www.hrw.org/world-report/2021/country-chapters/uganda>> accessed 22 October 2021.

²⁵⁸ *Ibidem*.

²⁵⁹ NAPE, *A Snapshot of Human Rights Abuses Amidst the COVID-19 Pandemic in Uganda* (Vol. 1) <<https://www.nape.or.ug/publications/other-publications/100-a-snaps-hot-of-human-rights-abuses-amidst-the-COVID-19-pandemic-in-uganda/file>> accessed 22 October 2021.

²⁶⁰ *Ibidem*.

²⁶¹ Public Health (Prohibition of Entry into Uganda) Order (Statutory Instrument 53 of 2020).

²⁶² Jonathan Kiwana, David F.K. Mpanga, 'COVID-19: Legal Considerations For Businesses In Uganda' *Bowmans* (23 March 2020) <<https://www.bowmanslaw.com/insights/COVID-19-legal-considerations-for-businesses-in-uganda/>> accessed 22 October 2021.

On 6th June 2021 the presidential directive prohibited inter-district travel.²⁶³

The fourth challenge is the cases of corruption and bribery which have been reported regarding food distribution and coordination.²⁶⁴ There were some reported cases of corruption, lack of transparency and accountability by the government as it has negatively affected COVID-19 response measures.²⁶⁵ A clear example was the arrest of Government officials that included Permanent Secretary to the Office of the Prime Minister, the accounting officer, the Assistant Procurement Commissioner, together with the head of COVID-19 relief management for inflating COVID-19 relief food prices.²⁶⁶ Also the 2020 Corruption Perceptions Index (CPI) released on January 2021 by Transparency International reveals that persistent corruption is undermining health care systems and contributing to democratic backsliding amid the COVID-19 pandemic.²⁶⁷ The Auditor General unearthed gross abuse of billions of shillings and other donations meant for the COVID-19 response when the country was battling the effects of the pandemic.²⁶⁸

Lastly, there is a challenge of human behavior responses to new rules and measures to combat COVID-19. Most of the COVID-19 legal and regulatory responses made a significant shift away from traditional social and economic lifestyles.²⁶⁹ As a result, there was limited appreciation of the rules and measures, and many people spread *infodemic* misinformation on COVID-19.²⁷⁰ This caused limited compliance with the rules by both the enforcement officers and citizens.²⁷¹

5. Conclusion

Uganda has contained the spread of COVID-19 through soft measures such as Presidential directives and guidelines, as well as hard measures such as orders, rules and the Penal Code. However, there are several challenges that have affected the implementation of the legal and regulatory measures and responses to prevent and control COVID-19 in Uganda that include confusion regarding the use of the term SOPs to cover all the soft and hard legal and regulatory measures, limited capacity to enforce permits and approvals, inspections and enforcement, violation of human rights concerns, corruption and human behaviour responses to new rules and response to COVID-19. It is therefore important that government considers developing a comprehensive legislation to respond to pandemics and epidemic and develop SOPs according to the WHO standards. There is also the need to strengthen the institutional framework at the national and district levels to ensure disaster preparedness and management. Further, there is need to raise awareness regarding human rights of enforcement agencies and citizens especially in emergency cases such as COVID-19.

²⁶³ Alex Ashaba, 'COVID-19 rules: Bodaboda rider shot dead at security checkpoint' *Daily Monitor* (14 June 2021) <<https://www.monitor.co.ug/uganda/news/national/COVID-19-rules-boda-boda-rider-shot-dead-at-security-checkpoint-3437268>> accessed 20 October 2021.

²⁶⁴ Isabirye Nathan and Musasizi Benon, 'COVID-19 relief food distribution: impact and lessons for Uganda' (2020) 35, 2 *Pan Afr Med J.* 142 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7608770/>> accessed 29 October 2021.

²⁶⁵ *Ibidem*.

²⁶⁶ Halima Athumani, 'Top Ugandan Officials Arrested in COVID-19 Purchasing Scandal' *Voa News* (9 April 2020) <<https://www.voanews.com/science-health/coronavirus-outbreak/top-ugandan-officials-arrested-COVID-19-purchasing-scandal>> accessed 20 October 2021.

²⁶⁷ Patricia Akankwatsa, 'COVID-19 exposes true cost of corruption' *The Independent* (4 February 2021) <<https://www.independent.co.ug/COVID-19-exposes-true-cost-of-corruption/>> accessed 20 October 2021.

²⁶⁸ Misairi Thembo Kahungu, 'Government fails to account for Shs.56 billion COVID-19 cash' *Daily Monitor* (12 March 2021) <<https://www.monitor.co.ug/uganda/national/govt-fails-to-account-for-shs56-billion-COVID-19-cash--3320674>> accessed 8 October 2021.

²⁶⁹ Bob O. Amodan, Lilian Bulage *et al*, 'Level and Determinants of Adherence to COVID-19 Preventive Measures in the First Stage of the Outbreak in Uganda' (2020) 17, 23 *Int. J. Environ. Res. Public Health* 8810 <<https://www.mdpi.com/1660-4601/17/23/8810/htm>> accessed 30 October 2021.

²⁷⁰ Betty K. Nannyonga, Rhoda K. Wanyenze *et al*, 'Infodemic: How an Epidemic of Misinformation Could Lead to a High Number of the Novel Corona Virus Disease Cases in Uganda' (3 June 2020) Preprints (doi: 10.20944/preprints202006.0009.v1) <preprints202006.0009.v1.pdf> accessed 30 October 2021.

²⁷¹ *Ibidem*. Human Rights Watch, *Uganda: Respect Rights in COVID-19 Response* (2 April 2020) <<https://www.hrw.org/news/2020/04/02/uganda-respect-rights-COVID-19-response>> accessed 30 October 2021.

Summary Report Concerning Responses to COVID-19 in the USA

Alexandra Harrington

Abstract. The United States of America (US) has been profoundly impacted by the Covid-19 pandemic, leading the world in both Covid-19 cases and deaths despite access to vaccinations and advanced treatments. Critical to the US response to Covid-19 from a legal and regulatory perspective is the dichotomy between federal and US state governance powers and systems, which have frequently come into conflict during the pandemic. At the same time, the pandemic occurred during a highly divisive presidential campaign, in which responses became a matter of political rhetoric, and an equally contentious aftermath. The change of presidential administrations in January 2021 brought significant shifts in national policies and rules regarding Covid-19 response and recovery. However, the tensions between national and state legal and regulatory responses remains and continues to be evident in responses to the rise of variants, particularly the Delta variant, across the country. This article reviews Covid-19 legal and regulatory responses and the national and state levels in order to highlight how these entities have addressed economic, social, and public health-related issues.

Keywords: COVID-19, Pandemic, Law, National Law, Federal Law, Local Law, United States, Federal Jurisdiction, State Jurisdiction, Administrative Law

1. Introduction

The United States of America (US) has been profoundly impacted by the Covid-19 pandemic, leading the world in both Covid-19 cases and deaths.¹

The jurisdictional power allocations have compounded this under the federal constitutional system in the US, which has proven to be a complex tool for legal and health governance during a public health-related emergency. At the same time, the pandemic occurred during a highly divisive presidential campaign, in which responses became a matter of political rhetoric and an equally contentious aftermath. The change of presidential administrations in January 2021 brought significant shifts in national policies and rules regarding Covid-19 response and recovery. However, the dichotomy between national and state legal and regulatory responses remains and continues to be evident in responses to the rise of variants, particularly the Delta variant, across the country.

This article discusses the critical elements of the US federal response to the pandemic both during the Trump administration and the Biden

administration and how the US States have responded on an individual level.

2. Federal Responses

The US officially recognized Covid-19 as a pandemic on March 13, 2020, when President Trump issued Presidential Proclamation Number 9994.²

Before this, there had been a series of executive orders regarding information gathering and early attempts at preparedness for an outbreak of some sort. Thus, from March 13, 2020, to the present, several laws and executive orders, proclamations, and memoranda have formed the core of US pandemic response. In turn, this has allowed federal agencies and US States to adopt responsive policies.

2.1. Economic and Social Responses

In terms of educational issues associated with the pandemic, it should be noted that much of the decision-making capacity regarding in-person and remote learning is vested in the States rather than the federal government. However, in December 2020, through Executive Order 13969, the Trump administration emphasized the need for schools

¹ Johns Hopkins University, *Covid-19 Dashboard* <<https://coronavirus.jhu.edu/map.html>> accessed 19 August 2021.

² *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (13 March 2020) Pres. Proc. No. 9994.

across the country to take CDC guidance into account and begin creating plans for the return to in-person instruction.³ In this context, the impacts of remote learning on children's educational progress and physical and mental health was stressed as critical. At the same time, there was an emphasis on the role of non-access to school breakfast and lunch services as detrimental to students and families' health and food poverty across the country.⁴ The Executive Order identified students attending private and parochial schools as facing risks of school closures and cuts, potentially overburdening public schools should these schools be unable to continue their functions.⁵ To address these educational concerns, the Executive Order allowed for scholarships for students and families identified as disadvantaged and lacking access to in-person education to pay for private or parochial school fees, tutoring or remedial education, access to homeschooling assistance, and special education access.⁶

Since January 2021, the Biden administration has focused on ensuring the readiness of all forms of school systems to return to in-person learning based on the ideas that "First, the health and safety of children, students, educators, families, and communities is paramount. Second, every student in the United States should have the opportunity to receive a high-quality education, during and beyond the pandemic."⁷ To accomplish this, there are extensive areas for coordination between

national, state, and tribal authorities and agencies, including for school breakfast and lunch programs and after-school programs.⁸

From the outset of the pandemic, the Trump administration issued a series of travel and immigration-related executive orders and instruments which sought to limit the ability of non-citizens to enter the country. In some instances, these measures were aimed at specific countries or regions where Covid-19 was highly prevalent at the time.⁹ This practice has been continued through the Biden administration, most recently in terms of the Delta variant in countries such as India.¹⁰ In other instances, however, these orders were used to target migrants, especially those arriving at the US-Mexico border.¹¹ These orders were continued throughout the Trump administration's tenure in office, although they were promptly rescinded at the outset of the Biden administration. Additionally, the Trump administration began a system of restricting the issuance of immigrant work visas and clearances starting in June 2020 under the guise of protecting the American workforce and jobs.¹² This highly controversial program has since been rescinded by the Biden administration.¹³

Many of these orders have expired and not been renewed, and the effective restrictions on travel for US citizens and foreign nationals have begun to change in 2021. Face masks and social distancing remain requisite for all airports within the US and on domestic flights and international flights on

³ See *Expanding Educational Opportunity Through School Choice* (28 December 2020) Exec. Order No. 13969.

⁴ *Ibidem*.

⁵ *Ibidem*.

⁶ *Ibidem*.

⁷ *Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers*, (21 January 2021) Exec. Order No. 14000.

⁸ *Ibidem*.

⁹ *Terminating Suspensions of Entry Into the United States of Aliens Who Have Been Physically Present in the Schengen Area, the United Kingdom, the Republic of Ireland, and the Federative Republic of Brazil*, (18 January 2021) Pres. Proc. No. 10138; *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, (11 March 2020) Pres. Proc. No. 9993; *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus* (14 March 2020) Pres. Proc. No. 9996; *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, Pres. Proc. No. 10041 (24 May 2020); *Suspension of Entry of Immigrants and Nonimmigrants Who Continue To Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, Pres. Proc. No. 10131 (31 December 2020);

Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, Pres. Proc. No. 9992 (29 February 2020); *Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures To Address This Risk*, Pres. Proc. No. 9984 (31 January 2020); *Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019*, Pres. Proc. No. 10143 (25 January 2021).

¹⁰ See *Suspension of Entry as Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019*, Pres. Proc. No. 10199 (30 April 2021).

¹¹ *Continuation of the National Emergency With Respect to the Southern Border of the United States*, 86 FR 6557 (15 January 2021).

¹² See *Suspension of Entry of Immigrants and Nonimmigrants Who Continue To Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, Pres. Proc. No. 10131 (31 December 2020); *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, Pres. Proc. No. 10052 (22 June 2020).

¹³ *Revoking Proclamation 10014*, (24 February 2021) Pres. Proc. No. 10149.

American airlines.¹⁴ In addition, those Americans traveling outside the US – to the extent possible – are required to take a Covid-19 test and test negative within 72 hours of their return to the US regardless of their vaccination status. Domestic air travel does not require a negative Covid-19 test, however.¹⁵

Significantly, in Executive Order No. 13927, the Trump administration invoked terms of the National Environmental Policy Act, which authorize federal agencies to approve alternate methods of complying with the environmental impact assessment and similar impact studies mandated for potentially impactful public and private projects during times of emergency.¹⁶ While seemingly neutral in language, in practice, this has resulted in the undermining of much environmental law and regulatory protection and the authorization of projects with long-term impacts when they have been proposed during the pandemic. In addition, the Executive Order contains similar provisions regarding the enforcement of the Endangered Species Act and other federal agencies tasked with overseeing national infrastructure.¹⁷

Given the timing of the pandemic declaration in the US on March 13, 2020, a little over a month before the set annual deadline for filing income taxes in the US on April 15, the Internal Revenue Service (IRS) acted quickly to extend the filing deadline to July 15, 2020. Additionally, the Trump administration authorized the deferral of payroll taxes, typically paid by employers at set times throughout the year, for industries and businesses meeting specific requirements.¹⁸ Student loan payments were also made deferrable across the Trump and Biden administrations for qualifying loans held through government and government-associated holders.¹⁹

On March 27, 2020, the US Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act.²⁰ This Act was broad in scope, seeking to protect employers and employees from the economic impacts of the pandemic at the same time as addressing critical issues such as housing assistance for those having trouble paying rents or mortgages. The CARES Act includes provisions for specific industries.²¹ The Act received criticism,

however, as a number of the financial support systems provided for smaller businesses were in the form of loans rather than outright grants. In comparison, many larger businesses and sectors received grants that were argued to be bailouts.²² In addition, under the CARES Act, provisions were made to ensure that those who became unemployed due to the pandemic were able to receive special assistance.²³ This has been reauthorized subsequent to the CARES Act, with many states following suit. While regarded as necessary at the time, the continuation of this practice has become controversial since many business owners argue that it incentivizes workers to remain unemployed and has caused labor shortages in many industries.

The CARES Act provided for an initial rebate to most Americans who file taxes in the amount of \$1,200 per person, with additional amounts added for children.²⁴ Under the CARES Act, new reporting requirements were established for manufacturers of medical supplies in cases of anticipated delays or disruption in production.²⁵ It also provided for reimbursement and cost coverage systems for Covid-19 testing so that cost would not inhibit anyone from being tested.²⁶ The federal work-study program, used to provide funding for students who work at qualifying on-campus jobs at their undergraduate and graduate universities, was expressly extended under the CARES Act to ensure that students could still work remotely and receive payments regardless of their ability to perform work remotely.²⁷ This was essential since these payments are calculated into student scholarships and financial aid packages from the beginning of each term. In terms of labor protections, the CARES Act extends the parameters of the Family Medical Leave Act to include employees who contract Covid-19 and employees with immediate family members who contract it.²⁸

The follow-up to the CARES Act was the American Rescue Plan Act of 2021 (Rescue Plan Act), which extended several CARES Act provisions and brought federal efforts to address critical issues raised by the pandemic to a level reflective of more

¹⁴ *Promoting COVID-19 Safety in Domestic and International Travel*, (21 January 2021) Exec. Order No. 13998.

¹⁵ *Ibidem*.

¹⁶ *Accelerating the Nation's Economic Recovery From the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities*, (4 June 2020) Exec. Order No. 13927.

¹⁷ *Ibidem*.

¹⁸ *Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster*, 85 FR 49587 (8 August 2020).

¹⁹ *Continued Student Loan Payment Relief During the COVID-19 Pandemic*, (8 August 2020) 85 FR 49585.

²⁰ PL 116-136 (27 March 2020).

²¹ See generally *ibidem*.

²² See generally *ibidem*.

²³ *Ibidem* at sect 2102.

²⁴ *Ibidem* at sect 2201.

²⁵ *Ibidem* at sect 3111.

²⁶ *Ibidem* at sects 3201 – 3203.

²⁷ *Ibidem* at sects 3505 – 3509.

²⁸ *Ibidem* at subtitle C.

current impacts.²⁹ The Rescue Plan Act addresses new sectors of the economy, particularly ranchers and farmers, as needing specialized aid and assistance given the effects of the pandemic.³⁰ The Rescue Plan Act also reflects the severe impacts of the pandemic and the lack of access to school breakfast and lunch programs on nutrition among the young and economically disadvantaged communities and provides additional funding to address this.³¹ The impacts of long-term remote learning and the inability for students to access educational support are also discussed in the Rescue Plan Act, which recognizes the need for flexibility in funding for school districts based on their Covid-19 experiences.³² The Rescue Plan Act extends the protection and assistance provided for small businesses under the CARES Act, including specific terms relating to revitalizing the restaurant industry.³³ Certain essential infrastructure systems, notably railroads and airports, are provided funding and other regulatory assistance under the Rescue Plan Act, including the return to higher passenger volumes as pandemic restrictions ease.³⁴ To encourage consumer spending, the Rescue Plan Act authorized an additional rebate of \$1,400 per qualifying American taxpayer and additional amounts for those with children.³⁵ The Act further authorized an extra child tax credit for 2021.³⁶

In August 2020, the initial protections for homeowners and renters unable to make mortgage or rent payments, respectively, from eviction as part of the CARES Act expired. Executive Order 13945 extends the protections contained in the relevant portions to the CARES Act to fill this void.³⁷ These protections have expanded across the transition in administrations. In July 2021, the Biden administration most recently extended them until October 2021 while recommending that the States take similar actions as well.

A critical power of the President of the US in times of declared emergency is the ability to designate sectors and industries as essential. This designation allows them to remain open despite

federal or state regulations that would otherwise require them to cease operations and provides the relevant federal administrative authorities with the ability to assist them in their operations. An example of the use of this power during the Covid-19 pandemic comes from the meat and poultry industry, which was designated as an essential part of the national supply chain in April 2020.³⁸ Similar allowances were made for the US International Development Finance Corporation to act as the primary purchaser and source of financing for purchasing necessary medical and other supplies on the international market.³⁹ Relatedly, the Executive Order on Regulatory Relief To Support Economic Recovery required all federal agencies to adopt measures addressing the pandemic while also seeking to assist the businesses and entities they regulate during it.⁴⁰

2.2. Medical Treatment and Vaccine Access

On the same day the US declared the existence of the pandemic, an additional Presidential Memorandum recognized the ability of the States and tribal agencies to create flexible policies for Covid-19 testing and funding allocations.⁴¹ Subsequently, several days later, the administration issued orders to federal agencies regarding prioritization and appropriations for purchasing and ensuring the supply of essential medical supplies for combatting the pandemic and ensuring that hospitals across the country had sufficient capacity to withstand a surge in Covid-19 patients.⁴² Shortly thereafter, the administration clarified this prioritization with an Executive Order, allowing the Secretary of Health and Human Services to implement measures that restricted and penalized hoarding of medical and related supplies during the pandemic.⁴³ In a significant development that has been widely used across many sectors, the administration issued Executive Order No. 13911, *Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical*

²⁹ See *American Rescue Plan Act of 2021*, (11 March 2021) PL 117-2.

³⁰ *Ibidem* at sect 1005.

³¹ See generally *ibidem*.

³² See generally *ibidem*.

³³ *Ibidem* at sect 5003 (C)(9)(b).

³⁴ See *ibidem*.

³⁵ *Ibidem* at sect 6428B.

³⁶ *Ibidem* at sect 9611.

³⁷ *Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners*, Exec. Order 13945 (8 August 2020).

³⁸ *Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19*, (28 April 2020) Exec. Order No. 13917.

³⁹ *Delegating Authority Under the Defense Production Act to the Chief Executive Officer of the United States International Development Finance Corporation To Respond to the COVID-19 Outbreak*, (May 14, 2020) Exec. Order 13922.

⁴⁰ *Regulatory Relief To Support Economic Recovery*, (May 19, 2020) Exec. Order No. 13924.

⁴¹ See *Expanding State-Approved Diagnostic Tests*, (March 13, 2020) 85 FR 15335.

⁴² *Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19*, (March 18, 2020) Exec. Order No. 13909.

⁴³ *Preventing Hoarding of Health and Medical Resources To Respond to the Spread of COVID-19*, (March 23, 2020) Exec. Order No. 13910.

Resources To Respond to the Spread of COVID-19, on March 27, 2020. In this extensive Order, President Trump expressly stated that:

'[t]o ensure that our healthcare systems are able to surge capacity and capability to respond to the spread of COVID-19, it is the policy of the United States to expand domestic production of health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators. Accordingly, I am delegating authority under title III of the Act to guarantee loans by private institutions, make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore domestic industrial base capabilities to produce such resources. To enable greater cooperation among private businesses in expanding production of and distributing such resources, I am also delegating my authority [...] to provide for the making of voluntary agreements and plans of action by the private sector.'⁴⁴

Many of these protections were extended, and indeed amplified, in additional presidential actions, which further identified the range of medical and associated supplies necessary for continuing to address the spectrum of health issues associated with Covid-19.⁴⁵

In December 2020, the Trump administration took steps to ensure the availability of the Covid-19 vaccine for the American population when it became available for widespread use.⁴⁶ As part of this plan, there are provisions for coordinating the distribution of vaccines internationally, but only after a reserve has been established. Thus, it would guarantee the availability of vaccines for all in the US seeking to obtain them.⁴⁷

As discussed in the state responses section below, telemedicine and telehealth access have become vital in the US as the pandemic has evolved.

Indeed, these medical services are increasingly being used to supplement standard healthcare, especially in vulnerable and marginalized areas. Under the CARES Act, additional funding was

authorized for telehealth services during the pandemic, particularly for the provision of healthcare in marginalized regions and populations at high risk.⁴⁸ Against this background, Executive Order 13941 from August 2020 enabled new payment schemes for healthcare in rural areas that necessitated the use of telemedicine during the pandemic.⁴⁹ Additionally, as the mental health toll of the pandemic has become apparent, there have been federal actions to recognize the issue and create oversight bodies tasked with providing information on and recommendations for methods of meeting these needs across a spectrum of populations and conditions.⁵⁰

When the Biden administration took office on January 20, 2021, it took several immediate measures to address the Covid-19 pandemic and federal responses to it. First, from the governance perspective, specialized advisory positions were created for the pandemic and provided advice on potential future health outbreaks.⁵¹

From the onset of the pandemic to the time of writing, the US has not adopted an overarching national mask mandate, although, as discussed below, many States have stepped in to fill this gap. However, among the first actions of the Biden administration was the Executive Order on Protecting the Federal Workforce and Requiring Mask-Wearing, under which everyone present at a federal building or other facilities – regardless of the reason – to wear a face mask, maintain necessary social distancing measures and follow applicable CDC guidelines in place at the time.⁵² This Order further requires coordination between federal officials and States, and other authorities to encourage the wearing of face masks across the country as a standard practice.⁵³ At the same time, the Biden administration has used existing laws, notably the Occupational Safety and Health Act, to attempt to extend federal influence in Covid-19-related workplace safety and oversight.⁵⁴

On July 1, 2021, the White House released the *U.S. COVID-19 Global Response and Recovery Framework*, seeking to ensure a coordinated

⁴⁴ *Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID-19*, (27 March 2020) Exec. Order No. 13911.

⁴⁵ *Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States*, Exec. Order No. 13944 (6 August 2020).

⁴⁶ *Ensuring Access to United States Government COVID-19 Vaccines*, (8 December 2020) Exec. Order No. 13962.

⁴⁷ *Ibidem*.

⁴⁸ *CARES Act*, *supra* note 22 at sect 3704.

⁴⁹ *Improving Rural Health and Telehealth Access*, (3 August 2020) Exec. Order 13941.

⁵⁰ See *Saving Lives Through Increased Support for Mental- and Behavioral-Health Needs*, (3 October 2020) Exec. Order No. 13954.

⁵¹ *Organizing and Mobilizing the United States Government To Provide a Unified and Effective Response To Combat COVID-19 and To Provide United States Leadership on Global Health and Security*, (20 January 2021) Exec. Order No. 13987.

⁵² *Protecting the Federal Workforce and Requiring Mask-Wearing*, (20 January 2021) Exec. Order No. 13991.

⁵³ *Ibidem*.

⁵⁴ *Protecting Worker Health and Safety*, (21 January 2021) Exec. Order No. 13999.

international, national and State-based effort to quell the pandemic and respond to its impacts.⁵⁵ This Framework establishes the five overarching policies that will inform American pandemic responses:

1) accelerate widespread and equitable access to and delivery of safe and effective COVID-19 vaccinations;

2) reduce morbidity and mortality from COVID-19, mitigate transmission, and strengthen health systems, including to prevent, detect, and respond to pandemic threats;

3) address acute needs driven by COVID-19, mitigate household shocks, and build resilience;

4) bolster economies and other critical systems under stress due to COVID-19 to prevent backsliding and enable recovery; and

5) strengthen the international health security architecture to prevent, detect, and respond to pandemic threats.⁵⁶

The Framework sets a global vaccination target date of 2022 and specifies that the goal is to vaccinate 2/3 of the eligible global population.⁵⁷ At the same time, the Framework works from the understanding that the national target is to bring Covid-19 under control and to reduce mortality rates to pre-pandemic levels rather than entirely eradicating the virus.⁵⁸

Under the CARES Act, Congress established a medical malpractice liability exception for medical professionals who volunteer to assist in Covid-19 responses, provided the act or omission potentially incurring liability happened as part of the Covid-19 treatment system.⁵⁹ This will be discussed below in the State context as well.

Anticipating the need for a vaccine to combat the Covid-19 pandemic, the CARES Act establishes requirements for the vaccine – prospective as it was at the time – to be administered free of cost to the American population through cooperation with federal, state, and private health insurance entities.⁶⁰

The Rescue Plan Act, enacted several months after vaccination began in most States, allocates

funding to States for vaccine rollout plans, including mobile vaccination units and the payment of secondary costs for vaccine access such as transportation costs to access vaccine distribution sites.⁶¹ The Act also provides for continued studies of the Covid-19 virus and emerging strains to identify and take proactive measures as necessary.⁶²

2.3. Federal-State Elements

In the US military system, the National Guard branches are organized by state and fall under the jurisdiction of a state governor and the President of the United States when exercising the Commander-in-Chief role. By the end of March 2020, President Trump issued the first authorization of the use of and federal payments for National Guard troops for Covid-19-related activities.⁶³ These orders have consistently been reauthorized each month from March 2020 onward, through the Biden administration. However, as the nature of the pandemic has shifted, the financial reimbursements to the States have begun to decline.⁶⁴

Several cases have been brought to the federal court system in the wake of Covid-19 pandemic responses by the government at all levels, although many of these cases have challenged State law on religious and freedom of association grounds. In these instances, the US Supreme Court has opined in favor of the least restrictive means for protecting the public while also respecting freedom of religion.⁶⁵ In a significant case, the US Supreme Court established a new precedent by setting a broad definition of the groups qualifying for recognized Native American group status to receive federal aid and assistance under the CARES Act.⁶⁶

3. State Responses

The initial responses of the States in terms of recognizing Covid-19 as a threat varied dramatically. In some States, such as Alaska, declarations of public health emergencies came as

⁵⁵ *U.S. COVID-19 Global Response and Recovery Framework* (1 June 2021).

⁵⁶ *Ibidem* at p 4.

⁵⁷ *Ibidem* at p 6.

⁵⁸ *Ibidem*.

⁵⁹ *CARES Act, supra* note 22 at sect 3215.

⁶⁰ *Ibidem* at sect 3714.

⁶¹ See *American Rescue Plan, supra* note 31 at subject D.

⁶² *Ibidem* at sect 2304.

⁶³ *Providing Federal Support for Governors' Use of the National Guard To Respond to COVID-19*, 85 FR 16997 (22 March 2020).

⁶⁴ See *Extension of the Use of the National Guard To Respond to COVID-19 and To Facilitate Economic*

Recovery, 85 FR 47885 (3 August 2020); *Extension of the Use of the National Guard To Respond to COVID-19 and To Facilitate Economic Recovery*, 85 FR 49225 (7 August 2020); *Memorandum To Extend Federal Support to Governors' Use of the National Guard To Respond to COVID-19 and To Increase Reimbursement and Other Assistance Provided to States*, 86 FR 7481 (21 January 2021).

⁶⁵ See *Tandon v Newsom*, 141 S.Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v Cuomo*, 141 S.Ct. 93 (2020).

⁶⁶ See *Yellen v Confederated Tribes of the Chehalis Reservation*, 141 S.Ct. 2434 (2021).

early as January 2021.⁶⁷ However, these declarations subsequently evolved into declarations of pandemic emergencies.⁶⁸

3.1. Economic and Social Responses

Although there has been a notable lack of lockdowns at the national level in the US when compared with other countries around the world, many States and even some municipalities have filled this void at various points throughout the pandemic. For example, in Alaska, major cities, including Juneau, the State capitol, have been locked down for extensive periods, resulting in severe economic impacts.⁶⁹ To allow for continued authorization of social, economic, and health programs to address the pandemic, the Alaska legislature approved legislation extending the declaration of a disaster-based emergency and conferral of emergency powers on the governor effective until December 31, 2021.⁷⁰ Perhaps most extensively, California adopted a shelter-in-place mandate for much of 2020, leading to a phased relaxation of restrictions throughout 2021.⁷¹ These rules are consistently updated as deemed necessary by the state.

Most recently, an order to wear masks in public was reinstated due to a spike in Covid-19 cases in California.⁷²

In terms of education, States have recognized the issues attendant with remote learning during

the pandemic and created a series of efforts to address them.⁷³ In some states, such as Arkansas, a dedicated tutoring corps has been established.⁷⁴

Colorado has established a special law to fund additional online educational services where necessary to fill the gaps in education stemming from remote learning systems.⁷⁵ Testing for students seeking to pass the grade they are currently enrolled in and advance to the next grade level, or to graduate from their school programs, has been a consistent issue of state concern, with some States opting to suspend or delay the administration of these tests where the use of online evaluations was deemed inappropriate.⁷⁶

To facilitate economic recovery and encourage qualifying businesses to remain open during the pandemic and ease restrictions, many states have adopted measures limiting any potential liability for businesses should Covid-19 transmissions occur on their premises.⁷⁷ In addition, many states have adopted laws and rules that extend the ability of those unemployed due to and during the pandemic. Some have also increased the number of benefits available to the unemployed.⁷⁸

As in the federal context, States have typically opted to extend income tax filings in 2020 and 2021.⁷⁹ Similarly, States have acted to ensure extended and enhanced laws to prevent evictions resulting from non-payment of rents and mortgages due to pandemic-related economic stresses.⁸⁰

⁶⁷ See, e.g., 2021 Alaska Laws Ch. 2 (H.B. 76).

⁶⁸ *Ibidem*.

⁶⁹ *Ibidem*.

⁷⁰ *Ibidem*.

⁷¹ See State of California, 'Current Safety Measures' <<https://covid19.ca.gov/safely-reopening/>> accessed 19 August 2021.

⁷² See City of San Francisco, 'Coronavirus (COVID-19)' <<https://sf.gov/stay-home-except-essential-needs>> accessed 19 August 2021.

⁷³ See e.g., Hawaii H.B. No. 1362 (2021); Illinois H.B. 2748 (2021); Maine Ch. 372 H.P. 238 (2021); North Carolina H.B. No. 82 (2021); Nevada S.B. No. 173 (2021); NJ Assembly No. 4461 (2021); PA Act No. 2021-66 (2021).

⁷⁴ See Arkansas S.B. 564 (2021).

⁷⁵ Colorado H.B. 21-1259 (2021).

⁷⁶ See Colorado H.B. 21-1161 (2021).

⁷⁷ See Arkansas H.B. 1487 (2021); Florida S.B. 72 (2021); Georgia H.B. 112 (2021); Hawaii H.B. No. 1376 (2021); Missouri S.B. Nos. 51 & 42 (2021); Montana H.B. No. 435 (2021).

⁷⁸ See CO Legis. 1ES 20B-002 (2020); 2020 CO. EO. D12-20; 2020 CO. E.O. D100-20; 2020 CT. E.O. 9P; 2020 DE Reg. Text 556331; DC Legis. Act 23-326 (2021); DC Legis. Act 23-435 (2020); 2020 FL E.O. 20-104; 2020 Hawaii Laws Act 9; 2020 HI Reg. Text 569056; 2020 ID E.O. P20-07; IL Legis. 101-633 (2020); 2020 IN E.O. 20-5; KS Legis. 1SS 1 (2020); 2019 KS E.O. 20-17; 2020 LA Reg.

Text 557817; MA Legis. 81 (2020); MA Legis. 201 (2020); MI Legis. 229 (2020); 2019 NE E.O. 20-04; NV Legis. 7 (2020); NY Legis. 97 (2020); 2020 OH Reg. Text 554457; 2020 OR Reg. Text 550910; 2020 PA Reg. Text 569459; 2020 RI Reg. Text 549315; 2019 SC E.O. 20-63; 2019 TN E.O. 73; 2019 VT E.O. 01-20; 2020 VA E.O. 54; 2020 WV E.O. 4-20; 2019 WI E.O. 20-07.

⁷⁹ See Arkansas S.B. 593 (2021); 2020 Colo. Legis. Serv. Ch. 5; 2021 Georgia Laws Act 3; 2020 Hawaii Laws Act 9; 2021 Idaho Laws Ch. 86; 2020 Ill. Legis. Serv. P.A. 101-635; 2020 Ia. Legis. Serv. H.F. 2641; 2021 KS E.O. 21-18; 2019 NE E.O. 20-17; 2020 NH Legis. Serv. Exec. Ord. 2020-56—Emerg.; 2020 New Mexico Laws 1st Sp. Sess. Ch. 4; 2021 Sess. Law. News of N.Y. Ch. 58; 2020 Pa. Legis. Serv. Act 2020-114; 2019 TN EO 36; 2020 Utah Laws 6th Sp. Sess. Ch. 15.

⁸⁰ See 2020 AL E.O. P20-06; 2020 AZ E.O. 20-14; 2020 AZ E.O. 2-049; 2019 CA E.O. 28-20; 2019 CA E.O. 37-20; 2020 Colo. Legis. Serv. 2020 CO E.O. D12-20; 2020 CO E.O. D31-20; 2020 CO E.O. D101-20; 2020 CO E.O. D99-20; 2020 CT E.O. 7S; Ch. 112; DC Act 24-67 (2021), Act 24-30 (2021); 2020 FL E.O. 20-180; 2020 IL Reg. Text 568990; 2020 IN E.O. 20-6; 2019 KS E.O. 20-10; 2020 KY E.O. 20-700; 2021 KY E.O. 21-073; 2019 ME E.O. 19-40; 2020 MD E.O. 11; 2020 Mass. Legis. Serv. Ch. 257; 2020 Miss. Laws H.B. 1810; 2019 MT E.O. D20-12; 2019 NE E.O. 20-07; 2020 NJ Sess. Law Serv. Ch. 149; NY A. 7127 (2021); 2019 NC E.O. 171; 2020 Oregon Laws 3rd Sp. Sess. Ch. 3; SC Act 99 (2021); 2020 Utah Laws 5th Sp. Sess. Ch. 11; 2020

Food production concerns have been raised at the state and national levels and have been the subject of various laws and rules. For example, in Arizona, a newly passed law established coordination between agricultural departments in the University of Arizona system and farmers and agricultural organizations to assist in food production to meet the needs of Arizona citizens.⁸¹

One of the unfortunate results of the Covid-19 pandemic and associated responses has been an increase in domestic violence across the globe, and this is undoubtedly true in the US. As a result, many US states have adopted laws and rules addressing domestic violence and seeking to assist adult and child victims in the short and long term. One core example of this is the trend in several states to create exceptions to stay-at-home or shelter-in-place orders for instances of domestic violence.⁸² In other cases, states have modified restrictions on courts and court practice during the pandemic to ensure that temporary and other forms of restraining orders can be ordered.⁸³

Under federal and the majority of state law, many formal documents must be executed in the physical presence of a licensed notary public to be legally binding. However, the pandemic has caused a strain on these requirements, especially when many of the offices in which notaries can be found have been closed for long periods of time. To remedy this issue, States have adopted laws to allow for the use of online conferencing systems to validate execution in the presence of a notary for the duration of the pandemic.⁸⁴ Similarly, some states have adopted laws to allow for the electronic filing of government filings as a result of the pandemic and pandemic responses.⁸⁵

3.2. Medical Treatment and Vaccine Access

Many states have adopted laws that recognize and expand the allowable uses of telemedicine and telehealth services for the duration of the pandemic, if not longer.⁸⁶ Additionally, States have tended to enact special laws to absolve medical professionals from tort liability related to the diagnosis and treatment of Covid-19 patients.⁸⁷

In the absence of a national vaccine passport system, some states have opted to create their own vaccine passports for use at large gatherings and other events. These can be used as a repository of information on vaccine administration for purposes such as boarding a flight.⁸⁸ Other states have shown extreme reluctance to participate in such systems, however, and some have gone as far as to ban even the requirement that a person show proof of vaccination by any state or sub-state governmental actor.⁸⁹ Further, many states have adopted laws that prohibit the state or sub-state governmental actors from requiring individuals to receive a Covid-19 vaccine.⁹⁰

In some instances, states have adopted legislation to allow the conversion of medical facilities to remote hospital settings to ease overburdened hospitals and assist in treating patients for issues other than Covid-19.⁹¹ Similarly, states have taken measures to provide additional reimbursements for hospice care facilities that have had to switch focus and receive long-term care nursing patients due to the need for other Covid-19-related treatment facilities.⁹² Nursing homes in the US represented sites of high Covid-19 transmission and death rates, and states have begun to recognize this in new laws which require the stockpiling of PPE and other essential items, adopt plans for future outbreaks similar to the Covid-19 pandemic

Vermont Laws No. 101; 2019 WA E.O. P20-19.5; 2019 WI E.O. 20-15.

⁸¹ Arizona S.B. 1825 (2021).

⁸² See 2020 AL E.O. 504; 2020 AZ E.O. 18; 2020 CT E.O. 23; 2020 DE E.O. 44; 2020 D.E. EO 50; 2020 IL E.O. 10; 2020 IL E.O. 32; 2020 IN E.O. 8; 2020 MN E.O. 20; 2020 MN E.O. 33; 2020 MN E.O. 47; 2020 MS E.O. 11; 2020 MS E.O. 12; 2020 MN E.O. 23; 2020 MT E.O. 500; 2020 NC E.O. 121; 2020 UT E.O. 500; 2020 UT E.O. 501; 2020 UT E.O. 502; 2020 WA E.O. 520; 2020 WI E.O. 511; 2020 WI E.O. 528.

⁸³ See Arkansas H.B. 1724 (2021); Cal. Rules of Court, App. I, CA ST RULES OF COURT App. I; NJ Directives Dir. 12-20; 9 NYCRR 8.202.48; 2020 NC E.O. 135; 2020 WA E.O. 584; 2020 WA E.O. 543.

⁸⁴ See Arkansas S.B. 340 (2021).

⁸⁵ See Colorado H.B. 21-1100 (2021); Illinois S.B. 730 (2021).

⁸⁶ See Arkansas H.B. 1063 (2021); Arizona H.B. 2454 (2021); Hawaii S.B. 970 (2021); Maryland S.B. No. 3 (2021); Maine Ch. 291 S.P. 50 (2021).

⁸⁷ See 2020 AL E.O. P20-05; 2020 Alaska Laws Ch. 10; Arizona S.B. 1377 (2021); 2019 CA E.O. 43-20; 2020 CO E.O. D20-20; 2020 CT E.O. 7FF; 2020 FL E.O. 20-85; 2019 HI E.O. 20-02; 2021 ID E.O. P21-01; 2019 IL E.O. 20-09; 2019 IA E.O. P20-03; 2019 KS E.O. 20-08; 2020 LA E.O. P20-32; 2020 MD E.O. 26; 2019 MA E.O. E20- 2019 MN E.O. 20-B; 2019 MN E.O. 20-28; Montana H.B. No. 435 (2021); 2019 NE E.O. 20-12; 2019 NH E.O. 20-04; 2019 ND E.O. 20-05; SC Act 99 (2021); TX S.B. No. 6 (2021); 2020 UT E.O. 20-69; 2019 WA E.O. P20-29; 2020 WV E.O. 7.

⁸⁸ See State of New York, *Excelsior Pass* <<https://covid19vaccine.health.ny.gov/excelsior-pass>> accessed 19 August 2021.

⁸⁹ See Arkansas S.B. 615 (2021).

⁹⁰ See Arkansas H.B. 1547 (2021); Arizona S.B. 1824 (2021).

⁹¹ See, e.g., Arkansas S.B. 663 (2021), H.B. 1061 (2021).

⁹² See Colorado S.B. 21-214 (2021).

and create oversight and coordination mechanisms for outbreaks at the facility level.⁹³

One area in which divergent state practices have emerged is the ability of family members to visit relatives in hospitals and long-term care facilities during the pandemic. In some states, these visits were banned from the early stages of the pandemic onward and are only now beginning to re-open, albeit with masking and other precautionary measures still in place.⁹⁴ However, in other states, laws were adopted to specifically require that hospitals and care facilities admit visitors subject to precautionary measure guidelines from the CDC.⁹⁵

Recognizing the intensive impacts of Covid-19 treatment on the medical community, some states have adopted measures that allow medical professionals needing time off after these rotations due to physical and emotional impacts to qualify for workers' compensation benefits.⁹⁶

4. Conclusion

The US response to Covid-19 has been diverse.

From federal mandates aiming to secure vaccine's availability and provide economic relief to US citizens to state-mandated movement restrictions and measures to facilitate economic recovery, Covid-19 has impacted US policy-making in unprecedented ways. Some of the state measures have helped fill in the gaps left by the federal-mandated measures. However, the juxtaposition of national and state legal and regulatory responses has proven to be an obstacle in comprehensively addressing the current public health crisis. Legal and health governance is crucial in times like these.

As the Delta variant brings new challenges to the healthcare system, the policy measures will once again be tested. The challenge now is to build back better in a way that ensures economic recovery and stability, but also prevents future pandemics from hitting the country as hard as Covid-19 has.

⁹³ See Connecticut S.B. 1030 (2021).

⁹⁴ See Centers for Medicare and Medicaid Services (CMS), *Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes* (CMS, 13 March 2020) <<https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and/guidance-infection-control-and-prevention-coronavirus-disease-2019-covid-19-nursing-homes-revised>> accessed 19 August 2021.

⁹⁵ See Alabama H.B. No. 521 (2021); Connecticut H.B. 6634 (2021); Maryland H.B. No. 983 (2021); NY A. 6966 (2021).

⁹⁶ Connecticut S.B. No. 660 (2021).

Belgian Responses to COVID-19

Matteo Fermeglia and Steven Van Garsse

Abstract. This contribution appraises the most relevant measures adopted in Belgium against the spread of the Covid-19 Pandemic. Moreover, it underscores how the complex Belgian institutional setup has hampered the adoption of prompt and effective responses to the Pandemic. To this end, in Section 1 it fleshes out the structure of the Belgian state, in particular highlighting the tangled division of competences across different levels of government. In Section 2 and 3, it analyses the measures adopted by the Federal, Regional and Local governments amidst the most severe phase of the Pandemic's outbreak. Relevant, the unclear allocation of competences and powers among levels of government as to the adoption of Covid-19 measures led to legal and institutional conflicts. In Section 4, 5 and 6 it skims through the evolution of the emergency regulatory regime following the Covid-19 spread, the measures aimed at contact-tracing and those aimed at supporting economic activities, respectively. In Section 7, it displays the most relevant domestic case law against the adopted Covid-19 measures. Last, in Section 8 it analyses the latest developments towards a new comprehensive legal regimes to tackle the current and future massive health crisis in Belgium.

Keywords: COVID-19, Belgium, COVID-19 Measures, COVID-19 Law

1. Introduction

Like many other European countries, the outbreak of the Covid-19 (or Covid-SARS 2) Pandemic in 2020 took Belgium by surprise. To date, more than 22,000 people have died because of Covid-19 and more than 60.000 people have been hospitalized. Hospitals have been repeatedly put under severe pressure as intensive care units were overloaded. To prevent the healthcare system from collapsing, unprecedented measures have been taken by the Belgian federal government in an attempt to curb the spread of the virus. At the same time, plans were and are being made to jump-start the economy also in light of the unprecedented recovery plan launched by the European Commission (NextGenEU).

In this article we will outline the most relevant Belgian responses to Covid-19. To this end, we first focus on the overarching organization of the Belgian State. This is relevant as the peculiar Belgian constitutional and institutional setup has played (and still plays) a prominent role in order to fully understand Belgium's responses to both the

onsetting Covid-19 sanitary and economic crisis. Second, we provide an overview of the main regulatory measures and the case law related to the Covid-19 restrictions. Third, we specifically focus on contact tracing and vaccination measures. Fourth, we address the Belgian adopted Federal, Regional and local measures to support the economy. Last, we conclude by shedding a light on future developments in terms of the adoption of a comprehensive legal framework in Belgium for the Covid-19 Pandemic.

2. Belgium is a Federal State

Belgium is a complicated country. It is a federal state, composed of the Federal level, the Regions and the Communities.¹ While from a legal standpoint such entities operate more or less on an equal footing, they are attributed different powers and competences in different fields. These three entities make up the first tier of competences in Belgium.²

¹ Belgian Constitution: <https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf> accessed 30 Septmeber 2021.

² Patricia Popelier and Catherina Van de Heyning, 'The Belgian Constitution: The Efficacy Approach to European

and Global Governance', in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019).

The Federal level retains powers in the area of foreign affairs, national defence, national security and public order enforcement, justice, finance, social security, important parts of national health and domestic affairs.

The three Regions – Flanders, Wallonia and the Brussels Capital Region – enjoy a wide competence with regard to economic matters, including employment, agriculture, water policy, housing, public works, energy, transport (except Belgian Railways), environment, town and country planning and more generally keep oversight (together with the Communities) on the initiatives taken at the local level – i.e. by Provinces, Cities and Municipalities.

The three Communities – the Flemish community, the French community and the German-speaking community – are competent for other aspects related to health, culture, education and some aspects of justice.

Besides this first tier, Belgium comprises 10 Provinces and 581 Cities/municipalities. Cities and Municipalities are competent for local matters, under the oversight of the Regions. For example, Cities retain competence over public order's enforcement at the local level. Last, Provinces are secondary administrations that exercise their powers in autonomy and have extensive powers, e.g., in the fields of education, social and cultural infrastructures, preventive medicine and social policy.

This very short overview of the division of powers in Belgium illustrates the difficulties in dealing with an acute and widespread crisis such as the Covid-19 Pandemic. Indeed, the outbreak of the Pandemic has unfolded a Gordian Knot, insofar as such complex allocation of powers and competences allowed no single entity at a given level to adopt full-fledged response measures. In fact, while comprehensive measures may be adopted at the Federal level, such measures could well be undermined by a lack of measures at the regional levels and even at municipal level. Thus, to ensure effective implementing measures are taken requires close cooperation across all relevant levels of government. In practice, this means establishing a thorough coordination between the Federal Ministers and Parliament, the Regional Ministers and Parliaments, the Provincial Governors, the Mayors, as well as of course all relevant Federal-Regional-Local administrations. Yet overall, this has

proven all but an easy task in the wake of the Covid-19 Pandemic.

In the following paragraphs we will explain the organisational setup adopted in Belgium and the most relevant measures adopted in the fight against Covid-19.

3. The Federal Level Took the Lead in the COVID-19 Pandemic

Against the above institutional setting, the Federal government firmly took the lead in the wake of the outbreak of the Pandemic in early 2020 (the so-called 'federal phase'). Whilst no specific legislation or plan was in place to deal with Pandemic events, the Federal government grounded its response measures on several existing federal laws. In particular, the Civil Safety Act 2007 (*Wet Civiele Veiligheid 2007*) was relied upon. Articles 181 and 182 of the Civil Safety Act allocate specific powers to the Federal government regarding the requisition and evacuation of the public, e.g. by restricting free movement or assigning a temporary residence to parts of the population.

Based on Articles 181 and 182, the Belgian National Security Council decided to take far-reaching measures to fight against the onsetting Covid-19. A state of emergency was declared over the entire country's territory. On March 13, 2020, the federal phase for the coordination and management of the Covid-19 crisis was officially launched in Belgium and hence 'urgent measures' were issued to limit the spread of the virus.³

The proclamation of this 'federal phase' had two important legal consequences. First, the Federal government was charged with the responsibility of coordinating the responses to the sanitary crisis. This came as a direct effect of the proclamation of the federal phase, pursuant to an existing Royal Decree regulating emergency planning.⁴

Second, decisions at the Federal government's level, mostly by the Minister of Interior Affairs, were taken under a set of Ministerial Decrees. It is primarily through these decisions that Belgium has implemented restrictive Covid-19 measures.

Having established a legal framework, the Belgian Federal government could finally pursue direct measures to halt the spread of Covid-19. Such measures have been iteratively amended, repealed or renewed depending on the virus's spread and with a view prevent the healthcare systems from collapse due to too many patients recovered

³ Ministerial Decree of 13 March 2020 declaring the federal phase on the coordination and management of the coronavirus crisis COVID-19, Belgian Official Gazette of 13 March 2020.

⁴ Royal Decree of 22 May 2019 on emergency planning and management at te municipal and provincial

level and on the role of mayors and provincial governors in case of crisis events and situations requiring coordination or management at the national level, Belgian Official Gazette of 27 June 2019.

(especially in Intensive Care Units). Below is a list of the most relevant regulatory measures adopted in the federal phase.

Federal level: overview of Ministerial Decrees:

- Ministerial Decrees of 13 and 18 March 2020 taking urgent measures to limit the spread of the coronavirus COVID-19⁵;
- Ministerial Decree of 23 March 2020 taking urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decrees of 24 March, 3, 17 and 30 April, 8, 15, 20, 25 and 30 May and 5 June⁶;
- Ministerial Decree of 30 June 2020 taking urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decrees of 10, 24, 28 July, 22 August, 25 September and 8 October 2020⁷;
- Ministerial Decree of 18 October 2020 taking urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decree of 23 October 2020⁸;
- Ministerial Decree of 28 October 2020 taking urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decrees of 1 and 28 November, 11, 19, 20, 21 and 24 December 2020, 12, 14, 26 and 29 January, 6 February, 6, 20 and 26 March and 24 and 27 April 2021⁹.

The substance of these measures is akin to those adopted by many other countries in the world, particularly in the European Union. Therefore, the essential objective of these measures was (and still is) to ensure social distancing and limit physical contact between persons as much as possible, thereby hopefully preventing the spread of the virus.

In practice, the above regulatory measures established a set of prohibitions limiting the exercise of economic activities and, ultimately, impinging on individuals' freedom. These measures include:

- Closing of restaurants and bars;
- Closing or restricting of (non-essential) shops;
- Closing or restricting music and theatre halls, museums and other public spaces;

- Closing or restricting fitness centres, sports infrastructures, swimming pools, wellness centres, etc.;
- Closing or restricting campsites, amusement parks, etc.;
- Prohibiting or restricting markets and fairs;
- Compliance with (hand) hygiene rules;
- Compliance with social distancing rules;
- Mandatory tele-working;
- Prohibition of worship;
- Prohibition or restriction of cultural, sports, and other outdoor activities;
- Prohibition of (certain) gatherings;
- Obligation to wear a face mask;
- Prohibition of (non-essential) travelling from and to Belgium (travel ban);
- Restricting gatherings in the private sphere ('bubbles');
- Prohibition of non-essential movements;

Yet certainly the most far-reaching measure imposed in Belgium in the fight against the Covid-19 crisis thus far (like in other countries in the initial phase of the Pandemic) was the general obligation for all citizens to remain locked-down at home the whole day with only a few exceptions (for example, to buy essential groceries or for compelling health reasons). This measure was imposed beginning March 18, 2020 right after the outbreak of the Pandemic and lasted until the beginning of June 2020.

Furthermore, besides the above Federal measures, Regional and Local governments adopted additional Covid-19 measures. In fact, Mayors and Province Governors still remain responsible for ensuring 'public order', albeit within the territory of their Municipality or Province. Importantly, this competence is withheld also in case of a national crisis such as the Covid-19 Pandemic. In Belgium, 'public order' is a broad concept that also involves the protection of public health, which is relevant in view of the unfolding Covid-19 crisis. Such powers are grounded primarily in the New Municipality Act (*Nieuwe Gemeentewet*) and the Province Act (*Provinciewet*). These powers have thus been used extensively

⁵ Ministerial Decree of 13 and 18 March 2020 on urgent measures to limit the spread of the coronavirus Covid-19, Belgian Official Gazette of 18 March 2020.

⁶ Ministerial Decree of 23 March 2020 on urgent measures to limit the spread of the coronavirus Covid-19, Belgian Official Gazette of 23 March 2020, as amended by Ministerial Decrees of 24 March, 3, 17 and 30 April, 8, 15, 20, 25 and 30 May and 5 June.

⁷ Ministerial Decree of 30 June 2020 on urgent measures to limit the spread of the coronavirus Covid-19, Belgian Official Gazette of 30 June 2020, as amended by

Ministerial Decrees of 10, 24 en 28 July, 22 August, 25 September and 8 October 2020.

⁸ Ministerial Decree of 18 October 2020 on urgent measures to limit the spread of the coronavirus Covid-19, *Belgian Official Gazette* of 18 October 2020, as amended by Ministerial Decree 23 October 2020.

⁹ Ministerial Decree of 28 October 2020 on urgent measures to limit the spread of the coronavirus Covid-19, Belgian Official Gazette of 28 October 2020, as amended by Ministerial Decree 1 and 28 November, 11, 19, 20, 21 and 24 December 2020, 12, 14, 26 and 29 January, 6 February, 6, 20 and 26 March and 24 and 27 April 2021.

during the Covid-19 crisis to adopt more restrictive measures at the local level, based on the degree of infection rates. For example, in August 2020 while Federal measures were being relaxed due to the decrease of infections, the Antwerp Province enacted a curfew on its whole territory in light of the local increase of the spread of Covid-19.¹⁰ Notably, this measure anticipated the adoption of a curfew at the Federal level some months later.

As a matter of principle, however, during the federal phase Local authorities must first consult with the higher competent authorities before adopting any additional restrictive measures.¹¹ Decisions taken without prior consultation and approval of the higher competent authorities can be annulled by those authorities. This has been the case with regard to the municipality of Deinze, where the Mayor mandated the use of face masks in supermarkets within the territory of the Municipality, in absence of such obligation under Federal regulations and without prior consultations with the Province of East-Flanders. This order was thus annulled by the Governor of the province of East-Flanders.¹²

Covid-19 measures have been also adopted at the Regional level (within its sphere of competence). Examples include the adoption of a Statute of 20 March in Flanders on measures to be taken in the event of a public health related civil emergency.¹³ This was the basis for subsequent Executive Decrees such as one aimed to extend or suspend the procedural deadlines and procedural requirements set out in immovable heritage legislation, in order to guarantee maximum legal certainty for citizens and recognised actors (including recognised immovable heritage municipalities, intermunicipal immovable heritage services, archaeologists) and one in order to extend the time-limits of the permit proceedings.

After a general relaxation of emergency measures during Summer 2020 and another lockdown declared by the end of October 2020, in the beginning of 2021 a certain relaxation occurred again, albeit that several measures became more restrictive at the same time. Examples of more restrictive measures include the ban on non-essential foreign travel to and from Belgium (coupled by mandatory testing and self-isolation upon entry). During the first lockdown, most Member-States of the EU implemented a strict

travel ban and/or border controls. Currently, however, most Member-States do not hold similar travel bans anymore, which is why the European Commission had subsequently expressed concern about Belgian travel restrictions.

Another evolution of the regulatory responses regards the new guidance issued on face masks. In fact, at the beginning of 2021 the rules became more strict as covering nose and mouth with a scarf or bandana is now no longer deemed sufficient and face masks must be used. At the same time it was stressed that employees should wear masks at their workplace at all times, even if they are more than 1.5 meters away from other colleagues.

As to relaxation measures, examples include the fact that hairdressers in Belgium have been allowed to reopen on 13 February - with other contact professions such as beauty salons and tattoo parlors following on 1 March. Holiday villages and campsites were also reopened on Monday 8 February, and animal parks on 13 February. Furthermore, real estate agents were again allowed to show potential buyers and tenants around properties.

As the third Covid-19 upsurge hit the country in March 2021, a new lockdown was ordered on March 24, albeit in a slightly less restrictive fashion as compared to that imposed during the first outbreak in early 2020. New measures include, for example, the possibility to only shop by appointment taken in advance and the so-called 'window-duty', requiring tourists travelling by train to occupy only places next to a window and requiring hairdressers to once again close their shops.

To take restrictive measures is one thing. Implementing them, however, is another issue. This requires close operational cooperation, concertation and timely implementation of measures and policy. *Discrepancies as to the level of cooperation among different levels of government and uncertainty on competencies have affected the effectiveness of the Covid-19 responses in some parts of the country.* Examples include the discussion on providing face masks to mental health units. Whereas Flanders is competent for regional hospitals and many other regional health institutions (psychiatric nursing homes included), mental health units are excluded.¹⁴ This confusion caused a delay.

¹⁰ Police Regulation of 29 July 2020 (Politieverordening van de gouverneur van 29 juli 2020 betreffende aanvullende maatregelen in de strijd tegen het coronavirus COVID-19), as amended by the Police Regulations of 5 and 12 August 2020.

¹¹ See Art. 28 of the Royal Decree of 22 May 2019.

¹² Decision of the Province Governor of East Flanders of 1 July 2020 annulling the decision of the Mayor of

Deinze of 30 June 2020 (Besluit van de gouverneur van de provincie Oost-Vlaanderen van 1 juli 2020 houdende vernietiging van het besluit van de burgemeester van Deinze van 30 juni 2020).

¹³ Official Gazette of 24 March 2020.

¹⁴ See <<https://www.vrt.be/vrtnws/nl/2020/05/29/waarom-niet-enkel-de-staatsstructuur-de-belgische-corrna-aanpak/V>> accessed 25 October 2021.

Enforcement of the measures was also an issue due to the division of powers between the different levels of government. An example is the decision to order obligatory quarantines for certain people. This was a decision of the Federal government, but in order to enforce these quarantines, legislative action from the Regions was required.

Furthermore, there was also discussion on how to best punish offenders. Non-compliance with the corona measures can lead to criminal enforcement, via imprisonment and criminal fines up to € 4000.¹⁵ It should be noted that, during the first wave of Covid-19, the possibility was added to enforce these measures via also (local) administrative fines, based on a Royal Decree.¹⁶ However, this system was open to criticism, e.g. regarding the added value in view of the already existing criminal system, and was not further extended.¹⁷

4. Overview of Important Case Law

The restrictive measures adopted at the Federal and Local level have had a serious impact on people's lives, rights and freedoms. Hence, as happened also in other countries, several individuals and companies challenged many of the measures adopted by public authorities.

Many of the legal challenges against Covid-19 measures have been filed under the fast-track, "extreme urgency" procedure before the Council of State (located in Brussels), which leads to an accelerated judgment if the claimant can prove an imminent danger, such as a risk of bankruptcy. Yet in most cases, the applicants failed to prove such requirement, thus resulting in a lot of dismissed requests. We report here four relevant cases before the Belgian Council of State.

The first decision (issued on 27 April 2020) rejected a challenge brought to the general imposition adopted during the first federal phase with regard to closure of shops, restaurants and public spaces. In this decision, the Council of State recognised a (very) wide discretion at the disposal of the competent administrative authority considering the ongoing urgent health crisis. Thus, in the Court's view, 'in light of the urgent fight against an unprecedented and most serious (international) health crisis' in Belgium, the Federal ministries entertain the 'widest discretionary power' in

adopting measures also when limiting the exercise of economic activities.¹⁸

In the second decision (issued on 30 October 2020), a challenge was brought to the curfew imposed over the whole Belgian territory by the Federal government, also regarding the legal grounds under which it has been adopted (i.e., the 2007 Civil Safety Act).¹⁹ The Council of State upheld the aforementioned law as a sufficient legal basis for a curfew measure imposed via a Ministerial Decree. This view has been confirmed in another decision of the Council of State, as well as in other decisions adopted by trial judges.²⁰

Interestingly, in another decision (dated 8 December 2020), the Council of State annulled the (then) adopted Covid-19 Federal rule generally prohibiting acts of worship except under limited circumstances (e.g., only spouses, their witnesses and the registrar could then attend weddings).²¹ In fact, the Council of State considered this measure to entail a disproportionate restriction of the freedom of religion. However, in a successive case the same Council of State upheld a Federal measure that while generally allowing the collective practice of worship in buildings, though limited such practices to a maximum of 15 people.²² According to the Council, the competent authority had made it sufficiently plausible that the contested restriction is necessary to protect public health in the context of the corona pandemic. The Council of State also considered that the norm in question did not conflict with, among other things, the freedom of religion, the equality principle and the proportionality principle.

Furthermore, on 2 February 2021, the Council of State annulled a Federal rule imposing the closure of holiday parks and camping areas over the Belgian territory.²³ According to the Court, no sufficient justification was given by the Federal Ministry as to the differential treatment between the kinds of accommodation targeted by the measure and other types of accommodation that were not affected by the measure (e.g. hotel rooms, B&B rooms, etc.).

Last but not least, several civil and criminal courts rendered judgements declaring (some of

¹⁵ See Art. 187 of the Civil Safety Act 2007.

¹⁶ Royal Decree no 1 of 6 April 2020, Belgian Official Gazette of 7 April 2020.

¹⁷ See Liesbeth Todts, 'Corona op lokaal niveau: de juridische mogelijkheden en grenzen van een lokaal coronabeleid' (2020) 4 Tijdschrift voor Wetgeving 292, 300.

¹⁸ Council of State, 27 April 2020, no.247.452.

¹⁹ Council of State, 30 October 2020, no.248.819.

²⁰ Council of State, no.248.818 of 30 October 2020; see also Correctional Court of Charleroi, 10 February 2021. However, see *contra* (earlier): Police Court of Charleroi, 21 September 2020; *cf.* Correctional Court of Brussels, 28 October 2020.

²¹ Council of State, 8 December 2020, no.249.177.

²² Council of State, 22 December 2020, nos.249.313, 249.314 and 249.315.

²³ Council of State, 2 February 2021, no.249.685.

the) the measures or sanctions illegal.²⁴ Arguments included the weak legal basis and in criminal/police cases the principle of *nulla poena sine lege*.

5. Contact Tracing & Vaccination Campaign

Like many other countries, Belgium organised contact tracing as a measure to track down and limit the spread of the virus. In Eastern countries, very methodical and efficient track & trace-systems were part of the reason that these countries were able to limit the impact of the pandemic.

At first, Belgium established a manual track & trace-system. However, due to the complex federal structure of Belgium this was not an easy task. The Federal level had no competence to organise a nation-wide system and had to let the Region take the initiative. This included enacting three different Regional decrees on contact tracing and setting up cooperation mechanisms among local governments. Finally, at the end of September 2020, Belgium also launched a contact-tracing app, called 'Coronalert'. The Regions have commissioned and outsourced the development of Coronalert. It is a free app for mobile phones. The Coronalert app uses Bluetooth technology to speed up contact detection in Belgium.

Vaccination was also organised by the Regions as this was within their competence. 95 temporary vaccination centres were founded with the help of Provinces and Municipalities, although the Covid-19 vaccination campaign is not proceeding at the adequate pace (as in almost all EU countries) due to several administrative constraints and vaccines delivery setbacks.

6. Measures Adopted to Sustain and Support Economic Sectors

Many of the adopted Covid-19 restrictive measures entail severe impacts on certain industries and businesses. Entire industries had to shut down abruptly, while other companies had to reinvent themselves. Therefore, alongside fighting the spread of the Pandemic, like many other countries in the world Belgium enacted specific measures to support the economy in general and certain industries in particular. All levels of government adopted different kind of measures to this aim, within their respective competences. The Federal level eased the procedure to allow workers on temporary unemployment due to *force majeure*, which gives financial breathing room to employers

who do not have to pay their employees while ensuring that the employees do not lose their jobs. It also installed a temporary moratorium on company bankruptcies (which ended in February). Local and Regional authorities granted direct subsidies to support specific economic sectors (e.g., small industries, bars, restaurants) in most financial distress due to the Pandemic.

Overall, a large majority of the measures adopted across all levels of government were tax measures, such as tax reductions, allowing delayed payments, tax credits, a new tax shelter system specifically for Covid-19, etc. Fiscal encouragement is also given to landlords, who forego all or part of rent due for the months of March to May 2020 (i.e., during the first mandatory lockdown) in the form of a 30% tax-reduction for the cancelled rent. In the public sector, public landlords dismissed all or part of the rentals of business that were closed.

Besides the above direct tax measures, Belgium has also adopted a series of indirect measures related to taxation. Examples include:

- Exemption from VAT and import duties for goods needed to combat the effects of the COVID-19 outbreak;
- Reduced VAT rate on the supply, the intra-Community acquisition, and the import of protective equipment;
- Temporary administrative tolerance for VAT deduction on company cars;
- Temporary reduction in the VAT rate on certain restaurant and catering services.

Some social measures were also introduced. An important measure relates to granting parental leave for employees, to allow them to combine work with childcare. The social elections were also postponed.

7. Concluding Remarks: A Covid-19 Law in Sight?

Belgium faced and is still facing huge difficulties in managing the Covid-19 crisis. Importantly, most of the issues stem from the complex system of allocation of powers and competences between the Federal level, the Communities and the Regions. In this regard, the Covid-19 outbreak has clearly unfolded the several pitfalls arising when there is a need to ensure coordination amongst different levels of government holding sometime overlapping competences and without a clear-cut hierarchy in place.

²⁴ Police Court of Charleroi, 21 September 2020; *cf.* Correctional Court of Brussels, 28 October 2020; Police Court of Charleroi 22 oktober 2020; Correctional Court of Kortrijk 20 July 2020; Tribunal de première instance

francophone de Bruxelles, Section civile, Ordonnance 2021/14/c, March 31, 2021, *Association Ligue des droits humains v. L'État Belge*.

There was also criticism and legal uncertainty related to the legal basis used to overcome this institutional conundrum. The aforementioned Civil Safety Act 2007 ultimately provides for a direct allocation of regulatory powers to (inter alia) the Federal Minister of the Interior, but such concentration of power was subject to a lot of criticism from many public figures. Lawyers' associations from each of Belgium's three language communities have criticised the excessive use of Ministerial Decrees to pass coronavirus measures often entailing severe restrictions on individuals' civil, social and political rights, without the necessary legal scrutiny and democratic approval in parliament. They argue that the rushed implementation of 'coronavirus decrees' leaves the measures, and potential sanctions, open to interpretation.²⁵ Moreover, experts have also pointed to the risk of the judiciary reversing decisions taken by public authorities (e.g., on sanctions for violation of the existing Covid-19 measures) in the future due to the lack of previous parliamentary scrutiny about the adopted Covid-19 related regulation.

These critics thus begged the question, whether a specific, formal legal basis should be adopted to ground such severe restrictions on fundamental rights like the measures taken during the Pandemic. Numerous possible advantages of such a formal legal basis can be identified, such as:²⁶

- No regulatory powers to a one-headed administrative body (i.e., one Minister);
- (More) parliamentary scrutiny;
- A structural legal framework for a more coordinated crisis management;
- A more solid legal basis, with respect for the legality principle and the fundamental rights;
- A list of possible measures *c.q.* restrictions on fundamental rights (foreseeability of the measures);
- More legal certainty;
- A clearly delineated framework within which severe restrictions/measures are (temporarily) possible.

As the same Belgian Prime Minister, Alexander de Croo, commented: "Fighting a pandemic often

requires far-reaching measures". Hence in February 2021, the Belgian Federal government has drafted a proposal for a comprehensive "Pandemic Act". The Pandemic Act draft has been officially approved by the cabinet of Ministers of 26 February 2021 and has now to be approved by the Federal Parliament.²⁷ If adopted, the pandemic law can be used for the Covid-19 pandemic, as well as for any future health emergencies caused by infectious disease. The Pandemic Act's adoption has now been also fast-tracked in light of a recent judgment by the Brussels Civil Court, which deemed the 2007 Civil Protection Act as not a sufficient legal basis for the adoption of the Covid-19 Ministerial Decrees, and therefore ordered the Belgian State to lift all Covid-19 measures by 30 days (i.e., before April 30, 2021).²⁸ The Belgian government has announced it will lodge an appeal against the Court's decision.

According to the draft Pandemic Act, a 'Pandemic Emergency' shall be promulgated by the King by Royal Decree for a maximum duration of three months. The decision should be taken on the basis of objective scientific data, after advice from the Minister of Public Health and after consultation in the Council of Ministers and with the Regions. The Royal Decree declaring the Pandemic Emergency must be ratified by law within a period of in principle two, up to maximum five days. When a Pandemic Emergency is declared, the Minister of the Interior, after consultation in the Council of Ministers, shall take the necessary measures in order to prevent or limit the consequences of the pandemic. Those measures must be necessary, appropriate, and proportionate to the objective pursued, as well as limited in time. When local circumstances require, Province Governors and Mayors can take additional measures, in accordance with the instructions of the Minister. The Pandemic Act lists out all the categories of possible concrete measures to be adopted by the Minister - which are similar to those already in place to fight the Covid-19 Pandemic. Last, the Pandemic Act provides for civil and criminal sanctions in case of violation of the measures adopted by the Minister pursuant to the Pandemic Act.

Although this proposal as such is positively received, it is nevertheless open to criticism, inter

²⁵ The Bulletin, 'Belgium's third wave of coronavirus, February-May 2021', (2021), The Bulletin <<https://www.thebulletin.be/updated-our-practical-guide-how-belgiums-coronavirus-measures-affect-you-0>> accessed 25 October 2021

²⁶ See, e.g. Patricia Popelier, 'Crisisbeheer per ministerieel besluit' (2010) 4 Tijdschrift voor Wetgeving 282.

²⁷ The Belgian Council of State, Legislation Section, has given its advice on April 7, 2021 (Conseil d'État,

section de législation, avis no. 68.936/AG du 7 avril 2021 sur un avant-projet de loi 'relative aux mesures de police administrative lors d'une situation d'urgence épidémique').

²⁸ Tribunal de première instance francophone de Bruxelles, Section civile, Ordonnance 2021/14/c, March 31, 2021, *Association Ligue des droits humains v. L'État Belge*. The judgment also condemns the State to a fine of 5.000 EUR/day should the State not comply timely with the decision.

alia because the new act would still empower one minister (the Minister of Interior Affairs) to decide on the measures to be taken. Whether this will mark a shift towards comprehensiveness, transparency, and legal certainty in the Belgian fight against the current and future major crisis, still has to be seen.

COVID-19 and Government Response in Germany. Building Resilience by Comparison of Experiences

Part I

Cristina Fraenkel-Haeberle

Abstract. This contribution investigates the German response to the COVID-19 pandemic. The analysis highlights the measures taken by the German government in cooperation with subnational units to mitigate the spread of infections, as well as the efforts made to stem the economic consequences of the containment measures. The emergency situation turned out to be a real stress test for the German legal system, and a serious challenge for democratic institutions.

Keywords: *Germany, COVID-19, Federalism, Rule of Law, Fundamental Rights*

1. The German Response to COVID-19

When COVID-19 broke out more than a year ago, Germany was initially very cautious in adopting measures to contain the disease, one reason presumably being that the genuine risk of spread of the virus was not immediately perceived.¹ However, as the critical nature of the situation became apparent, the German government progressively acted with a *crescendo* of prohibitions. This contribution highlights the efforts made by the German government in cooperation with subnational units to tackle the pandemic, as well as the crucial role played by the principle of the rule of law and the requirements of federalism in the German legal system, in spite of the emergency situation.

At the time of writing, the end of April 2021, a hard shutdown has been in force in Germany since mid-December 2020. The shutdown was tightened in January 2021 and was due to continue for at least several weeks. Kindergartens, schools, and shops were closed (except food shops, pharmacies, and banks), and significant events were still not

allowed. Hotels and restaurants have been completely closed since the beginning of November 2020. In February 2021, there was pressure from the *Länder* (the German federated states), which are competent in matters of culture and education, to reopen nursery schools and schools at least. At the beginning of March 2021, this prompted the federal government to draw up a general proposal for reopening, conditional on the trends of coronavirus variants and the availability of vaccines.² Unfortunately, the loosening of restrictions and the strong impact of the variants caused infection rates to soar and intensive care units to quickly reach saturation in hospitals across Germany.³ Thus, the German federal government decided to apply the emergency brake (*Notbremse*) and, accordingly, proposed an amendment to the Federal Infection Protection Act (*Infektionsschutzgesetz*).⁴ This new provision was promulgated on April 22nd, 2021, came into force the next day, and imposed a general extension of the shutdown at the national level until the end of June 2021.⁵

¹ See more extensively Elena Buoso and Cristina Fraenkel-Haeberle, 'La Germania alla prova del coronavirus tra Stato di diritto e misure emergenziali' (2020) *federalismi.it* 20, 75-104 <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=43704>> accessed 30 September 2021.

² See <<https://archiv.cdu.de/www.cdu.de/corona/mpk-beschluesse-3.3>> accessed 30 September 2021.

³ As shown on the homepage of the Robert Koch-Institut <https://www.rki.de/EN/Home/homepage_node.html> accessed 30 September 2021.

⁴ Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (*Infektionsschutzgesetz – IfSG*), 1 January 2001 (BGBl. I, p. 1045), § 28b.

⁵ For a more detailed analysis, see Section 5 of this chapter.

2. National Constitutional and Legal Rules on Emergencies

The COVID emergency involves complex assessments of risk which, being unspecified due to the novel and emergent nature of the virus and associated variants, is difficult to predict and quantify. As observed by well-known German sociologist Niklas Luhmann, democratic decisions and their legitimacy are of fundamental importance in situations of extreme uncertainty, when the actual virulence of a phenomenon is unknown, and it is impossible to precisely assess whether political choices will produce the desired effect.⁶ In line with this approach, Germany used standard parliamentary instruments to deal with the emergency, applying the available legislation, above all police law and the mentioned Federal Infection Protection Act. However, the latter was conceived for more limited epidemics and therefore had to be amended to suit the COVID-19 pandemic.⁷

Like many other countries with democratic and polycentric structures, a key role in crisis management was played by multilayer tables of political consultation. In Germany, this choice was also because the central state (the German Federation) has somewhat limited room to maneuver. According to the federal division of competencies, the German *Länder* were called to take a front-line role in managing the emergency, through regulations and general administrative measures, to implement the federal *Infektionsschutzgesetz (IfSG)*. In this framework (so-called executive federalism, or “*Vollzugsföderalismus*”),⁸ the Federal Government only exercises a power of recommendation, whereas the *Länder* have executive and administrative competence. The Federal Government permanently invited the conference of the Prime Minister of the *Länder* to the negotiating table (so called “*Ministerpräsidentenkonferenz*” – *MPK*). Thus, the quest for common solutions was an essential factor for building resilience and a

hallmark of the German pandemic management system.

This institutional architecture was also reflected in the central government’s role, which was characterized by the power bestowed by the fundamental law on Chancellor Merkel to determine the direction of government policy (*Richtlinienkompetenz*).⁹ This mechanism created convergence and a largely uniform approach throughout the country.¹⁰

In general, the Parliament did not abdicate its function in favor of the executive. Despite the secluded role of the opposition, the mechanisms of parliamentary democracy were not abandoned.¹¹ Parliament approved extraordinary measures against the pandemic in the plenary session. To do so without infecting each other, the following elementary precautions were taken. There was very pragmatic agreement on the need for one out of two members of Parliament. Since the parliamentary regulation states that the *Bundestag* can deliberate in the presence of 50% of its members,¹² the regulation was amended, lowering the structural quorum to a quarter of parliamentarians until the next national elections (September 26th, 2021).¹³ This regulation was considered compliant with democratic principles since members of Parliament had in any case been given the right to attend the sessions.¹⁴

3. Rule of Law, Obligation to Quote, and Principle of Essentiality

The decisive role of Parliament is an expression of the great importance of the principle of legality in Germany.¹⁵ Administrative activity, especially limitations to fundamental rights, must be expressly authorized by the legislative body. Fundamental rights are, therefore, real “counter-limits” for emergency measures.¹⁶ In this regard, constitutional jurisprudence has developed the “principle of essentiality” (*Wesentlichkeitsprinzip*), as a derivation of democratic principles and the rule

⁶ Niklas Luhmann, ‘Legitimation durch Verfahren’ (Frankfurt am Main, 2001), 174, 203.

⁷ Matthias Friehe, ‘Freiheit in höchsten Nöten: Warum die Corona-Krise nicht zum Verfassungsnotstand stilisiert werden darf’ (VerfBlog, 28 March 2020) <<https://verfassungsblog.de/freiheit-in-hoehsten-noeten/>> accessed 30 September 2021.

⁸ German Basic Law (*Grundgesetz – GG*), Art. 83.

⁹ German Basic Law (*Grundgesetz – GG*), Art. 65 (1).

¹⁰ Gerolamo Taccogna, ‘L’ordinamento giuridico tedesco di fronte al virus Sars-CoV-2’, in L. Cuocolo (ed.), *I diritti costituzionali di fronte all’emergenza Covid-19. Una prospettiva comparata, Osservatorio emergenza Covid-19 (2020) 93* <103.-Articolo-Cuocolo-I-diritti-cost.pdf (fanti-grossi.it)> accessed 30 September 2021.

¹¹ Sophie Schönberger, ‘Die Stunde der Politik’ (VerfBlog, 29 March 2020) <<https://verfassungsblog.de/die-stunde-der-politik/>> accessed 30 September 2021.

¹² Geschäftsordnung des Deutschen Bundestages (GO-BT), 25 June 1980 (BGBl. I, p. 1237).

¹³ Besondere Anwendung der Geschäftsordnung aufgrund der allgemeinen Beeinträchtigung durch COVID-19, 25 March 2020 (BGBl. I, p. 764, no. 17), § 126a GO-BT.

¹⁴ Matthias Friehe, ‘Freiheit in höchsten Nöten’ (n 7).

¹⁵ See Horst Dreier, ‘Rechtsstaat, Föderalismus und Demokratie in der Corona-Pandemie’ (2021) *Die Öffentliche Verwaltung*, 229.

¹⁶ Anna-Bettina Kaiser, ‘Ausnahmeverfassungsrecht’ (Tübingen, 2020) 207.

of law.¹⁷ In compliance with this principle, the basic rules governing the action of the public administration must be established by Parliament and not delegated to executive regulations, especially if these rules are essential for the protection of fundamental rights. This again shows the strong involvement of the Parliament in the German system.¹⁸

Moreover, Article 19 of the German Constitution, alias Basic Law (*Grundgesetz – GG*), the so-called “obligation to quote” (*Zitiergebot*), requires the legislator to expressly indicate the constitutional source of a restricted fundamental right when proposing and adopting such measures. Thus, according to the *Infektionsschutzgesetz*, for example, the right to personal freedom (Article 2, paragraph II, second sentence, *GG*), freedom of assembly (Article 8 *GG*), and freedom of movement (Art. 11, paragraph I, *GG*) may be affected.

Solid protection of fundamental rights, as a barrier to the power of state bodies, even in emergency situations, is also provided by another provision of the German Basic Law (Article 19, paragraph II, *GG*), according to which in no case can the indelible core of a fundamental right be infringed (so-called “*Wesensgehaltsgarantie*”).¹⁹ This absolute bar is based on the hypothesis that the dignity of man is an inalienable right, under Art. 1, paragraph I, *GG*, constitutes the essential nucleus of every fundamental right and enjoys absolute protection.²⁰

4. Government Response to COVID-19: Deactivation of the “Debt Brake”

Germany quickly perceived COVID-19 as having dramatic downsides for the economy. In March 2020, immediately after the imposition of shutdown by all the *Länder*, and with remarkable speed and a vast majority, the German Parliament

(*Bundestag*) passed a supplementary budget allowing new debt of over 150 billion EUR. The package was approved by the second chamber of Parliament (*Bundesrat*) two days later. The measure necessarily entailed deactivating the so-called “debt brake” (*Schuldenbremse*), added to the German Constitution in 2009.²¹ According to this provision, the ban on contracting new debt (under Article 115, paragraph II *GG*) can be waived “in the event of natural disasters or extraordinary emergency situations beyond state control and that significantly threaten public finances.” An absolute majority of the *Bundestag* (so called “*Kanzlermehrheit*”, which is the majority required by Art. 63 *GG* for election of the Chancellor) is necessary to waive the ban, and the resolution must be accompanied by a repayment plan with an adequate amortization period. Therefore, it was decided that debt contracted due to the pandemic could be paid off in 20 years, starting 2023.²²

For several years after the economic crisis of 2008, the Minister of Finance strenuously opposed a budget deficit, remaining firmly anchored to the ideal of the so-called *schwarze Null* (balanced budget).²³ However, with the spread of the pandemic, the government was paradoxically very eager to adopt immediate support measures to the economy, called *Soforthilfe*. The social-democratic Minister of Finance, Olaf Scholz, declared that he was a “convinced Keynesian,”²⁴ sustaining the economic theories of John Maynard Keynes regarding anti-cyclic measures and deficit spending by the state in times of crisis.

The program of immediate measures to support the economy included lump-sum subsidies to micro-enterprises and self-employed workers. The goal was to ensure the economic survival of companies, allowing them to overcome liquidity problems caused by the pandemic and the closure

¹⁷ Volker Boehme-Neßler, ‘Das Parlament in der Pandemie – Zum Demokratiegrundsatz am Beispiel von § 28a InfSchG’ (2021) *Die Öffentliche Verwaltung*, 243.

¹⁸ Hartmut Maurer and Christian Waldhoff, ‘Allgemeines Verwaltungsrecht’ (München, 2017) § 6, marginal note 12.

¹⁹ According to the interpretation of the Federal Constitutional Court, the *Wesensgehalt* (essential content) must be determined “for each fundamental right on the basis of its particular relevance in the general context” (Judgement of the Federal Constitutional Court, 18 July 1967, *BVerfGE* 22, 180, 219).

²⁰ Peter Häberle, ‘Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG’ (Heidelberg, 1983).

²¹ Gesetz zur Ausführung von Artikel 115 des Grundgesetzes, 10 August 2009 (BGBl. I, p. 2702), § 6 (*Ausnahmesituationen*).

²² This long loan period has been criticized by scholars with reference to the recent high frequency of exceptional

events, such as the outbreaks of BSE, SARS and bird flu, aid to Greece and the migration crisis, all of which required so-called “emergency legislation” (*Krisengesetzgebung*); see H.-G. Henneke, ‘Coronabedingte Finanzschäden in den (Kommunal-)Haushalten isolieren?’ (2020) *Deutsches Verwaltungsblatt*, 725; A. Schwertfeger, ‘Krisengesetzgebung’ (Tübingen, 2018).

²³ Von Michael Sauga, ‘Die schwarze Null ist gut für Deutschland’ (Spiegelonline, 4 May 2018), <www.spiegel.de/spiegel/olaf-scholz-will-keine-neuen-schuldenmachen-warum-das-gut-ist-a-1206284.html> accessed 30 September 2021.

²⁴ Martin Greive and Jan Hildebrand, Bundesregierung spannt gigantischen Schutzschirm: ‘Alle Waffen auf den Tisch’, (*Handelsblatt*, 13 March 2020) <www.handelsblatt.com/politik/deutschland/coronavirus-bundesregierung-spannt-gigantischen-schutzschirm-alle-waffen-auf-den-tisch/25642060.html> accessed 30 September 2021.

period.²⁵ In addition, a “fund for stabilization of the economy” (*Wirtschaftsstabilisierungsfonds*) was activated to support larger companies and protect employment through loans.²⁶ Allocations were also made to hospitals, health facilities, scientific research, and the epidemiology service (*Gesundheitsämter*). In the initial phase of the pandemic, Germany decreed a massive increase in the number of beds in intensive care units (ICUs), already very high per capita.²⁷ The total now could reach more than 30,000 units. To ensure complete use of existing capacity, an online national register was created for real-time monitoring of ICU beds (DIVI-register).²⁸

Other funds to support the economy have been allocated since the end of April 2020, when a first partial loosening of the restrictions began. The government approved a progressive increase in the redundancy fund (*Kurzarbeitergeld*) and extended unemployment benefits. Support was also provided for restaurants, and VAT was reduced from 19% to 16% during July-December 2020.

In March 2020, to adapt civil law to the aftermath of the pandemic, the Bundestag passed a law to mitigate the effects of COVID-19 in civil, bankruptcy, and criminal proceedings. It was included among the preliminary provisions of the civil code (Art. 240 *Einführungsgesetz BGB – EGBGB*).²⁹ This provision includes an extension of time (*moratorium*) for fulfilling a series of obligations, including payment of rents, leases, mortgages, utilities, and supply services. In this way, the legislator proposed a new balance of the mutual obligations of contracting parties, following

restrictions connected with the shutdown.³⁰

5. Adaptation of the existing Federal Infection Protection Act (*Infektionsschutzgesetz*)

The ordinary legislative basis for the fight against COVID-19 is provided by the mentioned *Infektionsschutzgesetz (IfSG)*, which came into force on January 1st, 2001.³¹ Thus the response to the pandemic was based on existing legislation, which was repeatedly adapted to the challenge of the pandemic in March 2020,³² May 2020,³³ November 2020,³⁴ and April 2021.³⁵

In March 2020, the federal government’s powers were extended by amendment of Art. 5 (2) *IfSG*, a very controversial provision that empowers the Ministry of Health to regulate basic medical care, derogating from the *IfSG* or its regulations if the emergency so requires. This power only exists if the German *Bundestag* determines an “epidemic situation of national significance.” The *Bundestag* also decides when the epidemic situation has ceased.³⁶ Initially, the *Infektionsschutzgesetz* did not contain a legal definition of “epidemic situation of national significance.” With the amendment passed in November 2020, Art. 5 (1) *IfSG* defines the prerequisites for an epidemic situation of national significance, namely a severe threat to public health throughout the country.³⁷

According to a legislative change introduced in March 2020, loss of income caused by having to look after children while schools were closed is eligible for compensation.³⁸ According to legal doctrine, these compensatory measures are

²⁵ See <www.bundestag.de/dokumente/textarchiv/2020/kw13-de-corona-schuldenbremse-688956> accessed 30 September 2021.

²⁶ Gesetz zur Errichtung eines Wirtschaftsstabilisierungsfonds, 27 March 2020 (BGBl. I, p. 543). For further details see Bundesregierung beschliesst weitergehenden KfW-Schnellkredit für der Mittelstand (Bundesministerium für Wirtschaft und Energie, Bundesministerium für der Finanzen, KfW) 6 April 2020 <<https://www.bmwi.de/Redaktion/DE/Pressemitteilung/2020/20200406-bundesregierung-beschliesstweitergehenden-kfw-schnellkredit-fuerden-mittelstand.html>> accessed 30 September 2021. See also Thorsten Ingo Schmidt, ‘Kreditaufnahme in der Pandemie’ (2021) *JuristenZeitung*, 382.

²⁷ See <<https://www.bundesgesundheitsministerium.de/presse/pressemitteilungen/2020/1-quartal/corona-gesetzespaket-im-bundesrat.html>> accessed 30 September 2021.

²⁸ See below Elena Buoso, Part II. Main Issues Raised by Covid-19 Response in Selected Topics, n 65-66.

²⁹ Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht, 27 March 2020 (BGBl. I, p. 569).

³⁰ Christian Wolf and others, ‘Die zivilrechtlichen Auswirkungen des COVID-19-Gesetzes’ (2020) *Juristische Arbeitsblätter*, 401.

³¹ See Peter Häberle, Hans Joachim Lutz, ‘Infektionsschutzgesetz Kommentar’ (München, 2020).

³² Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, 27 March 2020 (BGBl. I, p. 587).

³³ Zweites Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, 14 May 2020 (BGBl. I, p. 1018).

³⁴ Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, 18 November 2020 (BGBl. I, p. 2397).

³⁵ The last changes were introduced by Art. 1 of the Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, 22 May 2021 (BGBl. I, p. 802).

³⁶ Micheal Fuchs, ‘Corona, ‘Gesundheitsdiktatur’ und ‘Legisid’ (2020) *Die Öffentliche Verwaltung*, 653; Thomas Mayen, ‘Der verordnete Ausnahmezustand. Zur Verfassungsmäßigkeit der Befugnisse des Bundesministeriums für Gesundheit nach § 5 IfSG’ (2020) *Neue Zeitschrift für Verwaltungsrecht*, 828.

³⁷ § 5 (1) *IfSG*.

³⁸ § 56a *IfSG*.

justified to socialize risk and demonstrate a general liability of the welfare state.³⁹

Another critical amendment, introduced in November 2020, consists in the analytical listing of all the protection measures that can be adopted to fight the spread of infection, such as social distancing, wearing masks, hygienic practices in companies and government offices, a ban or limitation on cultural, sporting and leisure events, a ban on tourist travel and closure of restaurants and hotels.⁴⁰ This detailed provision again demonstrates the influential role of Parliament and the vital significance of the principle of legality in the German system, according to which the acts of the executive power must always be “authorized” by the legislator.

Finally, the fourth amendment came into force on April 23rd, 2020, introducing the “*Bundesnotbremse*” (federal emergency brake), which is activated when the “*Sieben-Tage-Inzidenz*” (seven-day incidence) that is the weekly average of infections per 100,000 people exceeds 100 on three consecutive days in a city or district. The measures envisage a curfew from 10 pm to 5 am, permission to meet only one person from outside the family unit, as well as the closing of shops, except grocery stores, florists, and booksellers. In order to buy in other shops, a negative test is needed and an appointment must be arranged. With a seven-day incidence higher than 150, only the pickup of ordered goods is allowed. Furthermore, with a seven-day incidence of 100, schools must alternate in person and distance learning, and with an incidence of 165, only distance learning is permitted.⁴¹

6. Preliminary Conclusions

Overall, the German response to COVID-19 was managed according to the principles of the rule of law and the requirements of federalism. In addition, the pandemic showed that despite the federal structure of the German legal system, it was possible to obtain broad agreement on decisions essential for tackling the pandemic, at least in the initial phase of the shutdown. This allowed coherence of the solutions adopted, in line with the principle of cooperative federalism and mutual consideration (*bündisches Einstehen füreinander*), a

leading criterion of the German legal system, not only in the field of financial relations.⁴²

Over the months, however, signs of impatience have begun to show at meetings of the 16 prime ministers of the *Länder* with Chancellor Merkel, the mentioned *Premierministerkonferenzen* – MPK. The search for consensus has become increasingly difficult, transforming the meetings into nocturnal marathons from which poorly considered decisions emerge. Indeed, the meeting scheduled for April 12th, 2021 was canceled at the last moment when it became clear that no common ground could be established. The federal equilibrium, maintained until then, had broken down. Almost everybody agreed on the need to urgently mitigate the spread of infection and pressure on intensive care units, but there was no unanimity on the measures to adopt.

Therefore, the center of gravity of decision-making shifted to the federal level with the fourth amendment of the *Infektionsschutzgesetz* of April 2021, which stipulates binding national parameters for contagion containment.⁴³ As the discussion in the *Bundesrat* (the *Länder* Chamber) showed, the amendment was seen as capitulating to the federal level,⁴⁴ though the law was passed unanimously. The representatives of the *Länder* begrudgingly agreed that, since urgent action was necessary, dissent on how to act should take second place. In response, the opposition sharply criticized the complicated system of percentages (*Zahlenakrobatik*), on which the containment measures are based. The liberal party (*Freie Demokraten* – FDP) immediately announced an appeal to the Federal Constitutional Court against the curfew, considered to violate fundamental freedoms protected by the *Grundgesetz*, also because the curfew still applies to those who have been vaccinated.

In general, it may be added that a unique feature of the German response to COVID-19 is the criterion of social distancing instead of lockdown. In most *Länder*, only interpersonal contact has been prohibited (*Kontaktsperre/Kontaktverbot*).⁴⁵ Containment measures, such as travel restrictions and staying at home (*Ausgangssperre/Ausgangsbeschränkung*), applied in Spain, Italy, France, and other European countries, have only been imposed in a minority of

³⁹ Peter Itzel, ‘Staatliche Entschädigung in Zeiten der Pandemie’ (2020) *Deutsches Verwaltungsblatt*, 792.

⁴⁰ § 28a *IfSG*.

⁴¹ § 28b *IfSG*.

⁴² Judgement of the Federal Constitutional Court, 19 October 2006, *BVerfGE* 72, 330, 386.

⁴³ See footnote 35.

⁴⁴ ‘Tiefpunkt der föderalen Kultur der Bundesrepublik Deutschland’ (low point of federal

culture in the Federal Republic of Germany), as the decision was defined by Reiner Haseloff, Prime Minister of Saxony-Anhalt.

⁴⁵ As for example in the regulations of Berlin of 22 March 2020 (*GVBl.* 2020, p. 220) and the *Land* Mecklenburg-Vorpommern of 17 March 2020 (*GVOBl.* 2020, p. 82)

Länder, including Bavaria.⁴⁶ The reason for this solution is a long-standing controversy regarding whether the Federal Infection Protection Act is an appropriate legal basis for preventing the entire population from leaving their homes.⁴⁷ Against this backdrop, the battle over the proportionality and legitimacy of the new containment measures, especially the curfew, is yet to be fought, even if the restrictions imposed have a limited duration.

⁴⁶ See *Bayerisches Infektionsschutzgesetz (BayIfSG)* of 25 March 2020 (*GVBl.* 2020, p. 174).

⁴⁷ Eike Ziekow, 'Die Verfassungsmäßigkeit von sogenannten, Ausgangssperren 'nach dem Infektionsschutzgesetz' (2020) *Deutsches Verwaltungsblatt*, 732.

Part II

Main Issues Raised by Covid-19 Response in Selected Topics

Elena Buoso

Abstract. The pandemic crisis has been an accelerator of many ongoing developments in the public administration but also in the society. It has also made clear the need for action in several key areas, in the immediate but also beyond the emergency. This contribution will address therefore some of the significant issues that have occupied the German system: the introduction of (in some cases mandatory) home office and home schooling; the digitalization and the simplification of the administrative procedure and public procurement; the innovations in the healthcare system. Finally, the reaction of the judicial system on the containment measures and the correlated compression of fundamental rights

Keywords: Germany, Pandemic Containment, Healthcare, Digital Tools, Judicial Review

1. Home Office: Contact Reduction at Work

The home office has become - where possible - *the* way of working during the shutdown and has, thus far, remained as preferred option afterward. In Germany, this model was significantly practiced before the pandemic compared to other countries. For example, a survey at the end of March 2020 showed that 43% of respondents already worked from home at least one day a week before COVID-19,⁴⁸ and an analysis taken on behalf of the Federal Ministry for Labour and Social Affairs stated that over two-thirds of the participants wished to work from home at least several days a week/month after the pandemic.⁴⁹

In 2020, the Ministry issued the SARS-CoV Occupational Health and Safety Regulation,

rendering employers and employees' obligations and rights equal both in a home office and office.⁵⁰ In January 2021, the Bund and *Länder* agreed to promote working from home as a practice.⁵¹ In addition, federal regulation was introduced, requiring employers to organize office work so that it can be done from home unless there are compelling needs that require physical presence at the workplace.⁵² At the same time, the federal states and other local authorities have taken similar action concerning the home office in their administrations.⁵³

On the one hand, these regulations encouraging working from a home office are being modified, including from July 1st, 2021, with the option for employers to reintroduce primarily traditional work arrangements, subject to restrictive

⁴⁸ The data are available at 'Home Office ist mehr als eine vorübergehende Krisenmaßnahme' (*Manage It*, 30 March 2020) <<https://ap-verlag.de/home-office-ist-mehr-als-eine-voruebergende-krisemassnahme/59444/>> accessed 30 September 2021. The survey also shows that, in an international comparison, German workers are well equipped for mobile work, as 57% of them has a room or area of the house dedicated to the purpose. They also report that 49% spend the same amount of time spent in the workplace in the home office. 74% also stated that productivity at home is the same if not higher than in the office, while the remaining 26% complained of the loss of productivity linked to the distance from colleagues and the consequent communication difficulties.

⁴⁹ See the report of Holger Bonin and others, BMAS Kurzexperte. Verbreitung und Auswirkungen von mobiler Arbeit und Homeoffice (IZA Institute of Labour Economics Research Report, n. 99, 2020) 18 <<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-70079-5>> accessed 20 August 2021. See also M. Schattenberg, Work from home has come to stay (Deutsche Bank Germany monitor 1/2021) 6.

⁵⁰ Arbeitsschutzausschüsse beim BMAS, SARS-CoV-2-Arbeitsschutzregel (GMBI, Aug. 20, 2020) 484. Last amended on 7 May 2021 (GMBI, May 7, 2021) 622.

⁵¹ Conference of Prime Ministers with the Chancellor, Decision 19 January 2021 <www.bundesregierung.de/suche/bund-laender-beschluss-1841048> accessed 30 September 2021.

⁵² Ministry for Labour and Social Affairs SARS-CoV-2-Arbeitsschutzverordnung (*Corona-ArbSchV*) (2021) § 2, section 4 <www.bundesanzeiger.de> accessed 30 September 2021.

⁵³ In November 2020 the number of public servants in home offices in North Rhine-Westphalia was 32.900, more than double (+117.7 percent) than in 2019: State Office for Information und Technik Nordrhein-Westfalen *IT.NRW:Zahl der Home-Office-Plätze verdoppelt* (IT.NRW, 9 December 2020) <www.it.nrw/itnrw-zahl-der-home-office-plaetze-verdoppelt-101915> accessed 30 September 2021. See also Von Wolfgang Görl, 'Wie eine Stadtverwaltung im Home-Office funktioniert' (2020) *Süddeutsche Zeitung* <www.sueddeutsche.de/muenchen/muenchen-stadtverwaltung-aemter-home-office-1.4861999> accessed 30 September 2021.

conditions regarding workplace contacts, COVID testing, and vaccines.⁵⁴ On the other hand, the home office has been permanently introduced as mandatory for employers and employees in the Federal Infection Protection Act when the so-called “*Notbremse*” is activated because the incidence of 100 infections has been exceeded (art. 28b, section 7, *InfSchG*).

2. Homeschooling

Since 2020, the German central government and the federal states have intervened with financial contributions to support schools and families in purchasing computers and upgraded internet access.⁵⁵ However, homeschooling has not been a success. The educational offerings have been uneven because the schools had very different technical equipment and the ministerial guidelines left - also for that reason - a lot of discretion to school directors and teachers.⁵⁶ The resulting heterogeneous educational offerings has often significantly disadvantaged students from socially vulnerable families.⁵⁷

Therefore, many teachers’ and parents’ associations are asking the *Länder*, which has jurisdiction over school policy, for more incisive intervention. In March 2021, for example, the *Land* of Berlin changed its School Law to allow those pupils who wish to repeat a year without it affecting their school career. At the same time, during the 2020/2021 school year, the law required that all students in a particular grade for designated degree programs move up to the next grade, regardless of

votes.⁵⁸ Several universities are also introducing similar rules, particularly extending the periods to complete all examinations.

3. Digital Administration and Public Procurement

The pandemic slightly accelerated the processes of modernization and digitalization of the administration, which was in progress for several years and had been established in particular by the *E-Government Gesetz* of 2013⁵⁹ and the Digital Agenda of 2014.⁶⁰ The pandemic response has not, in this sense, been an attempt to introduce profound changes.

Additionally, in the area of procurement law, Germany has reacted cautiously. In contrast, in other legal systems – such as in Italy – the pandemic has triggered intense discussion regarding simplification and ad hoc procedures for procurement. The German Ministry for the Economy and Energy called for the ordinary normal simplified and negotiated procedures already contemplated in the German law, in line with the European Commission’s recommendations for contracts above the EU threshold, to be used in pandemic responses.⁶¹ In July 2020, the Ministry intervened with binding directives to simplify procurement procedures and raise the thresholds for direct awards.⁶²

There has been no acceleration of the process of digitization of above-threshold contracts, which is already an ongoing concern, for example, the electronic register of procedures and the online

⁵⁴ See the draft of the new SARS-CoV-2-Arbeitsschutzverordnung of 1 June 2021, available on <www.bmas.de>.

⁵⁵ The various possibilities included in the ‘DigitalPakt Schule’ are described in detail on the website of the Ministry for Education and Research <www.bmbf.de/de/wissenswertes-zum-digitalpaktschule6496.php> and of the Federal Government <www.bundesregierung.de/bregde/themen/coronavirus/unterstuetzung-fuer-familien-1738334> accessed 30 September 2021.

⁵⁶ Ludger Wößmann and others, ‘Bildung erneut im Lockdown: Wie verbrachten Schulkinder die Schulschließungen Anfang 2021?’ (2021) *Ifo Schnelldienst* 74, 36; Detlef Fickermann and others, ‘Bibliographie zum Thema «Schule und Corona»’ (2021) *Die Deutsche Schule* 17, 213–233.

⁵⁷ Ludger Wößmann and others, ‘Bildung erneut im Lockdown: Wie verbrachten Schulkinder die Schulschließungen Anfang 2021?’ (2021) *Ifo Schnelldienst* 74, 47.

⁵⁸ Schulgesetz für das Land Berlin - (Schulgesetz – SchulG) (GVBl. Berlin, 2004, I, 26) §129a amended by Gesetz zur Anpassung schulrechtlicher Regelungen im Rahmen der SARS-CoV-2-Pandemie im Schuljahr 2020/2021 (GVBl. Berlin, 2021, I, 256).

⁵⁹ E-Government-Gesetz of 25 July 2013 (BGBl 2013, I, 2749). See L. Prell, ‘E-Government: Paradigmenwechsel in Verwaltung und Verwaltungsrecht?’ (2018) *NVwZ*, 1255.

⁶⁰ Germany Digital Agenda 2014 - 2017 adopted by Federal Cabinet on August 20, 2014 <www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2014/digital-agenda.html> accessed 30 September 2021.

⁶¹ Ministry for Economic Affairs and Energy, Rundschreiben zur Anwendung des Vergaberechts im Zusammenhang mit der Beschaffung von Leistungen zur Eindämmung der Ausbreitung des neuartigen Coronavirus SARS-CoV-2, (19 March 2020) <<https://www.bmwi.de/Redaktion/DE/Downloads/P-R/rundschreiben-anwendung-vergaberecht.html>> accessed 30 September 2021.

⁶² Federal Ministry for Economic Affairs and Energy, Verbindliche Handlungsleitlinien für die Bundesverwaltung für die Vergabe öffentlicher Aufträge zur Beschleunigung investiver Maßnahmen zur Bewältigung der wirtschaftlichen Folgen der COVID-19-Pandemie (8 July 2020) <www.bmwi.de/Redaktion/DE/Downloads/H/handlungsleitlinien-vergr-corona.html> accessed 30 September 2021. See Jonas Jürgens, ‘Das Vergaberecht in der (Corona)Krise: Zwischen Beschleunigung und Protektionismus’ (2020) *Vergaberecht*, 4/2020, 578-583.

access to procurement documents. The *Länder* introduced some changes for procurements below the EU threshold, such as submitting bids by email or an extended possibility of using the simplified electronic procedure.⁶³

At present, there have been no considerable, permanent changes in this sector and the new rules are effective only until December 31st, 2021.

4. Healthcare System and Digital Tools

According to the division of administrative responsibilities discussed in Part I, local health offices play a crucial role in monitoring and quarantine management within the framework of pandemic containment of the *Länder*.

Avoiding the collapse of the healthcare system has been one of the primary goals from the earliest stages of the pandemic, pursued not only by closing commercial activities and other preventative measures but also by increasing the number of hospitals (for this purpose, the Federal Building Code has been amended)⁶⁴ and intensive care beds (ICU). As the German Hospital Society wrote in September 2021, there were approximately 28,000 ICU beds in Germany before the pandemic, 22,000 equipped with ventilators. The occupancy rate of ICU beds was, on average, 70 to 80 percent at the time. Nationwide capacities were expanded. The number of operable ICU beds with ventilator capability suitable for COVID-19 patients increased to more than 28,000. There is an additional reserve of beds that can be activated within a week, which fluctuates between 10,000 and 12,000, depending on the staffing situation at a given time, coming to a maximum amount of 40,000 units. This reserve will

become available through cutbacks in standard care and other measures.⁶⁵ In addition, an electronic registry of ICU and special units linked to COVID was created to monitor hospital stress levels – the so-called DIVI-Register.⁶⁶

To relieve the burden on local health offices, the federal State has developed several digital tools:

- a) SORMAS (Surveillance Outbreak Response Management and Analysis System) for better management of contact tracing and contact chains;
- b) a digital symptom diary for less labor-intensive and resource-efficient care and management of isolated and quarantined persons, integrated into SORMAS;
- c) CovBot as an AI-supported telephone assistant for a relevant relief of the telephone lines of the health authorities;
- d) DEMIS (German Electronic Reporting and Information System for Infection protection) for a fast and nationwide standardized digital reporting and information processing of positive SARS-CoV-2 infectious agent detections.⁶⁷

A federal vaccination plan has been in place since November 2020, and vaccinations began at the end of December 2020,⁶⁸ starting with a few tens of thousands of shots and currently reaching a peak of over 1.3 million shots a day.⁶⁹ The federal government is responsible for procuring vaccines, while the states provide the necessary equipment for vaccination centers and mobile vaccination units.

4.1. Covid-19 Tracing Apps

In April 2020, the Robert Koch Institute developed an application that processes data from fitness

⁶³ For example Government of Baden-Württemberg, Verwaltungsvorschrift der Landesregierung zur Beschleunigung der Vergabe öffentlicher Aufträge zur Bewältigung der wirtschaftlichen Folgen der COVID-19-Pandemie - VwV Investitionsfördermaßnahmen öA (20 August 2020) Az. 64-4460.0/433 < <https://wm.baden-wuerttemberg.de/de/wirtschaft/aufsicht-und-recht/oeffentliches-auftragswesen/landesrechtlichevorschriften/>>. An updated list of the ministerial indications currently in force in the Länder: <www.forum-vergabe.de/news-detail/beschaffungen-in-der-corona-pandemie-fortlaufend-aktualisiert-8164/> accessed 30 September 2021.

⁶⁴ See Baugesetzbuch § 246b; Johann Hartl, 'Öffentlichkeitsbeteiligung unter Pandemie-Einschränkungen. PlanSiG - ein unglückliches Kürzel in unglücklichen Zeiten' (2020) *Alternative Kommunalpolitik*, 4/2020, 54-56; Johann Hartl 'Befristete Regelungen in Corona-Zeiten. Ein Überblick zu aktuellen Regelungen im Planungsrecht' (2020) *Planerin* 3/2020, 55- 56; R. Blechschmidt, '§ 246b BauGB Sonderregelungen für Anlagen für gesundheitliche Zwecke im Zuge der COVID-19-Pandemie', in Werner Ernst, Willy Zinkahn, Walter Bielenberg, Micheal Krautzberger (eds), *Baugesetzbuch Kommentar* (Beck, München, 2020).

⁶⁵ See the press release of the DKGEV September 2021 <www.dkgev.de/dkg/coronavirus-fakten-und-infos/> accessed 10 September 2021. See also Boris Augurzky and others, *Analysen zum Leistungsgeschehen der Krankenhäuser und zur Ausgleichspauschale in der Corona-Krise* (RWI-Leibniz Institute for Economic Research and the Technische Universität Berlin, 2021) 4.

⁶⁶ The register can be accessed on <www.intensivregister.de/#/index> accessed 30 September 2021.

⁶⁷ See 93rd Conference of Health Ministers Decision 6 November 2020 <www.gmkonline.de/Beschluesse.html>. accessed 30 September 2021.

⁶⁸ Nationale Impfstrategie COVID-19 (Bundesministerium für Gesundheit, Robert Koch Institute, Paul-Ehrlich-Institute, BZgA, 6 November 2020) <www.rki.de/DE/Content/Infekt/Impfen/ImpfungenAZ/COVID19/Impfstrategie_Covid19.html> accessed 30 September 2021.

⁶⁹ An updated day-by-day vaccination quota monitoring is held by the Robert Koch Institute: <www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Daten/Impfquotenmonitoring.html;jsessionid=F2DD0F74E043DFAA4E316FF92FC71DC0.internet061?nn=13490888> accessed 30 September 2021.

devices and smartwatches, requesting a “donation” of data from users. Contrary to expectations, the request has been accepted by more than half a million users, even though the donated data is not anonymous and is detailed, including sensitive data on individual health status.⁷⁰

Also available since June 2020 is the Corona-warn-app⁷¹ developed by the federal government with an open-source system according to the Pan-European Privacy-Preserving Proximity Tracing Protocol.⁷² Its digital contact tracing differs from approaches used in other countries⁷³ because there is no data collection on GPS position or repeater in the German app; instead, it uses only Bluetooth technology to register devices of COVID-positive tested users that come closer than two meters for at least 15 minutes. The app communicates with a central server once a day and sends out an alert if you have approached a COVID-positive individual. The use of the warn-app is voluntary and privacy safe since it does not store personal data but is based on randomly generated pseudonymized identification numbers, which change at regular intervals so that the developers and managers do not know the identity of a given ID or where the users are. The Corona-warn app is also helpful to obtain the EU Digital COVID Certificate directly - in the form of a QR-code - that can be requested otherwise to medical doctors and pharmacies authorized to issue it.⁷⁴

Since the beginning of 2021, another commercial app (Luca-app) has been available. It is based on the capture of cluster-specific codes (QR codes) that the user must scan with their phone to enter restaurants, theaters, and other places open

to the public that subscribe to this tracking system.⁷⁵

Although the number of downloads is relatively high (28 million for the Corona-warn-app⁷⁶ and about one million for the Luca-app⁷⁷), these apps have not proven to be very effective for pandemic containment.⁷⁸

5. Judicial Power and Fundamental Rights Protection in the Pandemic

Containment measures have compressed fundamental rights in a way unknown to the post-war German system. The judicial review of legislative and administrative decisions immediately came into effect, ensuring fundamental rights protections. This has led to an exponential increase in administrative and constitutional litigation, and the rights protection system has shown its effectiveness. In the pandemic stress test, fundamental rights have once again shown to act as duties to protect (*Schutzpflicht*) and as rights to defend (*Abwehrrecht*). These two dimensions must be balanced in the individual case.

According to the German Judges Association (DRB), more than 10,000 summary proceedings and lawsuits against anti-COVID measures were decided by the administrative and constitutional courts in 2020.⁷⁹ While the 51 administrative courts in Germany recorded more than 6,000 COVID-related proceedings from March to December 2020, the 15 higher administrative courts reported more than 3,000 complaints. Direct appeal to the Federal Constitutional Court and the states' Constitutional Courts (*Verfassungsbeschwerde*) also played an

⁷⁰ A detailed description of the project and analysis of the collected data, elaborated by the Robert Koch Institute, are accessible at: <<https://corona-datenspende.de/science/>> accessed 30 September 2021.

⁷¹ See <www.bundesregierung.de/breg-de/themen/corona-warn-app> accessed 30 September 2021. On the legal issues raised by this app see Thomas Köllmann, 'Die Corona-Warn-App. Schnittstellen zwischen Datenschutz und Arbeitsrecht' (2020) NZA, 831; M. Wünschelbaum, 'COVID-19: Pandemiebewältigung und Datenschutz. Kollektivvereinbarungen als krisentaugliches DS-GVO-Instrument?', (2020) NZA, 612.

⁷² Francesco Buccafurri and others, 'A Privacy-Preserving Solution for Proximity Tracing Avoiding Identifier Exchanging' (2020) IEEE Explore, 235-242, <<https://ieeexplore.ieee.org/ielx7/9240475/9240501/09240513.pdf>> accessed 30 September 2021.

⁷³ Jürgen Kühling and Roman Schidbach, 'Corona-Apps - Daten und Grundrechtsschutz in Krisenzeiten' (2020) NJW, 1545; Jinfeng Li and Xinyi Guo, 'Global Deployment Mappings and Challenges of Contact-tracing Apps for COVID-19' (2020) SSRN; Jan-Patrick Weiß and others, 'Analyzing the Essential Attributes of Nationally Issued COVID-19 Contact Tracing Apps: Open-Source

Intelligence Approach and Content Analysis' (2021) JMIR 9/3, doi: 10.2196/27232.

⁷⁴ The system is well explained on the website of the Ministry for Health <www.bundesgesundheitsministerium.de/coronavirus/faq-covid-19-impfung/faq-digitaler-impfung/faq-digitaler-impfnachweis.html> accessed 30 September 2021.

⁷⁵ Theresa Stadler and others, 'Preliminary Analysis of Potential Harms in the Luca Tracing System' (2021) arXiv [preprint].

⁷⁶ Details are available on the website of the RKI: <www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/WarnApp/Archiv_Kennzahlen/WarnApp_Kennzahlen_Tab.html> accessed 30 September 2021.

⁷⁷ Lena Rabe, 'Downloads der Luca-App über den Apple App Store in Deutschland bis Mai 2021' (2021) statista.com.

⁷⁸ Alexander Dix, 'Mit Apps gegen Corona - Was bringen Luca und Corona-Warn-App?' (2021) ZD-Aktuell, 04441; Jan-Philipp Stroscher, and Sabrina Schomberg, 'Digitale Kontaktnachverfolgung per App - ist ein Ende der Zettelwirtschaft in Sicht' (2021) ZD-Aktuell, 05138.

⁷⁹ 'Richterbund: Mehr als 10.000 Eilverfahren und Klagen gegen Corona-Auflagen' (Neue Osnabrücker Zeitung, 8 March 2021) <www.presseportal.de/pm/58964/4857338> accessed 30 September 2021.

important role. The federal court counted almost 900 proceedings related to the pandemic, including a record number of more than 240 emergency motions, although most of them were deemed inadmissible.⁸⁰ There is no official data concerning the constitutional courts of the states.

Most legal actions have been declared inadmissible or rejected, such as the recent appeals against the *Bundesnotbremse*.⁸¹ Some positive decisions - although primarily for injunctive relief - are particularly significant. They are based on:

- the principle of proportionality in the compression of a fundamental right: e.g., the freedom of movement,⁸² the right to protest,⁸³ or the freedom of religion.⁸⁴ The particular circumstances of uncertainty in which some containment measures were taken and the judgments were carried out have led to a change in the structure of the judgment of proportionality, in which the first step, that relating to the suitability of the choices made by the public administration, has taken on new relevance;

- the incompleteness of the preliminary investigation and scientific basis;⁸⁵

- the use of an administrative legal instrument to impose general measures that require a formal regulation.⁸⁶

With the *Bundesnotbremse*, the Federal State has taken over the uniform containment measures and simultaneously enacted them.⁸⁷ The consequence of this is the centralization of judicial protection at the Federal Constitutional Tribunal (*Bundesverfassungsgericht*) instead of the administrative or constitutional courts of the states. This outcome has been the subject of fierce criticism. On the one hand, it favors legal certainty and the stability of containment strategies. On the other hand, it risks lowering the protection of fundamental rights.

6. Lessons Learned: The Legacy of This Pandemic

The responses of the system to the pandemic have not all been optimal or sufficiently timely, however, the experience in dealing with this crisis allows us to identify some winning solutions, which confirm the validity of some structural choices or that could be developed further. They can be summarized in five points:

- 1) The democratic polycentric structure of the German system adopted a coordination strategy through political entities that have mostly proven effective: the Conference of Prime Ministers with the Chancellor. The German Basic Law does not prescribe this conference; instead, it is only mentioned in the rules of procedure of the federal government. Nevertheless, in the pandemic crisis, it became the most powerful decision-making body. It made it possible to conciliate the requirements of federalism and their differentiation with a reasonably unified strategy.

- 2) Even if the conference meetings are not public, this structure requires transparent communication of decision-making processes, which was achieved by an obvious communication strategy by the federal government and the *Länder*.

- 3) Such a pattern of political coordination requires the willingness of the Federal State and states to act in harmony. Unfortunately, the prolonged pandemic and approaching election deadlines cracked the compactness of the governments. Therefore, the Federal State intervened by taking decisions and imposing them on the states through an ordinary law of Parliament. Thus, German federalism confirms its unitary component that can become more or less evident according to need.

- 4) The Robert Koch Institute has contributed to communication clarity, ensuring up-to-date,

⁸⁰ See the official statistic of the Federal Constitutional Court available at <www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/vorwort.html> accessed 30 September 2021.

⁸¹ Federal Constitutional Tribunal (*Bundesverfassungsgericht* - BVerfG) 1 June 2021, 1 BvR 927/21 <www.bverfg.de/e/rk20210601_1bvr092721.html> accessed 30 September 2021. BVerfG 31 May 2021, 1 BvR 794/21 <www.bverfg.de/e/rk20210531_1bvr079421.html> accessed 30 September 2021.

⁸² High Constitutional Court of Baden-Württemberg (VGH Baden-Württemberg), decision 5 February 2021 <http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=33772> accessed 30 September 2021.

⁸³ BVerfG, 15 April 2020, 1 BvR 828/20 <www.bverfg.de/e/rk20200415_1bvr082820.html> accessed 30 September 2021.

⁸⁴ BVerfG, 29 April 2020, 1 BvQ 44/20 <www.bverfg.de/e/qk20200429_1bvq004420.html> accessed 30 September 2021.

⁸⁵ Constitutional Court of Saarland (VerfGH Saarland) 28 March 2020 - Lv 7/20 eA <<https://verfassungshof-saarland.de/frames/index.html>> accessed 30 September 2021; Administrative Court Berlin (VG Berlin), 31 May 2021 - VG 3 L 180/21 <<https://openjur.de/u/2341796.html>> accessed 30 September 2021.

⁸⁶ Administrative Court Munich (VG München), 24 March 2020, M 26 S 20.1255 <www.vgh.bayern.de/media/muenchen/presse/pm_2020-03-24_b1.pdf> accessed 30 September 2021.

⁸⁷ About the role of the federal State and of the federal Parliament in the pandemic, see H. Dreier, 'Rechtsstaat, Föderalismus und Demokratie in der Corona-Pandemie' (2021) DÖV, 229; V. Boehme-Nefler 'Das Parlament in der Pandemie' (2021) DÖV, 243.

scientific, and sober information. This pandemic has clarified the importance of the RKI's scientific advice and its role as an authoritative federal body, referred to by local and central governments, to whom the decision has always remained. The division of roles between technical and political is clear.⁸⁸

5) Finally, the Nudge Theory and the importance of persuasion and non-binding recommendations based on the precautionary principle have been affirmed. Many of the measures affecting individual behavior were not imposed, at least not immediately. Instead, these were recommended and accompanied by immediate business, and individuals support financial efforts. This has increased the willingness of the population to endure the shutdown and reduced the conflict with those who deny the seriousness of the pandemic and the necessity of containment measures. The protests have been quite loud and have even led to an attempted assault on the Bundestag,⁸⁹ but thankfully, in this context, it did not end up as Capitol Hill.

Elections for the new federal parliament (and thus the designation of the new chancellor) will take place in September. This has caused a sharpening of the political debate in recent weeks, also in relation to the handling of the pandemic, but does not seem to have had such a divisive effect on the society as in other countries.

Germany's management of the pandemic, while surely accentuating the role of executives, confirmed the cautious tendencies of a legal system that introduces innovations in stages and focuses on respect for the rule of law and constitutional guarantees. However, it must be acknowledged that in many cases – such as, for example, the management of the health system and support for workers – the effective intervention of the State has been guaranteed thanks to the considerable economic and financial resources available to the Federal Republic. This factor must be taken into consideration in every comparison.

⁸⁸ About the responsibility of the scientists during the pandemic, see L. Del Corona, 'Distrust in science as a threat to scientific freedom. Some considerations in light of COVID-19 emergency' (2021) CERIDAP <<https://ceridap.eu/distrust-in-science-as-a-threat-to-scientific-freedom-some-considerations-in-light-of-covid-19-emergency/>> accessed 30 September 2021.

⁸⁹ Von Jan Heidtmann, 'Im Westen Sit-ins, im Osten Randalen', (2020) *Süddeutsche Zeitung* <www.sueddeutsche.de/politik/demonstration-berlin-corona-massnahmen-hildmann-1.5014391> accessed 30 September 2021.

COVID-19 as a Global Institutional Event and Its Institutional Treatment in Greece

Yiannis Drossos

Abstract. this article, reflects an oral presentation given on 5 March 2021. Offering remarks and comments on the institutional impact of the anti-COVID measures indicates the institutional relevance of the pandemic. It is argued that the COVID-19 pandemic, notwithstanding its global nature, has marked a gradual retreat from the globalization. It has also marked the ‘return’ of the state -in contrast to the market- as the powerful actor suitable to assume and guarantee the measures necessary to combat the pandemic. The pandemic has also brought up some more general issues, such as the relation between science and politics, the relevance of the Constitution in times of ‘exception’, the reinforcement of the Executive at the cost of the Legislative, the need to accept limitations to the individual rights in order to combat the pandemic, the role and the limits of the Judiciary in times of the exceptional threat posed by the pandemic. The article then briefly presents the anti-COVID measures taken by Greece until the first months of 2021 and ends up raising the question whether the pandemic has created the pattern and mindset for permanent changes in our institutional structures and procedures.

Keywords: *COVID-19 Pandemic, Science, Politics, Exception, Rule, Anti-COVID Measures, Democratic Procedures, Individual Rights, Greece*

1. Introduction

The present paper offers some remarks and comments about the institutional impact of the anti-COVID measures made earlier this year. and reflects the state of the legal discussion of more or less around that time, basically stemming from legal material (such as legislative and regulatory administrative acts, case law, commentary etc.) dating back to early spring 2021 and 2020. At this point it has to be noted that at the beginning of the pandemic most constitutional comments on the anti-COVID measures were rather descriptive of the measures and of their possible impact on both the functioning of the democratic institutions and the constitutionally warranted individual rights. Also, since at the beginning of the pandemic no major assessment could be made on the expediency, or even the necessity of the measures because of lack of factual material, as a rule, the governments had no real option than to follow the expert advice of their epidemiologists and the courts had no real option than to accept the restrictive measures taken by the government on the basis of such advice. As the pandemic progressed and the impact of the measures taken (or of the omission to take measures) became more and more clear, the case law, and in general the relevant legal literature, became more elaborate and theoretical.

I will certainly not delve into assessing the substance of the measures taken to combat the pandemic, such as, restrictions of several constitutional rights, lockdowns, obligatory vaccination, curfews etc. from the epidemiological point of view nor comment on measures taken to support society and the economy during the pandemic. It is more than evident that the COVID-19 pandemic poses a threat to our health and lives, and to the overall functioning of our polities, economies and societies. More specifically, it threatens the effective democratic functioning of our constitutional states and civil liberties. To discuss the legal architectonics of the specific anti-COVID measures beyond the general framework set by the extra-legal occurrence which is the pandemic and by the nature of the Constitution as the supreme legal guarantor of the democratic freedom and the civil liberties would reduce the matter to a theoretically rather unimportant legal technique of how to successfully impose the commandments of the medical scientists as sanctioned by the government. Failing to seriously consider the pandemic’s *constitutional* ramifications would entail missing a very important point: that we are trying to preserve not only our lives and health, but also, and with equal prominence, the democratic and liberal institutional architecture sanctioned by our Constitutions.

2. The Institutional Relevance of the COVID-19 Pandemic

The COVID-19 pandemic *per se* is an extra-legal and extra-institutional event: it is not the outcome of a constitutional, legislative or jurisprudential decision, much less the outcome of a deliberate human, social or political decision. An epidemic spread all over the globe, it erupted as a *vis major*, an act of God -rather a wrath of God. This epidemic, apart from and in addition to the politics, economy, society and personal lives, affected also the legal, institutional and jurisprudential frameworks worldwide. In constitutional states the pandemic triggered hard cases of democratic governability and protection of civil and social rights.

To mention, as examples, two of them, on March 31, 2020, Indonesian President Joko Widodo, issued the 'Emergency Regulation No. 1 of 2020 on the National Finance and Financial System Stability Policy for Handling Corona Virus Disease 2019 (COVID-19) Pandemic and/or in Order to Face Threats that Endanger the National Economy and/or Financial System Stability'. The Regulation provides that changes to the National State Budget during the COVID-19 response period or threats to the national economy in the future (until the end of 2022) can be carried out by Presidential Regulation and not exclusively by the House of Representatives. It also provides immunity to government officials, so that they will not be held liable civilly and criminally and exempts them from any administrative liability.¹

A more striking example comes from South Africa, the Court of which (Gauteng Division, Pretoria, a Single Judge Court) in the case 21542/2020 in the case *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*² applying 'the rationality test' scrutinized the nature and the legality of some 'lockdown regulations' provided in the 'Disaster Management Act 57 of 2002'. Judge Davis observed that "There are numerous, thousands, no, millions of South African who operate in the informal sector. There are traders, fisheries, shore-foragers, construction workers, street-vendors, waste-pickers, hairdressers and the like who have lost their livelihood and the right to "eke out a

livelihood" as the President referred to it as a result of the regulations. Their contact with other people are less on a daily basis than for example the attendance of a single funeral. The blanket ban imposed on them as opposed to the imposition of limitations and precautions appear to be irrational³ to further note that to 'illustrate this irrationality further in the case of hairdressers: a single mother and sole provider for her family may have been prepared to comply with all the preventative measures proposed in the draft Alert Level 3 regulations but must now watch her children go hungry while witnessing minicab taxis pass with passengers in closer proximity to each other than they would have been in her salon. She is stripped of her rights of dignity, equality, to earn a living and to provide for the best interests of her children.'⁴

Judge Davis referred to a relative case law of the same Court where the following question was raised: "The virus may well be contained - but not defeated until a vaccine is found - but what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and, overall, the maintenance of the rule of law"⁵. From the evidence brought up to the Court he inferred that 'once the Minister had declared a national state of disaster and once the goal was to "flatten the curve" by way of retarding or limiting the spread of the virus (all very commendable and necessary objectives), little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was justifiable or not. The starting point was not "how can we as government limit Constitutional rights in the least possible fashion whilst still protecting the inhabitants of South Africa?" but rather "we will seek to achieve our goal by whatever means, irrespective of the costs and we will determine, albeit incrementally, which Constitutional rights you as the people of south Africa, may exercise"' and declared the questioned dispositions of the Disaster Management Act 'unconstitutional and invalid', but suspended the effect of this decision 'until such time as [the competent Minister] ... [will] review, amend and re-

¹ See Stefanus Hendrianto, 'Early Warning Signs of Abusive Constitutionalism in Indonesia: Pandemic as Pretext', (2020), Int'l J. Const. L. Blog <<https://www.iconnectblog.com/2020/06/early-warning-signs-of-abusive-constitutionalism-in-indonesia-pandemic-as-pretext/>> accessed 18 October 2021. On the same matter, but for another country (Hungary) see Timea Drinoczi, 'Hungarian Abuse of Constitutional Emergency Regimes - Also in the Light of the COVID-19 Crisis', <<https://real.mtak.hu/id/eprint/121764>> accessed 18 October-2021.

² Law Society of South Africa v President of the Republic of South Africa (CCT67/18) <<https://www.saflii.org/za/cases/ZAGPPHC/2020/184.html>> accessed 18 October 2021.

³ *Ibidem*, para 7.2.

⁴ *Ibidem*, para 7.3.

⁵ *Ibidem*, para 7.19.

publish' the questioned regulations 'with due consideration to the limitation each regulation has on the rights guaranteed in the Bill of Rights contained in the Constitution'⁶.

3. The Double Return of the State

A very remarkable consequence of the pandemic is the return of the relevance of the nation-state. Despite its global nature, the pandemic did not derive in a closer relationship among states, but had rather the contrary effect.

The coronavirus marked a partial retreat from the globalization. The state returned as the national, legally sovereign political entity, which in many aspects seemed to have been swallowed by the globalization. It is the states, and not international institutions that mainly, if not exclusively, take and enforce the practical measures to tackle the pandemic. It is behind the boundaries of their nation- states that citizens seek shelter to protect themselves from the global threat. In the EU countries rediscovered the long-forgotten borders between the Member States. Even indications of 'vaccine nationalism' become more and more present and protests against it more vocal.

The state has also returned as a powerful actor suitable to assume and guarantee critical measures

to face the pandemic. It is within the nestles of the state not in the 'invisible hand' of the market that citizens are seeking shelter. In the moment of truth, it became unmistakably plain that the only effective recourse stems not from the "invisible hand of the market", but in institutions such as the National Health Systems. Even the champions of ultra-liberalism (more or less professing the preponderance of the market, the radical limitation of the welfare state structures, and, in general, the reduction of the state to some few domains, deemed absolute necessary) feel obliged to (usually reluctantly and often hypocritically) reevaluate positively the so much despised state and state institutions in their political discourse, acknowledging them as the ultimate provider and guarantor of 'whatever it takes' to confront the disease.

4. Some Common Constitutional Issues Raised by the State's Reaction to the Pandemic

The pandemic has triggered a vivid, continuous and steady flow of information, scholarship and case-law regarding the constitutional treatment of the anti-COVID measures (or the failure to take such measures)⁷. As already mentioned, although an first part of this literature started as basically

⁶ *Ibidem*, para 7.17.

⁷ As already indicated, the scholarship and case law taken into consideration for this article dates back to the beginning of 2021. For an indicative idea on the amplitude of this scholarship, see <<https://verfassungsblog.de/category/debates/power-and-the-covid-19-pandemic-debates/>> accessed 18 October 2021. See also Joelle Goran, 'Power, Law and COVID-19 Pandemic, Part I: the Year of the Pandemic and Part II: Preparing for Future Emergencies' (posted on 15 May 2021) available respectively at <<https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-i-the-year-of-pandemic/>> accessed 18 October 2021 and at <<https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-ii/>> accessed 18 October 2021; Luísa Netto, 'The Right to Science-and-the-Pandemic:-at-the-Crossroads-of-Law-and-Politics'-(posted-on-4/2/2021) <http://feedproxy.google.com/~r/I-CONNECT/~3/Qbw7I2T2dp0/?utm_source=feedburner&utm_medium=email> accessed 18 October 2021; Ronan Cormacain and Ittai Bar-Siman-Tov (eds.), 'Legislatures in the time of Covid-19' 8(3) *The Theory Practice of Legislation* (2020); (also Ittai Bar-Siman-Tov, 'Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic - A Comparative Overview' (posted on 14 April 2021) <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3566948_code977344.pdf?abstractid=3566948&mirid=1> accessed 18 October 2021; Olga Hałub-Kowalczyk, 'Redefining the Right to Privacy in the Age of the COVID-19 Pandemic' (posted on 1 April 2021), <<http://www.iconnectblog.com/2020/04/redefining-the-right-to-privacy-in-the-age-of-the-covid-19-pa>

ndemic/> accessed 18 October 2021; Sean Molloy, 'Human Rights in Africa in the Context of Covid-19', <http://feedproxy.google.com/~r/I-CONNECT/~3/f_dF2iCFYkk/?utm_source=feedburner&utm_medium=email> accessed 18 October 2021; Alice Donald and Philip Leach, 'Human Rights and COVID-19: Forging Recovery After a Pandemic of Abuses?' *Human Rights and COVID-19: Forging Recovery After a Pandemic of Abuses?*; Daniella Lock, Fiona de Londras, and Pablo Grez Hidalgo, 'Parliamentary Engagement with Human Rights during the COVID-19 and the Independent Human Rights Act Review', *U.K. Const. L. Blog* (posted on 3 March 2021), *Parliamentary Engagement with Human Rights during COVID-19 and the Independent Human Rights Act Review*; Geroge Karavokyris, 'Constitutionalism and COVID-19 in Greece: The Normality of Emergency', *Verfassungsblog*, <<https://verfassungsblog.de/constitutionalism-and-covid-19-in-greece-the-normality-of-emergency/>> accessed 14 October 2021, and many-many others. To get a glimpse on the breadth of the case-law see the dozens of interim decisions of the French Conseil d'Etat, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=ca d=rja&uact=8&ved=2ahUKEwiD_uDRjuXwAhWUuaQKHZ pIsYQjBAwA3oECAQAQ&url=https%3A%2F%2Fwww.conseilletat.fr%2Factualites%2Factualites%2Fdernieresdecisions-referes-en-lien-avec-l-epidemie-de-covid-19&usg=AOvVaw1_hG7ZgLLygqSSFj1qxjKr> accessed 18 October 2021. Such decisions are produced almost every day all over the world and to get a glimpse on the complexity of the issues the courts are asked to cope with

descriptive (often with some commentary) of the constitutional aspects of the anti-COVID measures, as the pandemic and the repetitive waves of measures proceeded, more general themes started drawing the attention of legal scholarship and legal and political practitioners.

A first such theme is the relation between political decision and non-political and non-legal element, such as epidemiology findings (and imperatives). Has *Law's Empire*⁸ been replaced by the epidemiologists' empire? The relation -and possible clash- between legal obligation and political choice or between principle and necessity or between law and politics is an old acquaintance appearing through centuries and cultures. It seems that this time it reappears in the form of the tension between politics and science. To what extent is political power bound by the opinion of the scientists? Who bears the ultimate responsibility?

Another theme is exceptionality. To contain and overcome the pandemic is a necessity. Is this necessity driving the constitutional life outside its usual frames and leading to exceptionality as a factor permitting the bending of the constitutional parameters -and in the affirmative, to what extent? Is exceptionality -an extraordinary status- leading to, some, prevalence of science (epidemiologists) over politics, democracy and rights? Does it entail exceptional procedures, permitting the full or partial or time-limited by-pass of the democratic and parliamentary procedures? Does it permit measures justifiably encroaching civil and social rights? Up to which limit? Is this 'exceptionality' perhaps, the nucleus of a new normality?

The deviation from the normal parliamentary and more generally democratic procedures is another theme: how far is it permissible (or necessary) to *court-sircuit* the democratically accountable Parliament and refer to the Executive everything relating to the combat against the pandemic? Apart from and in addition to the procedural aspect of who takes the anti-COVID measures, and, perhaps more importantly, the extent and the conditions under which the pandemic is constitutionally admitted as a valid reason permitting (if not requiring) so many severe restrictions to basic constitutional rights is in the center of the constitutional discussion regarding the pandemic.

Last but not least is the role of Courts. Are they, when reviewing the constitutionality of the anti-COVID measures the ultimate umpire for their permissibility and enforceability? How far is the

jurisprudence coerced to take into account the particularities of the exceptional condition?

5. Greece's Institutional Response to COVID-19

Greece (I could add also Portugal) among the eurozone states has the *privilegium odiosum* of a very recent and particular experience: a two-fold effort to face an extreme crisis situation which is the all too well known crisis of their sovereign debt while avoiding overpassing their constitutional limits. The 2010-2018 financial crisis called for harsh austerity measures, including measures affecting the constitutional functioning of the Greek polity and limits to the extent of the constitutional rights protection. As a result, Greece learned the value of state's institutional and financial resilience⁹. Regarding the substance of the anti-COVID measures, Greece follows the general lines adopted by and in the EU-countries. The features of the country's *institutional* response to the pandemic could be outlined along the following lines.¹⁰

Strengthening the role of the Executive. Executive power had been radically dtrengthened during the years of financial crisis. This serves as a precedent to address the COVID-19 pandemic: we had the experience and knew the pattern. The main legal instrument used by the executive to legislate are the so-called Acts of Legislative Content. They are a form of presidential decree, issued on proposal by the government "under extraordinary circumstances of an urgent and unforeseeable need" (Art. 44 (1) of the Constitution). These acts are endowed with full force of law, valid and enforceable. They remain valid during the forty days following their issuance or forty days following the call for parliamentary session. However, if these acts are ratified by the Parliament, they remain valid for as long as the Parliament does not revoke them. Since 25 February 2020, seven "pandemic" Acts of Legislative Content have been issued. They have all found their way to the Parliament, where they were ratified and serve as the legal basis for most of the executive measures (ministerial decisions) dealing with the pandemic

At more detailed levels, additional COVID-related measures passed through the administrative channel of Ministerial Decisions, usually Common Ministerial Decisions (meaning co-signed by more Ministers), which are mainly

see, e.g., Maximilian Steinbeis, 'The Danse of the Courts', <<https://verfassungsblog.de/dance-of-courts/>> accessed 25 October 2021.

⁸ After Ronald Dworkin's famous treatise.

⁹ See Yiannis Drossos, *The Flight of Icarus*, European Legal Responses Resulting from the Financial Crisis (Hart Publishing 2020), 35 ff, 253 ff, 362 ff, 364 ff3, 75 ff.

¹⁰ For a short outline of the restriction imposed in Greece with regard to the pandemic see Karavokyris (n-1).

based on the Acts of Legislative Content. These Ministerial Decisions, and not parliamentary acts, are the basic practical instrument in systematizing the anti-COVID restrictions. A typical example of such Decision is the strategic Common Ministerial Decision 12639 dated 27 February 2021¹¹.

A piece of regulatory legislation (124 pages long) signed by eleven Ministers and one Secretary of the State, divides the country in three categories according to their risk level: (i) highly increased level ('red' areas), (ii) increased risk ('yellow areas') and (iii) supervision level ('green areas'). Then, in an excel-like format, the Decision enumerates in detail the personal, social and professional limitations applied to each level. The decision regarding which area of the country falls on which risk level is taken on the basis of the scientific opinion issued by the National Committee for the Protection of Public Health Protection from Coronavirous-19. -a committee composed by epidemiologists serving as the official scientific body -the voice of Science- instituted for monitoring and suggesting measures to combat the pandemic.

Another typical example of such Decision is the Common Ministerial Decision 31950 dated 22 May 2021.¹² This Decision was issued due to the easing of restrictions and signed by twelve Ministers and one Secretary of the State, (108 pages long). It categorizes public activities in 36 different categories (eg. public services, businesses, courts of law, hospitals, schools, universities, churches, archeological sites, theaters and cinemas, restaurants, means of transport, sports, commerce, parks, organized sea-shores, etc.). It details, one by one, the activities permitted and the conditions under which such activities are permitted (eg social distancing, wearing of masks, obligation to held meetings by means of teleconference, distance learning, obligation for tests or self-tests, distancing in the restaurants, bars and cafés, theaters, cinemas, organized sea-shores, etc.) and the administrative fines in case of non-observance of the restrictions.

The detailed character of the measures, as indicated by the example of the above two Common Ministerial Decisions, and the fact that such Decisions are signed by a large number of Ministers (practically covering every sector of public policy and public life), suggests that executive branch is the one in charge of the country's efforts to overcome the pandemic. However, sessions of the Parliament are held with the physical presence of the Members of the Parliament, but with a

restrained number of participating Parliamentarians, seated in a way that the requirements of the necessary distancing between the participants are met. Fortunately, unless snap elections are proclaimed, since the constitutional tenure of the present Parliament lasts until July 2023, no elections are expected for the next two years, so no such issue has come up.

Apart from some scarce exceptions, resentment against the restrictions has not derived in a wave of constitutional litigation. Nevertheless, civil rights are under stress. Restrictions affected freedom of movement (including freedom of assembly), freedom to develop professional activity, freedom of practicing several activities like sports, and freedom to follow religious ceremonies. The level of intrusion in these freedoms varies according to the risk level of the particular administrative area and the particular activity the restriction refers to. The rationale behind the restriction is given in the form of the expert opinion issued by the above-mentioned official Committee of epidemiologists.

Until May 2021, the country has had had three formal lockdowns (March-May 2020, November 2020-January 2021, February 2021 - beginning of May 2021)¹³, although restrictive measures have never been totally recalled. Freedom of movement was the first to be curtailed: movement was conditioned following an SMS authorization system for six specific reasons: (i) visiting a pharmacy or doctor or by appointment; (ii) shopping in a supermarket or grocery store; (iii) visiting a bank when an online transaction is not possible; (iv) providing assistance to someone in need or chaperoning children to/from school; (v) attending a funeral or exercising parental visitation rights and finally physical exercise ; (vi) or walking a pet. Up to two people could engage in these activities on the condition that they maintain a distance of 1.5 meters from one another.

Almost unconditional curfew 9 pm or 6 pm to 5 am has (depending on the risk level) been introduced since November 2020 until the first days of May 2021. Domestic travel was allowed exclusively for predefined specific reasons, such as health or business purposes, family reunification or returning to permanent residence. All non-essential stores have been shut down and only supermarkets, pharmacies and takeaway food business remained open. During Christmas holidays and until 2 January 2021, the government encouraged the 'click away' shopping method in retail stores and the operation of bookstores,

¹¹ KYA. Δ1α/Γ.Π.οικ. 12639 Official Gazette 739/B of 27.2.2021

¹² KYA Δ1α/Γ.Π.οικ Official Gazette B, 2141

¹³ Formally, one could count three lockdowns, the second ending in January and the third beginning in

February 2021. Counting only two lockdowns gives more accurately the picture of continuation of the restrictions from November 2020 until May 2021.

hairdressers, nail salons and vehicle inspection services. When in public, wearing a mask became mandatory. Education services, including primary schools, high schools and universities, were provided only through distance learning and digital tools.

In a precautionary easing attempted after the Christmas and New Year holidays all retail stores and shopping malls were permitted to reoperate, along with hair and beauty salons and vehicle inspection services. However, the SMS system introduced in March 2020 was retained. The shopping time was limited to two hours per day and only four customers were allowed per store of up to 100 square meters. Shops and stores in areas that are at highest the COVID-19 risk level ('red') areas, could operate only via the 'click away' method. On January 11 primary schools and nurseries reopened. However, in February the increasing COVID-19 spread triggered the third lockdown, bearing significant restrictions, especially for the 'red' areas of the country (including the region of Attica in which half of the Greek population is concentrated). Primary and secondary education switched again to distance learning. Regarding the exercise of freedom of religion, only up to nine people were allowed to attend ceremonies, such as weddings, baptisms, funerals, memorial services, etc. During Eastern, the most important religious holiday of the Greek Orthodox Church, no movement outside the boundaries of the administrative region was permitted, attending the services was restricted, including the number of persons allowed to sit at the Eastern family feast. These measures were only lifted after Eastern, which for the Greek Orthodox Church was celebrated on 2 May 2021.

These sets of restrictions were partially lifted in the first weeks of May and have been replaced by more lenient conditions set by the above mentioned Common Ministerial Decision 31590 of 22 May 2021. Progress of the vaccination¹⁴ allowed this to happen, along with the necessity to gradually open due to the tourist season and the activities related

thereto. The pace of infections was still alarming albeit showing some signs of decrease.¹⁵

As mentioned, unlike other European (and non-European) countries, no major juridical disputes regarding the constitutionality of measures have so far been filed. Greece's previous experience with the financial crisis might explain the stoicism that the country and the Greeks have shown with regard to the restrictions imposed to face yet another extreme crisis -a health crisis this time. Displeasure and resentment were (and still are) there, but not in any way similar to the protests and demonstrations, much less the cataclysm of the constitutional complaints against the harsh and severe measures taken to address the pandemic.¹⁶

The only COVID-related case law so far is found in some interim decisions issued by the Council of State (our Supreme Administrative Court and the main court conducting constitutionality review) on COVID-related restrictions. The Court denied the suspension of the questioned measures. The disputes that fueled these requests referred to restrictions of freedom of worship in churches and restriction of freedom of assembly. No other restrictions have so far been challenged before courts.

In a flagrant display of utilizing the pandemic for political purposes, in November 2020, the Greek government issued a complete ban on gatherings with more than four people during the lapse of four days. It is believed this was done with the aim of banning the regular yearly protest, organized mainly by the Left, to commemorate the bloody sacrifice of democratic students having occupied the Polytechnical School of Athens during the military junta in 1973. Amnesty International severely criticized the ban, stating that it "is disproportionate and violates Greece's obligations under international human rights law" and asked the Greek authorities to "urgently revoke this ban that constitutes a serious interference with the rights to freedom of expression and peaceful

¹⁴ According to 'Our World in Data', <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiBkrObnODwAhUJg_0HHdxODXIQ7OUFegQILxAC&url=https%3A%2F%2Fourworldindata.org%2Fcovid-vaccinations%3Fcountry%3D%2FWID_WRL&usg=AOvVaw0WXCT-GYDy5Sh2iQhWi4i> accessed 30 October 2021. 5.4 million people have been vaccinated were vaccinated in Greece on 21 May 2021, out of which 1.97 million have been administered the two doses, leading to a 18.3% of the population being fully vaccinated. On 3 November 2021 62% of the Greek population was fully vaccinated in addition to 2% partly vaccinated, *ibid*, accessed on 4 November 2021.

¹⁵ On 23 May 2021 Greece counted 389,804 cases (out of which 352,207 have recovered) and 11,772 deaths. Around mid-May 2021 the new cases oscillate between 2,781 (on 18 May) and 875 (on 23 May), but have not (yet) shown a stabilization of the pace of the new cases. For the figures see 'Worldometer Covid' <<https://www.worldometers.info/coronavirus/>> accessed 23 October 2021. On 4 November 2021 Greece counted 760,592 cases out of which 695,078 cases recovered while 16,109 people lost their lives, *ibid*, (accessed 4 November 2021).

¹⁶ See Yiannis Drossos, (n. 3) 35 ff, 353 ff.

assembly”¹⁷. In any case, the ban was breached by the leftist opposition parties, which commemorated the event with symbolic gatherings of hundreds of people, taking all anti-COVID precautions (masks, distancing etc.). The political nature of the case has been made unequivocally clear by the government’s reaction to the disrespect of the ban. The government failed to impose the administrative fines provided for the case, which has been politically justified by the Minister in charge of enforcing the ban in the first place.¹⁸

The Council of State, in two identical decisions¹⁹, rejected suspension requests against this ban, taking into consideration the opinion of the National Committee for the Protection of Public Health from Coronavirus-19 and the exceptional and provisional character of the measure.

With an analogous reasoning the Council of the State rejected several suspension requests against a number of restrictions regarding the temporary ban of places of public religious worship -basically churches and of the Holy Communion (a ritual of the Orthodox Church entailing that believers receive sacramental wine each after the other by the same priest, from the same cup and by the same spoon). The Court took into consideration the measure’s provisional character and the particular circumstances referred to expressly by the Court, such as the proportionate nature of the restriction vis-a-vis safeguarding the public interest, that is public health²⁰.

In an interesting *tournure*, the same Court annulled a Common Ministerial Decision imposing temporary traffic restrictions in the center of

Athens. The Court based its decision on the enabling provisions of three Acts of Legislative Content issued for the purpose of combatting the pandemic. In the Court’s opinion, the Common Ministerial Decision had nothing to do with public health protection, rather only to traffic regulations. Hence these measures could not be based on the legislation enacted exclusively for the purpose of addressing the pandemic.²¹

6. The Pandemic Mechanics as Engine for a New Institutional Mindset?

The Eurozone’s financial crisis has been the driving force for a large-scale set of deep reforms in the European economic governance, directly affecting the functioning of the constitutional structures of - at least- the Eurozone Member States.²² An analogous discussion has already been opened with regard to the impact of the pandemic on the economic governance of Europe. Do, the intervention, of unprecedented scale, to financially assist the economy of the EU states, the radical easing of the until recently relentlessly tough ‘stability’ discipline and the related initiatives of the European Central Bank form the nucleus of a different European economic structure and governance? Time will show²³.

In sum, a lot of what at the beginning appeared as an extraordinary measure to escape from an exceptional and temporary threat seems to have given the pattern and mindset for permanent changes in our institutional structures and procedures. The pandemic has introduced in our

¹⁷ See <<https://www.amnesty.org/en/documents/eur25/3346/2020/en/>> accessed 30 September 2021.

¹⁸ See a short commentary on the incident in Yiannis Drossos, ‘The unbearable certainty of an absolute constitutional discourse’ (in Greek, Η αβάσταχτη βεβαιότητα ενός απόλυτου συνταγματικού λόγου), newspaper ‘Η Αυγή’, 1 December 2020, <https://www.avgi.gr/politiki/373229_i-abastahti-bebaiota-enos-apoloytoy-syntagmatikoy-logoy> and <https://www.academi.a.edu/44618808/%CE%97_%CE%B1%CE%B2%CE%AC%CF%83%CF%84%CE%B1%CF%87%CF%84%CE%B7_%CE%B2%CE%B5%CE%B2%CE%B1%CE%B9%CF%8C%CF%84%CE%B7%CF%84%CE%B1_%CE%B5%CE%BD%CF%8C%CF%82_%CE%B1%CF%80%CF%8C%CE%BB%CF%85%CF%84%CE%BF%CF%85_%CF%83%CF%85%CE%BD%CF%84%CE%B1%CE%B3%CE%BC%CE%B1%CF%84%CE%B9%CE%BA%CE%BF%CF%8D_%CE%BB%CF%8C%CE%B3%CE%BF%CF%85> accessed 30 October 2021. In a different trajectory of utilising the pandemic for reasons alien to the effort to fend it off, several public entities yielded to the temptation and introduced quick procurement procedures of mainly but not exclusively material related with the pandemic (masks, medical equipment etc.) avoiding the normal tender procedure

tender procedure ‘because of the pandemic’, see, e.g., <<https://www.documentonews.gr/article/antilaloy-n-oifylakes-gia-17-ekat-se-filoys-kai-gnwstoys-apo-th-sofianikolaoy>> and <<https://tvxs.gr/news/egrapsan-eipan/paraititheite-ka-nikolaoy>>.

It seems that the covid pandemic triggered a more general temptation to avoid the normal (and controllable) legal procedures for public procurement, see Sue Arrowsmith (Anthology Editor), Luke RA Butler (Anthology Editor), Annamaria La Chimia (Anthology Editor) ‘Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic’ (2021) Hart Publishing.

¹⁹ Council of State, interim decisions 262 and 263/2020.

²⁰ Council of the State, interim decisions 49/2020 60/2020, 99/2020, 161/2020, 1/2021, 2/2021, 3/2021.

²¹ Decision 1992/2020 of the Council of the State.

²² See more in Yannis Drossos (n 3), 117 ff, 391 ff and *passim*.

²³ See e.g. Christos V. Gortsos and Wolf-Georg Ringe (eds) ‘Pandemic Crisis and Financial Stability’ (2020) European Banking Institute; Dolores Utrilla and Anjum Shabbir (eds) ‘EU Law in times of the pandemic. The EU’s legal response to COVID-19’ (2020) EU Law Live Press.

lives and to unprecedented level, themes such as distancing in the work relations, public deliberation, and personal communications, a redefinition of privacy limits, the radical reinforcement of the executive to the detriment of the democratic substantial and procedural ethos, a confusion between state authority and authoritative state, the cardinal importance of non-political elements (such as the medical science) either as rationale or as pretext for political decision, a redefinition of globality in its relation with the nation-state, polity and society. Some signs of a *pandemicspeak* seem to have appeared as well: 'telelearning', 'social distancing', 'self-test', 'rapid test', 'teleworking', 'vaccine nationalism', 'zoom', 'webinar', 'digital COVID-certificate' already belong to our everyday language.

Once again, the traditional liberal and democratic modes of social and political coexistence and principles, as sanctioned, e.g., by the common European constitutional structures and traditions, are on trial. The outcome cannot be easily predicted -but the process will be certainly of great interest, intellectual and other.

Civil Rights in Times of Pandemic – A Code of Conduct for City Governance

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Abstract. We discuss the need for a Code of Conduct for local urban governments that should consider a line-up of interconnected civil rights: Access to Information but also the Right to Privacy and to Personal Liberty. Local governments have a key role in collecting, analysing, and sharing information, which have a strong impact on personal liberty and privacy. However, due to COVID-19 pandemic emergency, national governments can declare derogations to the right to “seek, receive, and impart information”. We deliberate the value of enshrining Access to Information as an absolute human right in order prevent the spread of misinformation and ensure the accountability of multi-level governance structures. The same is true for the Right to Privacy, which is the other side of the same coin. Finally, national governments should recognize the unique needs of urbanized areas when it comes to personal liberty under present or future pandemics and establish consistent policies to support cities as duty-holders in a rights-based regime.

Keywords: *Local Urban Government, Code of Conduct, Access to Information, Right to Privacy, Right to Personal Liberty*

1. Introduction

In the following article we discuss implementing a Code of Conduct for local urban governments. It is our opinion that this Code of Conduct should be composed of interconnected civil rights, notably access to information and also the right to privacy and to personal liberty.

We do not deny that in times of pandemic the priority should be the protection of the life of all individuals within their territories, and that such priority justifies derogations from the obligations as provided by the International Covenant on Civil and Political Rights. However, we want to highlight that while derogations have been declared and measures have been adopted by the central government to meet this priority, the majority of these measures are implemented at the local level.

Local governments have a key role in collecting, analysing, and sharing information, which has a strong impact on personal liberty and privacy.

However, in state of emergency the right to “seek, receive, and impart information” can be suspended.

These issues are further complicated by multi-level governance structures that often involve local governments sharing information with the central government, potentially leading to delays and the sharing of inconsistent or inaccurate data.

Finally, we deliberate the value of enshrining access to information as an absolute human right in order to prevent the spread of misinformation and ensure government accountability. Smart technologies, surveillance, and contact tracing systems have been used to contain the spread of the pandemic and smart cities have also been used to monitor the success of social distancing measures implemented by governments. Since mass surveillance and collection of personal information data constitute a threat to the privacy of individuals, this article highlights the right to privacy from a city and multi-level governance perspective because this is where so much information is being and has the potential to be generated and shared. Much of the political debate around the COVID-19 pandemic focuses on how state action to control the spread of the virus affects individual liberty, with many countries seeing strong and sometimes violent opposition to restrictions on personal freedom and others taking the opportunity presented by the pandemic to impose significant restrictions of rights generally associated with “liberty.”

2. Civil Rights Responsibilities at Local Level – A Need For Consistency

Where do cities fall in this picture? Cities are generally not considered as guardians (duty-

holders) of “liberty.” That is generally seen as the function of a central government or a constitution that sets out broad principles and values. It is central governments that are usually the subject of constitutions and that are charged with upholding constitutional principles. Cities deal with the *mundane* aspects of daily life: garbage collection, public transportation, utility services. But cities can take and have taken actions that affect individual liberties. Local governments have been “front-line responders”¹ and, at least in parts of the United States, are also taking the lead in vaccinating people.

Cities possess significant powers over people’s daily lives and can play a role in protecting everyone’s liberty. National governments should recognize the unique needs of urbanized areas when it comes to liberty under present or future pandemics and establish consistent policies to support cities as duty-holders in a rights-based regime. Considering the Covid-19 pandemic, the Human Rights Treaties Branch of the UNHCHR released their *Internal HRTB toolkit of treaty law perspectives and jurisprudence in the context of COVID-19*² in May 2020 during the early stages of virus spread. The document clearly reiterates the range of responsibilities and obligations of States in the event of a state of emergency. Unfortunately, the role and responsibilities of the local governments are not indicated with the same clarity.

The UN Inter-Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (2011)³ highlights four groups of key human rights in need of protection in disasters:

- Protection of life, security and physical integrity and family ties.
- Protection of rights related to the provision of food, health, shelter, and education.
- Protection of rights related to housing, land and property, livelihoods, secondary and higher education.
- Protection of rights related to documentation, movement, re-establishment of family ties, expression and opinion, and elections.

Rights under the ICCPR subject to restriction include mobility rights, privacy rights, freedom of expression, and certain safeguards related to the

administration of justice. However, the ICCPR delineates certain rights that cannot be derogated from even during a declared state of emergency, including the right to life, freedom from torture, and freedom of thought, conscience, and religion⁴.

While not a criticism of multi-level governance structures, it is still important to recognize the need for consistency across all levels of government, particularly when it comes to guaranteeing the fundamental human rights of citizens.

3. Right to Access Information

During the ongoing COVID-19 pandemic, city-level government and the different sets of restrictions between the rural and the urban areas have caused a significant impact on the management of the virus. In the fight against COVID-19, access to reliable information about cities, including updates on the areas with the highest number of cases in a specific timeframe, is fundamental because they are densely populated hubs for movement and travel, making cities and urban areas potential virus hotspots.

Identifying the high-risk areas could help avoid the spread of the pandemic, and – simultaneously – it could help central and local governments better understand and recognize what kind of restrictions could be effective in that specific area.

While most cities have freedom of information and access to information policies, they were certainly not developed with an understanding of the potential consequences of a global pandemic.

With city governments being at the frontline of public health information and enforcement, healthcare and vaccine rollout, access to information and freedom of information must be seen in a different light. Applying a human rights lens to existing policies and procedures enables governments to ensure they are protecting and maintaining the rights of citizens while responding to emergencies in the most effective way possible.

With regards to the legislative framework of human rights, there are multiple United Nations documents that address access to information. Resolution 59 of the UN General Assembly (1946) states that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁵ The

¹ United Nations, *Policy Brief: COVID 19 in an Urban World* (July 2020) 2.

² United Nations Human Rights Office of the High Commissioner, Human Rights Treaty Branch, *Internal HRTB Toolkit of Treaty Law Perspectives and Jurisprudence in the Context of COVID-19* (15 July, 2020) <https://www.ohchr.org/Documents/HRBodies/TB/COVID19/HRTB_toolkit_COVID_19.pdf>.

³ <https://www.ohchr.org/Documents/Issues/IDP/Persons/OperationalGuidelines_IDP.pdf>.

⁴ 'OHCHR | International Covenant on Civil and Political Rights.'

⁵ 'Freedom of Information | United Nations Educational, Scientific and Cultural Organization', <<http://www.unesco.org/new/en/communication-and->

International Covenant on Civil and Political Rights, Article 19 includes the same working, adding, “...either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁶ The HRTB kit recognizes the challenge of access to information, noting that certain groups – including Indigenous peoples, asylum seekers and certain national or ethnic groups – may face difficulties accessing public information. Therefore, it urges states to implement programs and systems that help ensure accurate information is available to all, regardless of their language, ethnicity, culture, or citizenship.

Throughout the pandemic, citizens and governments have suffered because of what has widely been referred to as an “infodemics”⁷. Created by a collision of unintentional and intentional misinformation, media sensationalism and conspiracy theories, particularly those promoted by populist leaders, these infodemics have had deadly consequences. In the very early stages of the global pandemic, experts claimed that approximately 800 people had died as a direct result of misinformation by drinking methanol believing it to cure the virus between December 2019 and April 2020⁸. Pandemics are inherently challenging when it comes to the sharing of information as researchers are constantly learning and government policy-making processes are not always adept at being flexible, nor are they traditionally based in science. Governments tend to create policies that are highly influenced by public opinion and tolerance, as opposed to empirical evidence⁹.

The politicization of the Covid response has exacerbated existing political divides. In 2020, former United States President Donald Trump claimed the virus was a hoax and was being exaggerated by media.¹⁰ Populists and anti-scientific leaders like former United States President Trump and current President of Brazil

Jair Bolsonaro have contributed to the spread of misinformation by openly dismissing scientific findings and misdirecting their administrations in their response to the pandemic¹¹. As stated by Max Roser, there are vast differences between how countries with populist leaders have handled the pandemic, with countries such as the US, Brazil and the UK having extremely high infection and death rates¹².

This unprecedented challenge, while extremely worrisome to democracy, does offer an opportunity for local governments to tackle the ideological divisions that contribute to misinformation. There is a proven distinction between trust in local governments and national governments. Fitzgerald and Wolak found that, provided there are opportunities for citizens to have a voice in local governments, people, specifically in Western Europe, report a greater trust in local government over centralized governments¹³. Citizens are more likely to place trust in local authorities¹⁴ and feel that they are more likely to not only comprehend significant community issues but respond to them¹⁵. Trust in local government is only increased by the proximity of officials and services to citizens. Citizens may personally know an elected local official and are more likely to interact with local services such as education, healthcare, housing, and law enforcement. This increased level of interaction and transparency is likely a contributing factor to the trust extended to local officials and offers significant opportunities to battle misinformation.

If citizens have a higher level of trust in local governments, they are more likely to trust the information coming from them. Information regarding hospitalization, deaths and the efficacy of public health measures may be less likely to be seen as “fake news” if the source of such information is local, as opposed to national. The localization of news and information may be considered in the future as a useful tool for battling infodemics.

information/freedom-of-expression/freedom-of-information/browse/1/> accessed 13 April 2021.

⁶ 'OHCHR | International Covenant on Civil and Political Rights' <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 13 April 2021.

⁷ The Lancet Infectious Diseases, 'The COVID-19 Infodemic' (August 1, 2020) 20, 8, The Lancet Infectious Diseases 875.

⁸ Md Saiful Islam and others, 'COVID-19-Related Infodemic and Its Impact on Public Health: A Global Social Media Analysis' (October 7, 2020) 103, 4, The American Journal of Tropical Medicine and Hygiene, 1621–29.

⁹ The Lancet Infectious Diseases, 'The COVID-19 Infodemic' (August 1, 2020) 20, 8, The Lancet Infectious Diseases 875.

¹⁰ David L. Levy, 'COVID-19 and Global Governance' (2021) 58, 2, Journal of Management Studies, 562–66.

¹¹ Jakob-Moritz Eberl, Robert A. Huber and Esther Greussing, 'From Populism to the 'Plandemic': Why Populists Believe in COVID-19 Conspiracies' (October 2, 2020) SocArXiv.

¹² Max Roser and others, 'Coronavirus Pandemic (COVID-19)' Our World in Data (May 26, 2020) <<https://ourworldindata.org/coronavirus/country/brazil>> accessed 13 April 2021.

¹³ Jennifer Fitzgerald and Jennifer Wolak, 'The Roots of Trust in Local Government in Western Europe' (January 1, 2016) 37, 1, International Political Science Review, 130–46.

¹⁴ Gabriel A. Almond, *The Civic Culture, Political Attitudes and Democracy in Five Nations* (Princeton, N.J.: Princeton University Press, 1963).

¹⁵ Robert Alan Dahl, *Size and Democracy, The Politics of the Smaller European Democracies* (Stanford, Calif: Stanford University Press, 1973).

One particularly challenging aspect of access to information during the pandemic is the digital divide. With many traditional, in-person methods of sharing information banned to prevent the spread of the disease, online information has become the main source of information for many. That information ranges from preventing the spread of the pandemic and identifying symptoms to treatment and vaccination options and financial supports for those impacted by Covid-19.

In the United States, 53% of Americans noted that the internet has been an essential tool for accessing information about the pandemic. The study, conducted by Pew Research Study, also found that 36% of lower income families had no access to a computer with internet at home¹⁶. Rural Americans in particular face additional challenges with one-third having no broadband internet connection at home and only about 3 in 10 rural adults owning a desktop or laptop computer, a smartphone, home broadband connection and tablet. In contrast, 43% of urban adults own all four technologies or devices¹⁷. Further research in the United States directly addressed the issue that screening processes for Covid-19 were initially made available online, where many patients could not access the information¹⁸.

Local governments are uniquely positioned to address the digital divides that impact access to information, particularly during a pandemic. Local services, particularly public libraries, have spent the last decade or more seeking to bridge the digital divide for citizens by offering public internet access and a range of e-government services. As noted by Bertot, Jaeger, Langa & McClure, public libraries are increasingly serving as agents of e-government and increasingly play significant roles in emergency response by connecting to citizens to family and critical resources via the internet¹⁹. This role of public libraries in providing access to information is particularly impactful in rural communities

where broadband internet access may be limited.

Petri argues that internet access through public libraries and other government-provided means should not be a privilege, but a human right that local governments cannot ignore²⁰.

We have an additional challenge in that there are multiple sources of information related to the pandemic. This can also feed into misinformation and lack of trust in information coming from government sources or global bodies, such as the World Health Organization. Before many governments were distributing information, universities were. Johns Hopkins University was really the first organization to begin collecting and sharing real-time cases of Covid around the globe. It does, however, beg the question of – is more information better? When there are multiple sources of information between the government, academia, private sector and the media, there are bound to be inconsistencies. Data is defined in different ways, and this can lead to distrust in information if sources are not consistent with each other.

There are discrepancies between even the most significant sources of information, the World Health Organization, and country-specific data sets. On April 5, the World Health Organization (WHO) portal was tracking total deaths in the United States at 551,391²¹, while the CDC death count sat at 554,064²² for the same timeframe. Johns Hopkins University meanwhile listed the US number of deaths to be 555,226. On the same date, the WHO listed the total number of cases worldwide as 131,020,967 and 2,850,521 as the number of worldwide deaths. Johns Hopkins University, one of the first organizations, and the first academic organization, to collect data on the pandemic,

¹⁶ Emily Vogels and others., *53% of Americans Say the Internet Has Been Essential during the COVID-19 Outbreak: Americans with Lower Incomes Are Particularly Likely to Have Concerns Related to the Digital Divide and the Digital "Homework Gap,"* Pew Research Center (Pew Research Center, 2020).

¹⁷ 1615 L. St NW, Suite 800 Washington, and DC 20036 USA 202-419-4300 | Main 202-857-8562 | Fax 202-419-4372 | Media Inquiries, 'Digital Gap between Rural and Nonrural America Persists', *Pew Research Center* (blog) <<https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>> accessed 29 April 2021.

¹⁸ Anita Ramsetty and Cristin Adams, 'Impact of the Digital Divide in the Age of COVID-19' (July 1, 2020) *Journal of the American Medical Informatics Association* 27, no. 7, 1147–48 <<https://doi.org/10.1093/jamia/ocaa078>>.

¹⁹ John Carlo Bertot and Paul T. Jaeger and Lesley A. Langa and Charles R. McClure, 'Public Access Computing and Internet Access in Public Libraries: The Role of Public Libraries in e-Government and Emergency Situations' (2006) *First Monday* 11, no. 9 <<https://ictlogy.net/bibliography/reports/projects.php?idp=1437>>.

²⁰ Claire Petri, 'Rural Libraries and the Human Right to Internet Access', in Brian Real (ed.) *Rural and Small Public Libraries: Challenges and Opportunities*, vol. 43, *Advances in Librarianship* (Emerald Publishing Limited, 2017), 13–35 <<https://doi.org/10.1108/S0065-28302017000043002>>.

²¹ 'United States of America: WHO Coronavirus Disease (COVID-19) Dashboard With Vaccination Data', <<https://covid19.who.int>> accessed 5 April 2021.

²² Centers for Disease Control and Prevention, *COVID Data Tracker*, <<https://covid.cdc.gov/covid-data-tracker>> accessed March 28 2020.

counted the number of global cases at 131,570,882 with total global deaths sitting at 2,856,545²³.

In-country data reporting and collection has been problematic in the United States and has been implicated in the heavily criticized response to the pandemic. The main data information centre, the Centre for Disease Control (CDC) relies on states to collect and communicate data to them. With states each conducting their own testing and reporting statistics to their own local health organizations before sharing data with the CDC, delays and inaccuracies make monitoring more challenging.²⁴

Throughout the pandemic, local governments have often been the primary collectors of data, particularly when it comes to hospitalization rates and death rates. As data moves upstream to centralized governments, there are inherently delays in reporting. Additionally, data collection and reporting methods differ from healthcare system to healthcare system added to discrepancies as data from multiple sources is combined at the higher levels of government. Local governments are able to offer increased transparency in how data is collected and can reduce delays in the sharing of key data that may impact not only policy measures but the individual behaviours of citizens.

4. Right to Privacy

One cannot help but consider the right to privacy and the right of access to information as two sides of the same coin. On the one hand, the government gives information to its citizens at the local level in a top-down process. On the other hand, governments also need detailed data to provide specific strategies against the pandemic. For this reason, they acquire information from the citizens with a bottom-up approach through data collection.

To sum up, it can be possibly argued that the right of access to information is related to the question, “what information does the government give to the citizens?”. The fulfilment of the right to privacy plays a key role when the question to

answer is, “what information does the government get from the citizens?”.

To help contain further spread of the virus, some of the most used tools are smart technologies, surveillance, contact tracing systems, and city-based tracking maps. An example of a tracking map is *The UN-Habitat COVID-19 Readiness & Response tracking platform*²⁵ that provides scores representing readiness and responsiveness levels in a growing number of highly populated cities²⁶.

Some of the indicators employed to determine the scores are public health capacity and national collaborative will for readiness, and treatment and economic response for responsiveness.²⁷

Technologies are fundamental for communities and local authorities to support rapid reporting, management, and analysis of data and information.

It is particularly true for smart cities, which have also been used to monitor and control the effectiveness of social distancing measures.²⁸

So far, cities have been a critical player in the fight against the pandemic, implementing national and regional-level regulations at the urban and local, finding locally appropriate solutions²⁹.

However, tools such as mass surveillance and personal data collection have been a significant threat to the right to privacy.

The right to privacy is a fundamental human right, and it is strictly related to data protection. It includes the right to be let alone and freedom from intrusion into one's private life, limiting governmental and private actions and interventions that threaten individuals' privacy.

Under this right, the unwarranted and unjustifiable publication or disclosure of one's private information and personal matters is not allowed.

Moreover, the right to privacy is essential to autonomy and the protection of human dignity. The Universal Declaration of Human Rights (1948) states that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour

²³ Johns Hopkins Coronavirus Resource Center, *COVID-19 Map*, <<https://coronavirus.jhu.edu/map.html>> accessed 5 April 2021.

²⁴ H. Daniel Xu and Rashmita Basu, 'How the United States Flunked the COVID-19 Test: Some Observations and Several Lessons' (August 1, 2020) *The American Review of Public Administration* 50, no. 6–7, 568–76 <<https://doi.org/10.1177/0275074020941701>> accessed 5 April 2021.

²⁵ UN Habitat, *COVID-19 Readiness & Response* <<https://unhabitat.citiq.com/>>.

²⁶ UN-Habitat, *UN-Habitat COVID-19 platform tracks hundreds of new cities* (2020, December) <<https://unhabitat.org/un-habitat-covid-19-platform-tracks-hundreds-of-new-cities>>.

²⁷ UN-Habitat, *UN-Habitat COVID-19 city tracker now includes daily pandemic worldview* (2020, November) <<https://unhabitat.org/un-habitat-covid-19-city-tracker-now-includes-daily-pandemic-worldview>>.

²⁸ Simon Chandler, 'How Smart Cities Are Protecting Against Coronavirus But Threatening Privacy' (2020, April 13) *Forbes* <<https://www.forbes.com/sites/simon-chandler/2020/04/13/how-smart-cities-are-protecting-against-coronavirus-but-threatening-privacy/>>.

²⁹ UNESCO, *Online meeting report, Urban Solutions: Learning from cities' responses to COVID-19* (2020, June 25) UNESCO Cities Platform Online Meeting <<https://en.unesco.org/urban-solutions-Learning-from-cities-responses-to-COVID19>>.

and reputation. Everyone has the right to the protection of the law against such interference or attacks.³⁰

On the European level, the European Convention on Human Rights (ECHR) states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³¹

Many countries explicitly recognize a right to privacy in their constitutions³². They at least include the rights of secrecy of communications and inviolability of the home³³. For example, recent constitutions – like that of South Africa – include definite rights to access one's personal information.³⁴ However, in countries like the US or India – where privacy is not explicitly recognized in the constitutional text – courts have found that right in other provisions³⁵. In India, the Supreme Court – in a landmark judgement of August 2017 – overruled the previous judgements on the matter.

The judges declared that the right to privacy is a fundamental human right protected under the country's Constitution.³⁶

The pandemic is raising salient questions about the right to privacy and urban development everywhere in the world. On the one hand, COVID-19 is the reason why cities are finally experiencing the long-overdue unprecedented process of transformation³⁷. On the other hand, the ongoing

pandemic is a challenge for city life. People will have to learn what the new normal and the new city standards are and how they will influence the post-pandemic urban context. Undoubtedly, technology is a primary tool necessary in the administration of all these present and future advances.³⁸

However, although technology is part of the focal strategy in the fight against the global pandemic of COVID-19 and rethinking and reshaping the role of cities, there are negative aspects to consider, as well. Technologies such as surveillance and collection of personal information and metadata through contact tracing apps have significant implications for the right to privacy and, subsequently, for other related rights, for example, the right to be free from discrimination.

Contact tracing is an essential public tool that identifies, assesses, and manages people who may have been exposed to an infectious disease, breaking the transmission chain. Digital technology, cities' organization and effort are key players in the process³⁹. Furthermore, another fundamental factor for the success of this system is close and harmonious engagement with communities⁴⁰ and responsiveness to their concerns.

Contact tracing grants authorities the information required to identify anyone in close contact with the subject individual to control the outbreak of a disease. The traditional method, widely used in the past, consists of tools including credit card transactions, CCTV cameras, and interviews.⁴¹ Contact tracing applications are a relatively new tool, and they are the source of serious worldwide concerns regarding the right to privacy because they can track the movement of people, notifying them of their close contact with COVID-19 cases.⁴² There are many other issues to consider, for example, reliability and problems related to lack of widespread implementation.

Besides, universally adopted contact tracing

³⁰ United Nations, *Universal Declaration of Human Rights* (1948) Art. 12 <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>.

³¹ European Convention on Human Rights (1950) Art. 8 <https://www.echr.coe.int/documents/convention_eng.pdf>.

³² Global Internet Liberty Campaign, *Privacy and Human Rights, An International Survey of Privacy Laws and Practice* <<http://gilc.org/privacy/survey/intro.html>>.

³³ *Ibidem*.

³⁴ *Ibidem*.

³⁵ *Ibidem*.

³⁶ See Supreme Court of India, *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors.*, August 24, 2017 Retrieved from https://main.sci.gov.in/supreme-court/2012/35071/35071_2012_judgement_24-Aug-2017.pdf: "The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article

21 and as a part of the freedoms guaranteed by Part III of the Constitution".

³⁷ Mark Nicholson, 'How Covid-19 has made smart cities smarter than ever' (2020, November 16) Smart Cities World <<https://www.smartcitiesworld.net/opinions/opinions/how-covid-19-has-made-smart-cities-smarter-than-ever>>.

³⁸ *Ibidem*.

³⁹ WHO, *Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing* (2020, May 28) Interim guidance, 1-3.

⁴⁰ WHO, *Contact tracing in the context of COVID-19*, (2021, February) Interim guidance, 1.

⁴¹ Emre Kursat Kaya, *Safety and privacy in the time of Covid-19: contact tracing applications* (2020, June) Centre for Economics and Foreign Policy Studies, 2020, 2.

⁴² Michele Collazzo and Alexandra Tyan, 'Emergency Powers, COVID-19 and the New Challenge for Human Rights' (2020, June) Istituto Affari Internazionali, 3.

rules do not exist, leading to divergences in the way data are collected.

Data can be collected through GPS location or Bluetooth connected devices, and data storage can be centralized or decentralized.⁴³ GPS trackers have a constant connection, providing an updated location at any time, whereas the Bluetooth (or proximity) tracking needs people to download an application that works when the device gets in close contact with other smartphones' Bluetooth connections, detecting and recording their unique anonymous code⁴⁴. Even if the latter is considered a better way to collect Covid-related data in terms of privacy in many countries, one of the major problems concerning the proximity tracking system is that its effectiveness depends not only on the number of people that decide to download the application but also on their will to update their health information once they get infected to notify people that have been in close contact with them. In centralized systems, phone numbers and locations are collected in a central server, whereas in decentralized models, the information is not transmitted to a central database. The former approach gives more rapid access to relevant health information, but it also raises more privacy issues.

There are many reasons why local and other government levels should pay careful attention to the privacy issue from the city's perspective. Even if contact tracing and mapping the COVID-19 situation are fundamental to slow infections down, the control public and private entities have on personal data and information could lead to negative consequences. Mass surveillance and lack of privacy can create social stigma. They could also lead to a situation where individuals make choices based on their fear of potentially letting others know what they are doing. Furthermore, as a consequence, people could also lie about their medical condition or refuse to get tested because they are afraid of what other people could say or think about them. For these reasons, guaranteeing

the right to privacy in the urban environment is fundamental.

From this perspective, many principles already stated or suggested by international and supranational organizations and specialized agencies can inspire a city-level code of conduct.

These principles can be borrowed and used locally as guidelines to avoid the breach of this right and a situation in which citizens do not want to cooperate. This set of principles could also help create consistency between the national and the local levels of government.

Data collection should be carried out lawfully and fairly.⁴⁵ Authorities should ensure that data exchange is carried out according to law and existing privacy principles⁴⁶. It must be temporary, carried out for specific purposes in the fight against the pandemic and time-bound⁴⁷. Local governments must ensure integrity, confidentiality⁴⁸, and security, deleting data when they reach their goal. In other words, data collection should be limited by purpose⁴⁹.

Moreover, measures related to data and personal information must be justified, and they must cease as soon as they are no longer needed.

This principle is essential so that people shall not fear that authorities could use such measures to control them even after the pandemic will be over, outlasting their justification and turning them into standard practice. It is crucial to understand that the regulations implemented during the pandemic cannot be long term solutions because they are supposed to be provisional and temporary.

Furthermore, the more time passes, the more evident the inconsistency between the national and local levels of government becomes.

Lastly, data collection must be transparent. On this principle, the WHO (2020) stated that:

Data collection and processing shall be transparent, and individuals shall be provided with concise and reader-friendly information in clear and unambiguous language regarding the purpose of collection, the types of data collected, how data

⁴³ Emre Kursat Kaya, *Safety and privacy in the time of Covid-19: contact tracing applications* (2020, June) Centre for Economics and Foreign Policy Studies, 2020, 3.

⁴⁴ *Ibidem*.

⁴⁵ See European Union (2016) General Data Protection Regulation (GDPR), Chapter 2, Art. 5 para 1(a) <<https://gdpr-info.eu/art-5-gdpr/>> “[Personal data shall be] processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’)”.

⁴⁶ UN System Organizations, *Joint Statement on Data Protection and Privacy in the COVID-19 Response* (2020, November) <https://www.un.org/sites/un2.un.org/files/joint_statement_on_data_protection_and_privacy_in_covid-19_response.pdf>.

⁴⁷ *Ibidem*.

⁴⁸ See GDPR, Art. 5 para 1(f) <<https://gdpr-info.eu/art-5-gdpr/>> “[Personal data shall be] processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (‘integrity and confidentiality’)”.

⁴⁹ See GDPR, Art. 5 para 1(b) “[Personal data shall be] collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (‘purpose limitation’)”.

will be stored and shared, and how long data shall be retained [...]”⁵⁰.

Transparency is fundamental because it builds trust between citizens and all the actors involved at every governance level.

Another principle relating to the processing of personal data that must be examined can be found under Article 5 of the GDPR, and the WHO’s Interim Guidance of May 2020 is *data minimization*⁵¹. Urban authorities should identify the minimum amount of personal data needed, and they should not hold additional personal information. Furthermore, local governments should make a further effort, demonstrating that all the processes are correct and that the information they collected, used, retained, accessed, or disclosed, is what they needed for healthcare purposes and nothing more, based on the so-called principle of accountability⁵².

If individuals are subjected to unfair surveillance, they must also have access to effective contestation remedies and mechanisms.⁵³

Other suggested principles that should be applied to the urban level concerning digital proximity tracking technologies are independent oversight and civil society engagement⁵⁴. The former entails that an appointed actor must ensure that health data collected by the local government through contact tracing apps are not used for other purposes. Besides, the subject should be in charge of verifying that the measures are unavoidable and proportionate to their impact and effectiveness.

Also, independent oversight should be helpful to “prevent abuse or exploitation of vulnerable and marginalized communities”⁵⁵. The latter is the principle of public engagement, and it refers to the inclusion of categories such as civil society organizations and marginalized groups in the open, active, and essential participation in the data collection process.⁵⁶

This code of conduct for the multilevel governance would help avoid not only the breach of the right to privacy but also of other rights strictly related to that one, such as the right to dignity, autonomy, and the right to be free from discrimination. Furthermore, these principles, aimed at addressing the pandemic’s challenges from the perspective of the right to privacy and data protection in the urban environment, can be considered the foundation for a fair and

transparent technological development of cities and a universal starting point for the consistent management of future crises.

5. Right to Personal Liberty

COVID-19 gives an opportunity to consider these different perspectives on liberty, to look at pandemic-related discourse on liberty in an urban context, and to consider the role cities play in respecting, protecting, promoting, and fulfilling human rights. Though cities are not generally seen as guardians of human rights, local governments are often the first on the scene in a disaster and at least in theory have a closer relationship to their inhabitants than national governments. As such, they possess significant powers over people’s daily lives and can play a role in protecting everyone’s liberty. National governments should recognize the unique needs and strengths of urbanized areas when it comes to liberty and the pandemic and establish policies to support cities as duty-holders in a rights-based regime.

Liberty for the purposes of this discussion will be defined vis-à-vis the International Covenant on Civil and Political Rights and in relation to societies that have the ambition to describe themselves as democratic. In particular, restrictions on free expression and peaceful assembly; the rights of arrested, detained, and charged people; mask mandates; and lockdowns and movement restrictions. Some of these restrictions are or were apparently necessary, some might not have been necessary (depending on the context), and some were blatant violations of human rights. In fact, the word “inconsistent” aptly describes legal and regulatory approaches to managing the pandemic, both among and within countries. According to context, personal liberty can mean different things, and some definitions of “liberty” include the freedom of the individual to assert their own definition of “liberty.” Democratic societies must take this into account when considering how to balance potential restrictions on liberty with the need to enact public health measures.

Marie-Bénédicte Dembour’s four schools of thoughts on human rights will serve as an analytical framework for the discussion of the varied

⁵⁰ WHO, *Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing* (2020, May 28) Interim guidance, 3.

⁵¹ See GDPR, Art. 5 para 1(c) <<https://gdpr-info.eu/art-5-gdpr/>> “[Personal data shall be] adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’)”.

⁵² GDPR, Art. 5 para 2. Retrieved from <https://gdpr-info.eu/art-5-gdpr/>

⁵³ WHO, *Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing* (2020, May 28) Interim guidance, 4.

⁵⁴ *Ibidem*, 5.

⁵⁵ *Ibidem*.

⁵⁶ *Ibidem*.

perspectives on “liberty”.⁵⁷ Dembour’s four schools are (1) natural, (2) deliberative, (3) protest, and (4) discourse.⁵⁸

The natural school of thought describes what is very often taught in introductory human rights courses as the rationale for human rights: individuals possess human rights by virtue of their humanity; they are negative entitlements that are thus absolute; and they exist whether or not they are recognized by any particular society.⁵⁹

According to the deliberative school, human rights are rather political values that liberal societies choose to adopt—they exist through societal agreement.⁶⁰ The protest school of thought sees human rights as a means to redress injustice, a means to contest the status quo in favour of the oppressed. Human rights are thus something to be claimed on behalf of the poor or oppressed. The discourse school sees human rights as existing simply because people talk about them and does not consider them necessarily the correct answer to solving the ills of the world. This school of thought fears the imperialism of imposing a grand and universal notion of human rights and sees limitations of an ethic based on individualistic human rights.⁶¹

5.1. Liberty and the Natural School

The highly individualistic opposition to restrictions imposed to control the spread of COVID-19 is at first glance consistent with the natural school’s focus on possessing human rights by virtue of being human.

A lawsuit against San Diego (California) County’s mask requirements argues: “The requirement of Plaintiff to wear a facial covering in public when not in his residence restricts his right to travel within the County by forcing him to make a decision between wearing a facial covering which provides no medical benefit and in fact creates other collateral health risks, or remain a prisoner in his own home. Either choice violates essential constitutional rights of the Plaintiff.”⁶²

International human rights law sets out various tests for permissible limitations on human rights. In general, restrictions must be set out in law (the legality principle), legitimate, necessity, and

proportionate.⁶³ Though many of the COVID-19 restrictions are permissible under international law, from the perspective of the natural school, they could still be violations of human rights.

This raises one of the challenges of classifying human rights as something possessed by humans and as negative entitlements that are thus absolute and exist whether or not they are recognized by any particular society. Rights do not exist in an individual’s void; they run up against other rights held by others. This presents a challenge for a natural school effort to concretely define human rights.

Another example are mask restrictions. Many mask opponents cite their right not to wear a mask.

Though few clearly articulate what right is at stake (The right to breathe freely? Or the right not to have to “obey” a government mandate?), what is inherent in the anti-mask argument is a perspective focused on the inviolability of the individual.

However, this perspective fails to consider the rights of others. It is unclear what the natural school’s perspective might be on an individual’s duties toward others; the focus rather seems to be on the negative obligations of the state. But might there be negative obligations of private individuals to not violate others’ rights? Would such a concept be compatible with the natural school’s view? If a source of human rights is “man’s moral nature,” there may be room for individual duties toward fellow man.⁶⁴

In addition to the problem of individuals’ negative obligations, it is unclear how a purist natural perspective looks at balancing of rights. Is it possible to undertake a balancing of rights if one believes we all possess them because we are human? Balancing requires an acknowledgement of a hierarchy of rights, either an absolute hierarchy or one that can be determined by context. But the liberty arguments against COVID-19 restrictions almost entirely fail to consider any potential balancing of, for example, the right to property in terms of residential evictions versus the right to housing.

⁵⁷ Marie-Bénédicte Dembour, ‘What Are Human Rights? Four Schools of Thought’ (2010) 32, 1, Human Rights Quarterly, 1–20.

⁵⁸ *Ibidem*, 2–4.

⁵⁹ *Ibidem*.

⁶⁰ *Ibidem*, 3.

⁶¹ *Ibidem*, 4.

⁶² As quoted in Gary Warth, ‘San Diego resident sues county over mask orders’ (June 2, 2020) San Diego Union Tribune <<https://www.sandiegouniontribune.com/new>

[/health/story/2020-06-02/palomar-health-workers-sues-county-over-masks-orders](https://www.sandiegouniontribune.com/new/health/story/2020-06-02/palomar-health-workers-sues-county-over-masks-orders)>.

⁶³ See generally *Siracusa Principles on the Limitation and Derogation Principles in the International Covenant on Civil and Political Rights* (April 1985) American Association for the International Commission of Jurists, <<https://www.icj.org/wpcontent/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>>.

⁶⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice 1* (2d ed. 2003).

5.2. Liberty and the Protest and Discourse School

The protest school's perspective on human rights as a tool to protect the poor, underprivileged, or oppressed fails to articulate much of the individual liberty perspective on human rights and COVID-19.

The argument against COVID-19 restrictions is generally not framed as elites versus non-elites, nor as a class dispute, which some may see as ironic as in many countries the restrictions on movements and access to services have concretely impacted non-elites.⁶⁵ Rather, the contesting parties are individuals and governments, or the objection is grounded in deep-state conspiracy thinking.

The discourse school sees human rights as existing simply because people talk about them.⁶⁶ It appears less concerned with the notion of individual rights in the way the concept is applied to COVID-19 restrictions. That said, the school's "fear [of] the imperialism of human rights imposition and stress [on] the limitations of an ethic based on individualist human rights" is instructive.⁶⁷ If not imperialist, one could look at the liberty-based opposition to COVID-19 restrictions in western countries as a dominating philosophy based on a highly-individualist ethic that ultimately undermines public health and safety. For the most part, human rights is ultimately not what the opponents are concerned with. Rather, their motivation leans toward identity and politics and power. Human rights are manipulated to this end.

Opponents to restrictions are co-opting "human rights" for an identity-politics objective. It's not really about rights, it's about who's in charge.

5.3. Liberty and the Deliberative School

Ultimately, the goal of human rights is (or should be) to enable all human beings to flourish as individuals within the global community of humanity. Human rights are a means to this end. If so, then perhaps the most effective approach to operationalizing human rights is societal agreement. Under the deliberative school of thought, human rights govern how we interact with each other. One does not need to make them

⁶⁵ Stefanie DeLuca, Nick Papageorge, and Emma Kalish, 'The Unequal Cost of Social Distancing' (30 March 2020) Johns Hopkins University & Medicine <<https://coronavirus.jhu.edu/from-our-experts/the-unequal-cost-of-social-distancing>>; World Bank, *Poverty and Distributional Impacts of COVID-19: Potential Channels of Impact and Mitigating Policies* (16 April 2020) <<https://thedocs.worldbank.org/en/doc/9804915871336159320090022020/original/PovertyanddistributionalimpactsCOVID19andpolicyoptions.pdf>>.

"relevant to the whole of moral and social human life"⁶⁸ to achieve this goal.

In this case, if human rights are something to agree upon to achieve this goal for humanity, perhaps it is possible to retain one's highly-individualist ideology and also acquiesce to restrictions to control major global public health emergencies. The deliberative school considers the possibility for compromise. Human rights are procedural rather than substantive. They are a guide on how to do things rather than a grand statement of moral imperatives. Society can thus discuss and determine the parameters of human rights and liberties to identify what human rights mean. Thus, society must identify what are "human rights" in a global pandemic. One would hope society considers the importance of public health to the full realization of human rights.

6. Final Remarks

Cities are prime locations to take a deliberative approach to liberty rights and then pandemic. Cities can promote participation, transparency, accountability, rule of law, equity, and inclusiveness. They can adopt charters of rights, advocate for principles of fairness to apply to their inhabitants, and they can advocate for rights with other government units/institutions.

Many cities have taken measures to promote individual liberties. Shibuya ward in Tokyo issues same-sex partnership certificates.⁶⁹ Tokyo has prohibited discrimination based on sexual orientation and gender identity.⁷⁰ Mexico City decriminalized abortion and legalized gay marriage in addition to creating a constitution for the city.⁷¹ San Francisco, Los Angeles, Pittsburgh, New Orleans, and Washington D.C. have informally adopted the Convention on the Elimination of All Forms of Discrimination Against Women.⁷² New York and Chicago grant municipal citizenship.⁷³

Taking these examples, one would think cities could engage in a deliberative process to identify what rights are needed to ensure the protection of both public health and liberty. Unfortunately, many national legal systems do not provide cities with such powers. Cities have limited power under many

⁶⁶ Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) *Human Rights Quarterly* 32, no. 1, 4.

⁶⁷ *Ibidem*.

⁶⁸ *Ibidem*, 3.

⁶⁹ Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford Comparative Constitutional Series 2020) 106.

⁷⁰ *Ibidem*, 107.

⁷¹ *Ibidem*, 136-37.

⁷² *Ibidem*, 160-61.

⁷³ *Ibidem*, 166-67.

national constitutions, if constitutions grant them any power at all. They often depend on higher-level governments for their budgets. And many legal systems incorporate “pre-emption” doctrines under which city ordinances can be superseded by legislative acts issued from state or central governments. For example, the governor of the U.S. state of Texas prohibited municipalities from fining individuals who violate locally-imposed mask mandates, rendering them unenforceable,⁷⁴ and a legislator in the state filed a bill to prohibit localities from requiring the wearing of masks in public places saying, “The simple truth is that only the legislature is constitutionally authorized to create, amend, or abolish criminal laws,”⁷⁵ completely ignoring the long list of municipal ordinances classified as criminal laws.

Cities rarely are considered as guarantors of individual liberty. Political discourse on liberty is often centred on national politics. But the notion of cities as centres of government is not new. In the pre-Westphalian system, cities possessed significant governing power.⁷⁶ Cities could be a vehicle today for developing consensus on how best to control pandemics and also protect human rights. One starting point could be the development of a code of conduct for cities in managing states of emergency that would provide standards for both protecting public health and individual liberty.

⁷⁴ Dan Whitcomb, ‘Texas governor lifts state’s mask mandate, business restrictions’ (2 March 2021) Reuters <<https://www.reuters.com/article/us-health-corona-virus-usa/texas-governor-lifts-states-mask-mandate-business-restrictions-idUSKCN2AU2JB>>.

⁷⁵ Isaiah Mitchell, ‘Texas Lawmaker Files Bills That Would End State and Local Mask Orders’ (1 March 2021)

The Texan <<https://thetexan.news/texas-lawmaker-files-bills-that-would-end-state-and-local-maskorders/>>.

⁷⁶ Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford Comparative Constitutional Series 2020) 166.

COVID-19 Response in Italy

Matteo Gnes

Abstract. The article describes the response of Italy during the first year and half of the COVID-19 pandemic, from its outbreak until Autumn 2021, focusing on the public health measures response. The scope of the article is to describe the public health measures adopted as well as their legal basis and the main legal problems that such measures raised, to identify the mistakes, the administrative problems and the inefficiencies that affected the Italian response. Section I provides a chronicle of the main events, from a legal and administrative perspective, that characterized the Italian response to COVID-19. Section II offers a synthetic picture of the regulatory context in which the measures were adopted, of the new legal environment set up to deal with the pandemic and discusses the main legal problems and issues that characterized the management of the pandemic. The Final Section briefly describes the main legal problems and lessons for the future that the COVID-19 pandemic may provide.

Keywords: COVID-19, Pandemic, Government Response in Italy

1. Foreword

Italy was the first Western country hit by the COVID-19 pandemic: Italy and the Italians were not ready, from the healthcare and the psychological and economic perspectives, for the COVID-19 pandemic. Italy was unprepared to respond promptly, efficiently and firmly to the outbreak of the pandemic.

At the end of August 2021, after three waves of the COVID-19 pandemic hit Italy, more than 4.5 million people have been infected by COVID-19 and more than 129,000 persons have died due to COVID-19 or to the complications connected to it.

The containment measures that should have kept the virus outside Italian borders or limited its spread in the Italian territory failed. Mitigation measures, established to keep the spread of the virus under control, finally resulted in a strong lockdown (from March to May 2020), which strongly limited the rights of citizens and the possibility to carry out economic activities. Rights, including fundamental rights of citizens (and foreigners), have been strongly limited, although not completely suspended.

However, taking account of the unprecedented situation and of the many problems (and casualties) that even other European and American countries suffered, the Italian response has been pointed to as a good example for other countries in the world.¹ It has been underlined that Italy has been able to recover and to set up a sophisticated system of monitoring the spread of the virus and to adopt flexible containment and mitigation measures.²

Mistakes and delays have occurred. A number of deaths might have been avoided if such mistakes have not occurred. Criminal investigations are being carried out to check if such mistakes occurred because of fault or fraud.

The aim of this research is to provide a chronicle of the main events, from a legal and administrative perspective, that characterized the Italian response to COVID-19 (Section I) and to offer a synthetic picture of the regulatory context in which the measures were adopted, of the new legal environment set up to deal with the pandemic, and to discuss the main problems and issues (only under the legal perspective) that characterized the management of the pandemic (Section II). Identifying mistakes, administrative problems and inefficiencies may help in improving the response

¹ Cf. Jason Horowitz and Elisabetta Povoledo, 'Italy, Pandemic's New Epicenter, Has Lessons for the World' (2020) The New York Times of 21 March 2020 <<https://www.nytimes.com/2020/03/21/world/europe/italy-coronavirus-center-lessons.html>> accessed 1 November 2021 (as all other links indicated in this article); and Gary P. Pisano, Raffaella Sadun and Michele Zanini, 'Lessons from Italy's Response to Coronavirus',

(2020) Harvard Business Review (27 March 2020) <<https://hbr.org/2020/03/lessons-from-italys-response-to-coronavirus>>.

² Cf. Jason Horowitz, 'How Italy Turned Around Its Coronavirus Calamity' (2020) The New York Times of 31 July 2020 <<https://www.nytimes.com/2020/07/31/world/europe/italy-coronavirus-reopening.html>>.

and procedures to be adopted in case of future catastrophic events as the COVID-19 pandemic has been, and unfortunately still is at the moment this article has been written. The COVID-19 pandemic may provide us lessons for the future (Conclusions).

Section I: Chronicle of the Italian Government Response to COVID-19

2. The Outbreak of the COVID-19 Epidemic in Italy

At the beginning of 2020, in Italy the “Chinese epidemic” (as it was called at that time) was considered something far away, concerning a limited part of China, with a very low possibility of spreading in Europe and in other areas of the world.

The first cases of people affected by the new virus in China were reported to the World Health Organization (WHO) by the national authorities on 31 December 2019 and on 22 January 2020 the government ordered the quarantine of the city of Wuhan and, a few days later, in other towns of the Huabei region.³ On 17 January 2020, the relevant EU agency, the European Centre for Disease Prevention and Control (ECDC), issued an alert, stating that the likelihood of importation of cases of the “novel coronavirus” (as it was provisionally defined) to the EU had to be considered low, but could not be excluded.⁴ On 30 January 2020, the Director-General of WHO declared the novel coronavirus outbreak a public health emergency of international concern (PHEIC), the WHO’s highest level of alarm.⁵

During this period, that can be seen as a “quiet period before a storm”, the Italian health authorities set up some preliminary measures to take care of the epidemic that was still considered a local and localized health issue. The Minister of

Health of Italy set up a “task force” on 22 January 2020, with the aim to carefully observe the evolution of the epidemic in China, to suggest to the Minister of Health guidelines for people, workers and students moving back and forth to the Huabei region, among other measures.⁶

So, at that time, the idea, not only of the Italian and European health authorities, but even of doctors and scientists all over the world, was that the “novel Coronavirus” could hardly circulate and hit other parts of the world, and not absolutely Europe or US.

The idea was that the “novel Coronavirus” was a virus belonging to the family of respiratory viruses, that could be kept under control with checks and restrictions at the borders, such as checking symptoms as fever with thermoscanners, or by imposing quarantine to all the persons coming from affected areas. The previous experiences of the Middle East Respiratory Virus (MERS, first identified in 2012) and SARS (2002-2004) which caused a great concern worldwide, but a very limited spread,⁷ and the initial idea that the spread of the “novel Coronavirus” would be possible only through persons with symptoms, likely caused a general underestimate of the risk of a worldwide spread.⁸

3. The Monitoring of the Spread of the “Novel Coronavirus”

After the institution of the “task force” on 22 January 2020, the Minister of Health issued specific orders (using the power conferred to him by the Italian health legislation), providing for the first prophylaxis activities, indicating a number of hygiene measures for those needing to travel to the affected areas (including vaccination against influenza and hand and respiratory hygiene),

³ See World Health Organization, ‘Novel Coronavirus (2019-nCoV) Situation report - 1 21 January 2020’ and subsequent reports <<https://www.who.int/emergencies/diseases/novelcoronavirus2019/situation-reports>>.

⁴ European Centre for Disease Prevention and Control, *Rapid Risk Assessment: Cluster of pneumonia cases caused by a novel coronavirus, Wuhan, China, 2020*, 17 January 2020 <<https://www.ecdc.europa.eu/en/publications-data/rapid-risk-assessment-cluster-pneumonia-cases-caused-novel-coronavirus-wuhan>>.

⁵ World Health organization, *WHO Director-General’s statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)*, 31 January 2020, <[https://www.who.int/dg/speeches/detail/who-director-general-statement-on-ih-er-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-statement-on-ih-er-emergency-committee-on-novel-coronavirus-(2019-ncov))>.

⁶ On the institution of the task force, see the press release of the Minister of Health (22 January 2020), available on the website of the Ministry of Health, <<https://www.salute.gov.it/portale/nuovocoronavirus/>

detttaglioComunicatiNuovoCoronavirus.jsp?lingua=italiano&menu=salastampa&p=comunicatistampa&id=5373>. The minutes of the task force are available on the website of the Ministry of Health, at <<https://www.salute.gov.it/portale/nuovocoronavirus/detttaglioPubblicazioniNuovoCoronavirus.jsp?lingua=italiano&id=3070>>.

⁷ For a comparison of the different Coronaviruses, see Eskild Petersen, Marion Koopmans, Unyeong Go, Davidson H Hamer, Nicola Petrosillo, et al., ‘Comparing SARS-CoV-2 with SARS-CoV and influenza pandemics’, (2020) *The Lancet* 20, 1 Sept. 2020.

⁸ As concerns the very low risk perception at the eve of the pandemic in Italy amongst healthcare workers, see Matteo Riccò, Luigi Vezzosi, Federica Balzarini, Nicola Luigi Bragazzi, ‘Inappropriate risk perception for SARS-CoV-2 infection among Italian HCWs in the eve of COVID-19 pandemic’ (2020) 91, 3 *Acta Biomed*.

establishing biosecurity measures for any healthcare personnel involved with possibly affected persons (i.e. use of facial mask, waterproof gown, gloves), providing separate airport routes for passengers coming from Wuhan and establishing the activation of the surveillance system for suspected cases of infection, as well as the isolation and carrying out of tests (through nasopharyngeal and oropharyngeal swab) for "suspected cases of COVID-19", and providing for measures for the prophylaxis of students returning from China⁹. When the situation in China worsened, special flights were organised by the Italian authorities to bring back Italians from China and providing for a quarantine period upon their arrival in the Italian territory¹⁰.

On 31 January 2020, the day following the WHO declaration of the public health emergency of international concern, the Italian Government declared the state of emergency according to the civil protection legislation¹¹. As will be explained later, such an emergency declaration, which is frequently adopted by the Government to counteract situations that are outside of the ordinary (like earthquakes or floods, but also disruption of the local service of waste collection), allows the specially appointed commissioner (which, in the case of large emergencies, like in the case of COVID-19, is usually the Head of the Civil protection department) to adopt acts which may derogate to a number of laws, especially in the field of public contracts¹².

Thus, at the beginning of February 2020, the Head of the Civil protection department adopted ordinances aimed at coordinating interventions, also through implementing bodies, aimed at

prohibiting air, land and sea traffic on the national territory; providing for the coming back of Italians from affected places; sending specialized personnel abroad; providing for the acquisition of drugs, medical devices, personal protection devices, and biocides; providing the requisition of certain goods; establishing an advisory technical-scientific committee (*Comitato tecnico scientifico* - CTS); and establishing measures to safeguard the validity of the school year of students engaged in international mobility programs in areas at risk of contagion or returned from such areas and therefore subjected to quarantine¹³.

4. The Outbreak of COVID-19 in Italy: The First Public Health Measures Adopted (the First Wave)

Even before the WHO declaration of the public health emergency of international concern, Italy had very close contacts with the COVID-19 outbreak on 29 January 2020, two Chinese tourists were found positive for COVID-19 and cured in a specialized hospital in Rome. However, all their contacts were immediately traced, and the situation was immediately put under control.

The nightmare became true on 21 February 2020: at 1 o'clock in the night the welfare assessor of the region of Lombardia declared that an Italian man, with no links with China, had been found positive to the new Coronavirus.¹⁴ Although later on it would be found out that the Coronavirus had been already circulating in the North of Italy for several months (December or even November 2019), this man was defined as "patient one", i.e. the first person infected locally¹⁵ and that day is considered the formal beginning of the pandemic in Italy.

⁹ Ministry of Health, circulars 1997 (22 January 2020 and 1 February 2020).

¹⁰ It was a complex operation coordinated by the head of the Civil protection department (as provided by its order, 3 February 2020, 630), which required the intervention of many public bodies, such as the Ministries of Foreign affairs, of Defence, of Health, of Infrastructures and the National Civil Aviation Authority.

¹¹ Decision of the Council of Ministers (31 January 2020) on *the declaration of the state of emergency as a result of the health risk associated with the onset of diseases resulting from transmissible viral agents*, published on the Italian Official Journal (G.U., 1 February 2020, 26).

¹² The Italian Civil protection code is established by the legislative decree (2 January 2018), 1. The Council of Ministers, upon the occurrence of events which, following a prompt assessment carried out by the Civil protection department and in conjunction with the regions and autonomous provinces concerned, upon the proposal of the President of the Council of Ministers, declares the state of emergency of national importance, setting its duration and determining the territorial extent with

reference to the nature and quality of the events (art. 24, par. 1). The duration of the state of emergency of national importance cannot exceed 12 months and can be extended for no more than a further 12 months period (art. 24, par. 3). A further extension of the state of emergency is thus possible only by passing a specific law.

¹³ See Civil protection orders (3 February 2020) 630; (6 February 2020) 631; (12 February 2020), 633; (13 February 2020), 635; (21 February 2020), 637; (22 February 2020) 638; (25 February 2020), 639.

¹⁴ Press release of the Regione Lombardia (21 February 2020) <www.lombardianotizie.online> accessed 1 November 2021.

¹⁵ The patient "zero", i.e. the person who brought the SARS-CoV-2 virus in Italy has never been identified (and it will never be). In epidemiology, there is a distinction between the "primary case" and "secondary case" (where the primary case is the individual who brings the disease into a population, i.e. any defined group of people; and the people infected by him are called secondary cases, and those infected by them are the tertiary cases). Another definition is that of "index case", i.e. the first case discovered by the health care system in an outbreak, that

Immediately afterwards, new cases were found in other towns of the Lombardia region and in other regions of the North of Italy.¹⁶ Emergency restrictive measures (i.e., quarantine) were immediately adopted by the Minister of Health together with the presidents of the impacted regions: a red area with about 50,000 residents was created and other red areas had been created in the following days.¹⁷

The Government response to the first wave of the pandemic in Italy (February-May 2020) may be divided in 4 phases: “Phase 0” relates to the measures taken before the pandemic spread in Italy (22 January – 21 February 2020); “Phase 1” refers to the restrictive measures taken to contain the spread of the virus, ending up with a national “lockdown” (21 February-3 May 2020); “Phase 2” relates to the step by step reopening and relaxing of containment measures after the lockdown (4 May-14 June 2020); and “Phase 3” relates to the response based of measures taken to keep under control the pandemic during its very low spreading (15 June-7 October 2020). At the end of the third phase, a new wave of pandemic spread in Italy, which resulted in a different approach (from October 2020).

In order to contain the spread of COVID-19 (during the so-called “Phase 1” of COVID-19 response, from 21 February to 3 May 2020) a new special legislation was enacted (decree-law, 6, 23 February 2020), providing special powers to the President of the Council of Ministers (in short, also defined as the Prime Minister), acting upon the proposal of the Minister of Health. Such powers, to be exercised through a decree of the President of the Council of Ministers (DPCM) included the possibility to establish the prohibition of departure from the affected area by all individuals; the prohibition of access to the area concerned; the suspension of events, initiatives, meetings of any kind, in public or private places; the suspension of educational services for children and schools of all levels, including universities, except for distance learning activities; the closure of museums and other cultural institutes and places; the suspension of competition for access to public employment; the application of the quarantine measure to

individuals who have had close contact with confirmed cases of COVID-19; the obligation of people entering in Italy from areas at epidemiological risk (as identified by the WHO) to inform the Italian health authorities; the closure of all commercial activities (except those for the sale of basic items, such as food and medicines); the closure or limitation of the activity of public offices; the use of personal protective equipment or the adoption of particular precautionary measures to enter essential public services and shops; the limitation of land, air, rail, sea transportation; and the suspension of work activities for companies, except those providing essential and public utility services (or for activities carried out at home).¹⁸

The first DPCM was issued on 23 February 2020 and established (for 14 days) red areas (with closure of schools, shops and sport activities, among others) in certain areas of the regions Lombardia and Veneto.

In the following days (and months) an increasing number of DPCM would enact progressively restrictive measures.

The DPCM of 25 February 2020 established the suspension of the activities of schools and universities through 1 March 2020, as well as the suspension of judicial proceedings for the whole territory of the regions Emilia Romagna, Friuli Venezia Giulia, Lombardia, Veneto, Liguria and Piemonte (i.e., most areas of the North of Italy).¹⁹

The DPCM of 1 March established differentiated measures for the period from 2 to 8 March, notably the obligation to use face masks by suspected cases and, in the red areas, also when accessing public services or shops; moreover, it established containment measures (i.e., prohibition of parties and sport events, closure of schools and museums, special care for restaurants, smart working, surveillance of cases) in the “orange areas”.²⁰

The DPCM of 4 March provided for certain measures to be applied in the whole territory of Italy until 3 April 2020: prohibition of sport competitions, obligation to follow special prudential rules for sport activities in gyms, limited access to emergency departments for accompanying persons, information and hygienic measures and closure of schools till 15 March.²¹

leads to an investigation and possibly to find that there were cases who had fallen ill before the index case was diagnosed: see Johan Giesecke, ‘Modern infectious disease epidemiology’ (Boca Raton, CRC Press, 2017) 11.

¹⁶ The data on the trend of the COVID-19 epidemic are available on the website of epidemic department of the Italian higher health institute (Epicentro of the Istituto superiore di sanità – ISS) <<https://www.epicentro.iss.it/coronavirus/sars-cov-2-sorveglianza-dati>>.

¹⁷ Orders of the Ministry of Health in agreement with the President of the Lombardy Region (21 February 2020), providing for urgent measures regarding the

containment and management of the epidemiological emergency from COVID-19 (G.U., 25 February 2020, 47).

¹⁸ Art. 1, par. 2 of the decree-law 23 February 2020, 6, G.U., 23 February 2020, 45), providing urgent measures regarding the containment and management of the epidemiological emergency from COVID-19.

¹⁹ DPCM 25 February 2020, G.U. (25 February 2020) 47.

²⁰ DPCM 1 March 2020, G.U. (1 March 2020), 52.

²¹ DPCM 4 March 2020, published in G.U. of 4 March 2020, n. 55.

The closure of schools for all the Italian territory was a really extraordinary event.

5. The Italian National Lockdown (March-May 2020)

The epidemic situation was quickly worsening: in many regions in the North of Italy the intensive care departments of the hospitals had already reached their maximum capacity and patients had to be moved to hospitals in other areas; the number of deaths was quickly increasing (reaching its maximum level of around one thousand deaths per day at the beginning of April 2020), protective tools (and especially face masks) were not available for all of the population (and actually available in a very limited amount even for hospital doctors and paramedics).

As it was not clear, at that time, how exactly the SARS-CoV-2 virus (as it was later definitively named)²² could infect people²³ and vaccines and medical care for the novel Coronavirus had still to be found, the only tool to limit the diffusion of the pandemic was to establish a large regional lockdown, so to limit personal relationships and contacts between people. On 8 March 2020 a very large red zone, extending to almost all the North of Italy, was established, with strong restriction on the movement of people, who had to stay at home except for reasons of work, necessity, or health.²⁴

Unfortunately, the news that a very restrictive DPCM was going to be issued circulated hours before it was published in the Official Journal, so thousands of Italians found the way to move to central and southern regions of Italy.

After this event, in order to prevent an uncontrolled diffusion of COVID-19 in the whole territory of Italy, it was felt necessary to extend the restrictive measures provided for the North of Italy to the whole Italian territory: in a dramatic press conference in the evening of 9 March 2020 the Prime Minister declared he had just signed a DPCM whose content would be summarised as follows: “I

stay at home” (#iorestoacasa). The DPCM of 9 March extended to the whole Italian territory the measures established with the DPCM of 8 March: the most important measure was the obligation for any “natural person” to avoid any movement in entry and exit from the territories, “as well as within the same territories”, except for some specific reasons: proven work needs, situations of necessity and reasons of health. Other measures were the suspension of public and private events; the closure of ski resorts, museums, schools and universities, swimming pools, gyms and sports centres (except for the training of professional or high-level athletes); the limitation for commercial activities (that could operate only under certain conditions); the absolute prohibition of exiting from their place for affected or quarantined persons; and the preference for the use of “agile working” (i.e., from home).²⁵

Other measures were enacted in the following days: the DPCM of 11 March 2020 ordered the closure of all shops and retail business activities (except food shops and pharmacies);²⁶ the Minister of Transportation issued decrees on 17, 18, 28 March to limit access to Italy from abroad; on 20 March 2020 the Minister of Health issued an order to close parks, public gardens etc. and clarifying the activities which could be carried out, such as jogging, although only around home; the DPCM of 22 March 2020 ordered the closure of trade and industrial activities (with some exceptions).²⁷

6. The Reopening After the First Wave (Phase 2: 4 May-14 June 2020)

As a consequence of the hard lockdown measures adopted by the Italian Government, the epidemic situation began to improve at the end of April 2020.²⁸ The slope of the epidemic curve was heading down, and thus the DPCM of 26 April 2020, on the one hand established new safety measures, such as the obligation to use face masks (even if self-produced) in all indoor public places;²⁹ on the

²² The International Committee on Taxonomy of Viruses (ICTV) on 11 February 2020 named the virus as “severe acute respiratory syndrome coronavirus 2”, in short “SARS-CoV-2”.

²³ At that time, it was not clear if the virus would be transmissible only through direct breathing contacts (by inhaling droplets containing the virus coming out from the mouth or nose of close people while breathing or talking), at what distance (1 or 2 meters) or even through contacts with objects that have been touched by infected people.

²⁴ DPCM 8 March 2020, G.U. (8 March 2020) 59.

²⁵ DPCM 9 March 2020, G.U. (9 March 2020) 62.

²⁶ DPCM 11 March 2020, G.U. (11 March 2020) 64.

²⁷ DPCM 22 March 2020, G.U. (22 March 2020) 76.

²⁸ See Giovanni Sebastiani, Marco Massa and Elio Riboli, ‘COVID-19 epidemic in Italy: evolution, projections and impact of government measures’ (2020) 35 *European Journal of Epidemiology* 341; cf. also Sara Tedeschi, Lorenzo Badia, Fabio Berveglieri, Rodolfo Ferrari and others ‘Effective Containment of a COVID-19 Subregional Outbreak in Italy Through Strict Quarantine and Rearrangement of Local Health Care Services’ (2021) 8 *Open Forum Infect Dis.*, 2; Silvio De Flora and Sebastiano La Maestra ‘Growth and decline of the COVID-19 epidemic wave in Italy from March to June 2020’ (2021) 93(3) *Journal of Medical Virology*, 1613 ff.

²⁹ Previously, the obligation to use face masks concerned only suspected cases (according to the idea that only persons with symptoms could spread the virus)

other hand, it established a step by step reopening as from 4 May, beginning with limited openings of essential facilities, parks, libraries and providing for a daily regional monitoring of the epidemic situation: it was the so-called “Phase 2” of the COVID-19 response, from 4 May till 14 June.³⁰

With the decree-law of 16 May 2020, n. 33, it was established the end of the movement restriction inside the regions as from 18 May and between the different Italian regions as from 2 June 2020.³¹

The DPCM of 17 May 2020 permitted, as from 18 May 2020, mobility in the same region (i.e., the possibility to move between towns and places in the same region) and the reopening of churches; as from 25 May, the reopening of gyms; and as from 15 June the reopening of theatres and concert halls. All such activities had to be carried out according to safeguard measures provided by protocols attached to the DPCM.³²

7. The Measures to Keep the Pandemic Under Control (Phase 3: 15 June – 7 October 2020)

The DPCM of 11 June 2020 marks the beginning of the “Phase 3” of the COVID-19 response (from 15 June to 7 October): it was established that as from 15 June 2020 sport competition would be allowed (although without attendance of the public) and bingo halls and similar places would be reopened. However, discos and dance clubs had to remain closed.³³

As from the beginning of July, the epidemic slope was flat: there were no (or very few) new daily cases, and no COVID-19 deaths during the summer 2020. Some scientists asserted that the virus was “clinically dead”, as the hospital COVID-19 departments were emptying, and the viral load of the few infected persons was much lower as compared to what had been observed in the previous months.³⁴ Some people even thought that

there would not be a second wave of the COVID-19 epidemic.

With the DPCM of 7 August 2020 minor changes to measures and protocols were adopted, giving room for regional reopening of certain activities.³⁵

This allowed some Presidents of regions (e.g., the President of the Sardinia Region) to issue orders to reopen dance clubs and discos.³⁶

As later became clear, the virus had not disappeared during the summer, but it had been spreading in a concealed way; and the reopening of discotheques has been considered one of the biggest mistakes in the management of the epidemic. The discotheques are places that let people to get in touch with other people they have never met before, and thus it is also the perfect place for viruses to find “susceptible persons” (i.e. persons that are not immune to the virus)³⁷ and to increase its spread. And this is what happened: Sardinia is one of the most beautiful places where to go to sea in Italy and many tourists from every part of Italy went there to enjoy their summer holidays. When they came back home, many of them carried with themselves the virus, that so could spread in regions where its spread had been quite low during the first wave.

During the summer 2020 containment measures were arguably relaxed too much by the Government and have been applied in an even more relaxed way by Italians. The number of cases was extremely low and close to zero, it was possible but not certain that a second wave of the epidemic would raise, and not enough attention was paid to the spread of the virus in Northern countries of Europe during the summer 2020. If Italy has been the first country to be affected by COVID-19 in winter 2020, and other European countries have been hit by the pandemic with 15-30 days of delay, the strong lockdown measures adopted by Italy reversed the situation. During summer 2020 the epidemic spread in most North European countries

and people accessing public offices and services: see art. 3, par. 5, DPCM 1 March 2020.

³⁰ DPCM 26 April 2020, G.U. (26 April 2020) 108.

³¹ Decree-law 16 May 2020, 33, providing further urgent measures to deal with the epidemiological emergency from COVID-19, G.U. (16 May 2020) 125.

³² DPCM May 2020, G.U. (17 May 2020) 126.

³³ DPCM 11 June 2020, G.U. (11 June 2020) 147. The measures provided therein were subsequently extended till 31 July 2020 by DPCM 14 July 2020, G.U. (14 July 2020) 176.

³⁴ The director of the anaesthesia and resuscitation unit of the San Raffaele hospital in Milan, professor Alberto Zangrillo, stated in some interviews, published on newspapers, that the COVID-19 had “clinically” disappeared, as no new cases had been observed in his hospital (see the interview on *La Stampa* (Turin, 31 May

2020), <<https://www.lastampa.it/cronaca/2020/05/31/news/zangrillo-san-raffaele-il-coronavirus-clinicamente-e-sparito-torniamo-alla-vita-normale-1.38912263>>). Although the members of the CTS and of the ISS (the Higher Institute of Health) were surprised and worried about such a declaration, even the deputy minister of health stated that the virus circulation was very low (see the interview on *Il Fatto quotidiano* (Milan, 13 June 2020) 4).

³⁵ DPCM 7 August 2020, G.U. (8 August 2020) 198.

³⁶ Order of the President of the Sardinia Region, (11 August 2020), 38. With order (16 August 2020), 41, discotheques have been closed again.

³⁷Cf. Johan Giesecke (n 15) 8. People became immune to the virus for a number of factors, such as the development of antibodies after having survived to the illness or after having been vaccinated.

(and especially Germany and UK) and it was going to hit Italy later.

At the beginning of September 2020, although the number of cases increased marginally during the summer, the epidemic situation seemed to be under control: the DPCM of 7 September 2020 made some minor changes to measures and protocols and issued specific measures to assure the reopening of schools.³⁸

8. The Second Wave and the Approach Based on Regional Measures (October 2020-February 2021)

The effects of the relaxation of the containment and mitigation measures during the summer 2020 became clear during the autumn. The epidemic slope began to rise quickly and became steep (so called second wave of the pandemic: October-November 2020), so that measures had to be adopted to control the spread of the virus and to avoid another strong lockdown. Thus, the new measures focused more on regulating private and public activities than in restricting movements of persons. However, certain restrictive measures had to be adopted

With the decree-law of 7 October 2020, n. 125 the obligation to use face masks at any time and in every place, even in open air places (of course, except at home) was established for the first time since the beginning of the pandemic.³⁹ The DPCM of 13 October 2020 established safety measures and protocols to assure the safe opening of commercial and retail activities and ordered the closure of discotheques.⁴⁰ As the pandemic slope was still rising, the DPCM of 18 October 2020 established new stricter protocols for certain activities and that attendance of high schools should be in mixed mode (50% of students in class and 50% at home, through distance learning) also in order to reduce the crowding on public transportation mainly used by students.⁴¹ The pandemic was still raising, so the DPCM of 24 October 2020 ordered that at least 75% of students should attend classes from home, ordered the closure of restaurants at 18 (so to avoid crowding at dinner time without establishing the

complete closure of restaurants) and the complete closure of gyms (even if they had reopened since 15 June under the respect of specific safety measures).⁴²

The DPCM 3 November 2020 introduced a system of different containment measures and limitations to movements on a regional basis, according to the exceeding of some specific thresholds (so called red, orange and yellow areas) and established new measures, such as the closure of high schools and universities (so allowing only distance learning), the obligation to always wear facial masks at school and the curfew (from 22 to 5, so to avoid evening gatherings of people). The new system was based on the application of increasingly tougher measures according to the regional level of the pandemic: every Friday the Minister of health, on the basis of the analysis of a scientific body, declared in which area any of the 20 Italian regions would be included as from the coming Sunday (and, later, from the coming Monday, in order to respond to the requests of restaurant owners and their clients). Although a strong lockdown during the Christmas holidays had been proposed by many scientists, the Government issued the decree-law of 18 December 2020, n. 17, which established only certain limitations of movement during the Christmas holidays (no mobility towards other town and regions, except between the closest small towns; and strong restrictions of mobility only during the holidays and the weekends of the Christmas period), the closure of theatres, bingo, etc.⁴³

Such measures succeeded in lowering the curve of the pandemic (notwithstanding a small increase of cases at the beginning of January 2021), so that the decree-law of 5 January 2021, n. 1 established a step-by-step reopening of high schools.

9. The Third Wave and the Introduction of the “White Zone”

The DPCM of 2 March 2021 established a set of different rules for the different “coloured” areas and introduced a new “white zone”, where only very basic prophylactic measures had to be

³⁸ DPCM 7 September 2020, G.U. (7 September 2020) 222.

³⁹ Decree-law 7 October 2020, n. 125, providing urgent measures connected with the extension of the declaration of the epidemiological state of emergency from COVID-19 and for the operational continuity of the COVID alert system, as well as for the implementation of Directive (EU) 2020/739, 3 June 2020, G.U. (7 October 2020) 248.

⁴⁰ DPCM 13 October 2020, G.U. (13 October 2020) 253.

⁴¹ DPCM 18 October 2020, G.U. (18 October 2020) 258.

⁴² DPCM 24 October 2020, G.U. (25 October 2020) 265.

⁴³ Unfortunately, the containment measures have been *de facto* counteracted by another State measure. In order to promote the use of cashless payments tools (so to prevent the use of cash and limiting tax evasion), the ministerial decree 24 November 2020, n. 156 (issued according to art. 1, par. 288, 27 December 2019, 160), established a State cashback for purchases in (physical) shops using cashless tools. As online purchases had been excluded from the cashback, this encouraged purchases in shops instead than online purchases, so causing crowds in the Christmas period.

followed (but not, for example, the obligation to wear face masks also in open air).

The system based on the different regional restrictions (providing for different colours of the regions, corresponding to the application of increasingly stronger restrictive measures) was modified by the decree-law of 13 March 2021 n. 30,⁴⁴ enacted by a newly appointed Government, which gave a primary application of the criteria of the number of contagions (establishing that in the case of more than 250 new infected people every 100.000 persons in a week the region would be classified as red) and established stricter measures for specific periods (e.g. during Easter 2021, as established also by the DPCM of 2 March 2021).⁴⁵ Other measures were established as well, as the possibility for workers to avail themselves of the smart or home working in case of the quarantine of sons younger less 14 years old.

In March-April 2021, the third wave of the virus began to lower, so the decree-law of 18 May 2021, n. 65 progressively raised the curfew hour (from 22 to 23, as from 18 May 2021, and to 24 from 7 June 2021) which was abolished (in yellow areas) as from 21 June 2021. Commercial activities were progressively fully reopened in yellow areas with the only need to respect safety protocols: restaurants (also in their indoor spaces) as from 1 June 2021; commercial businesses located in markets and shopping centres as from 22 May; fitness centres and gyms from 24 May and indoor swimming pools as from 1 July; ski places as from 22 May; betting rooms, bingo halls and casinos as from 1 July; amusement parks as from 15 June; and cultural, social and recreation centres as from 1 July. The decree-law changed the parameters used to define the colours of the regions, weighting more the percentage of occupancy of beds in the medical area and in intensive care for COVID-19 patients.⁴⁶ During the summer 2021 all of the Italian regions progressively qualified as white areas and remain in such a condition (except for Sicily, which was in yellow zone from 30 August till 9 October 2021). Very limited areas (specific cities) had been declared red zones for a limited amount of time during the summer and autumn 2021.

On the side of the safety measures, the fight to Coronavirus has been boosted by the vaccination campaign, which began in Italy, as in many European countries, on 27 December 2020.

Section II: The Main Legal Problems of the Italian Response to COVID-19

10. Issues and Problems of the Italian Response to COVID-19

The COVID-19 pandemic affected every area of society and lives of people. The management of the pandemic, in Italy as well as in most countries, was mainly based on limitations to movements, economic activities, religious practices, education, and so on, in order to assure personal distancing and thus to limit the spread of the virus.

Other measures were taken in order to control the spread of the virus (e.g. the tracking of cases) and to take care of affected persons, as, for example, the strengthening of hospital emergency departments and the creation of special units to visit patients at home.

Only after the development of COVID-19 vaccines (as from the end of 2020) the approach to the pandemic slightly changed, focusing more on finding the way to vaccinate as many persons in the shortest time as possible than in imposing strong measures of personal distancing. Nonetheless, basic safety measures as personal distancing, use of facial masks, avoidance of crowded gatherings had to be maintained.

This research focuses only on the main legal problems concerning the government public health measures to control the spread of COVID-19. Other measures and issues, such as the care of COVID-19 patients, the public communication on the pandemic and the management of its economic and social consequences will be only briefly addressed in this research.

It must be underlined that the factual situation strongly influenced the choice of the measures that have been established. In fact, due to the lack of a vaccine to prevent the disease, the long healing times of people affected by COVID-19 and the scarce resources to treat the persons who have been strongly hit by the virus, it was necessary to fight the spread of the virus with the only available tool, namely by imposing a "personal distancing" (also incorrectly defined as "social distancing") amongst people. In fact, given the difficulty of identifying contagious subjects (as even asymptomatic people could spread the virus), and the difficulty of reconstructing the chain of contagion (with the "contact-tracing" systems and techniques), the solution adopted to address both the first epidemic wave, and, albeit in a lighter way, the second and

⁴⁴ Decree-law 13 March 2021, 30, providing for urgent measures to deal with the spread of COVID-19 and support interventions for workers with minor children in distance learning or quarantine.

⁴⁵ DPCM 2 March 2021, G.U. (2 March 2021) 17.

⁴⁶ Decree-law 18 May 2021, 65, providing urgent measures relating to the epidemiological emergency from COVID-19.

third waves, was the limitation of personal and social relations.

11. The Regulatory Tools Available to the Government to Deal with the Emergency

In the field of health protection, the fundamental principles are provided by article 32 of the Italian Constitution, that, on the one hand, recognizes that “the Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent”⁴⁷ and, on the other hand, that limitations of people’s freedom may be established by law for reasons related to public health, so that “no one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person”⁴⁸. Moreover, article 16 of the Constitution provides that “every citizen has the right to reside and travel freely in any part of the country, except for such general limitations as may be established by law for reasons of health or security. No restriction may be imposed for political reasons”.⁴⁹

It must be stressed that the Italian Constitution does not provide or regulate special emergency powers of the Government, except as concerns the possibility that the Government may be vested of the “necessary powers” in the case of war⁵⁰ and as concerns its power to issue temporary legislation in case of necessity and urgency (so called decree-laws).⁵¹

However, certain emergency powers are established by the ordinary legislation. In certain

cases, emergency powers are given to specific authorities in specific situations. In other cases, the legislation assigns to certain public authorities (e.g. the Minister of Health or the Minister of the Interior, the prefect, the mayor), in cases of urgent need concerning certain situations broadly defined (usually, in order to protect public security and health) the power to adopt the most appropriate measure, even by derogating to the current legislation⁵². As such power is attributed by law, it is not considered to be illegal but as a “safety valve” of the legal system, necessary to deal with unforeseen and/or unforeseeable situations that risk to endanger the legal system itself or its purposes, as the safety and health of its associates⁵³. Although the possibility to issue such urgent orders is “extra-ordinary” and provides huge discretionary powers to the public authority as concerns the specific measures to adopt, it is based on a situation of “urgency” and it is meticulously regulated in terms of competence and legitimacy. The Constitutional Court declared the legality of such powers, provided that they would meet certain requirements, such as their “limited temporal duration according to the necessity and urgency; adequate motivation; effective publication in cases where the measure is not individual; compliance with the general principles of the legal system”⁵⁴.

The legislation in force at the time of the spread of the pandemic (which comprises rules even dating back to the pre-republican period, but still in force) assigned emergency powers (i.e. the power to issue urgent orders), to deal with situations of health danger or health emergency, to specific authorities.

⁴⁷ Art. 32, paragraph 1, Italian Constitution.

⁴⁸ Art. 32, paragraph 2, the Italian Constitution.

⁴⁹ Art. 16, Italian Constitution.

⁵⁰ Art. 78, Italian Constitution, establishes that «Parliament has the authority to declare a state of war and vest the necessary powers into the Government».

⁵¹ Art. Art. 77, Italian Constitution, establishes that «The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction. Such a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication. Parliament may regulate the legal relations arisen from the rejected measure».

⁵² E.g., the power to issue urgent orders is provided by art. 2, royal decree 18 June 1931, 773 (consolidated act of public security laws), that provides that the prefect «in the event of urgency or for serious public necessity, has the right to adopt the measures necessary for the protection of public order and public safety».

⁵³ The definition of the power of ordinance as a “safety valve”, to be found in all of the modern legal systems, at the disposal of the administration, in order to evade the strict conditions established by the legislation, is provided by Massimo Severo Giannini, *Lezioni di diritto amministrativo* (Milano, Giuffrè, 1950), 102, and *Diritto amministrativo* (Milano, Giuffrè, 1993, 267), and was subsequently taken up by both legal science and by case law (see the judgments of Consiglio di Stato, section V, 7 December 1973, 1601, (1973) Consiglio di Stato, I, 1907, and of 9 February 2001, 580, (2001) Foro amministrativo, 427, for which «the contingent and urgent ordinance [...] is characterized by the absence of any legislative predetermination of the content, in order to allow it those margins of elasticity indispensable to guarantee efficiency and effectiveness and to make it adequate to provide for cases of urgency [...], on condition, however, that its enactment is preceded by the observance of all the guarantees set by the legal system»). On the limits and trends in the field of emergency powers, see Matteo Gnes, ‘I limiti del potere d’urgenza’, (2005) *Rivista trimestrale di diritto pubblico*, 641.

⁵⁴ Constitutional Court, 2 July 1956, 8.

In the first place, according to the consolidated text of the health laws of 1934, the Minister of the Interior, who at that time was entrusted with health functions in relation to the protection of the community, has the power to issue “special ordinances for the visit and disinfection of houses, for the organization of medical services and aid and for the precautionary measures to be taken against the spread of the disease itself”.⁵⁵

Secondly, the 1978 law establishing the national health service attributes to the State the competence in the field of international prophylaxis⁵⁶ and provides that in situations of urgency and danger for the health the Minister of Health or the president of the region or the major (according to the geographical extension of the emergency) can issue urgent temporary orders.⁵⁷

Thirdly, other emergency powers are provided for by art. 117 of the legislative decree 31 March 1998, n. 112, which attributes to the mayor, as representative of the local community, the power to adopt contingent and urgent orders in the case of health and public hygiene emergencies of an exclusively local nature. Similar powers are vested in the State or the regions according to the geographical extension of the emergency. In addition, other urgent powers, to deal with situations that endanger public safety and urban safety, are attributed to the mayor by the consolidated law on the organization of local authorities.⁵⁸

Finally, other powers - aimed at protecting life, physical integrity, assets, settlements, animals and the environment from damage or the danger of damage deriving from disasters of natural origin or deriving from human activity - are attributed to the bodies operating within the national civil protection system.⁵⁹

Moreover, it may be remembered that, in order to prevent epidemics, especially of the flu type, it has long been foreseen by the World Health Organization that States adopt national pandemic plans.⁶⁰ However, the most recent pandemic plan was approved in Italy in 2006.

⁵⁵ Art. 261, royal decree (27 July 1934), 1265.

⁵⁶ According to the provisions of Article 117 of the Constitution, as reformed in 2001.

⁵⁷ Art. 6 and 32, law 23 December 1978, 833, respectively articles 6 and 32.

⁵⁸ Art. 50 and 54, Legislative Decree 18 August 2000, 267.

⁵⁹ Law 24 February 1992, 225 and now legislative decree (2 January 2018), 1.

⁶⁰ World Health Organization, *Pandemic influenza preparedness and response: a WHO guidance document* (Geneva, WHO, 2009); *Whole-of-society pandemic readiness. WHO guidelines for pandemic preparedness and response in the non-health sector* (Geneva, WHO, July 2009); *Pandemic Influenza Risk Management Guidance*

12. The Intertwining of Regulations and the Development of a New Pandemic Emergency Legislation

The intertwining of the various legislation, which attribute emergency powers to State, regional and local authorities has resulted in regulatory chaos, partly as a result of the regional articulation of competences in health matters. To give a broad idea of the regulatory chaos that arose as a consequence of the pandemic, during the Government chaired by Giuseppe Conte, that dealt with the most difficult phases of the pandemic (from its beginning until 13 February 2021), the following regulatory acts have been issued to manage the pandemic: 4 decisions of the Council of Ministers to declare and then extend the State of emergency (31 January 2020, 29 July 2020, 7 October 2020 and 13 January 2021), 31 decree-laws, 23 DPCM, more than sixty orders of Head of the Civil protection department, more than 30 orders of the extraordinary Commissioner for the COVID-19 emergency, more than one hundred orders and circulars of the Minister of Health, a few hundred orders of the presidents of the regions, and probably a few thousands orders of the mayors (taking account that in Italy there are around eight thousands municipalities).

Such confusion has been accentuated by commentators, journalists, politicians and some public figures, some of whom have contested the very existence of a health emergency, sometimes making confusion between the declaration of a state of emergency (according to the civil protection legislation) and the existence of a health emergency.

In order to shed some light on the intertwining of the different tools used, it is necessary to illustrate which tools have been used, for what purposes and with what limits⁶¹.

First of all, in chronological order, there are the civil protection measures, issued on the basis of the civil protection legislation and having as a legal prerequisite the declaration of a state of emergency. Situations of emergency are typically managed

(Geneva, WHO, 2017); *A checklist for pandemic influenza risk and impact management: building capacity for pandemic response* (Geneva, WHO, 2018).

⁶¹ For a detailed description of the measures and the legal debate, see Matteo Gnes, ‘Le misure nazionali di contenimento dell’epidemia da COVID-19’ (2020) *Giornale di diritto amministrativo*, 282; Fabio Giglioni, ‘Le misure di contrasto alla diffusione dell’epidemia nella fase due’ (2020) *Giornale di diritto amministrativo* 414; and Angelo Golia, Laura Hering, Carolyn Moser and Tom Sparks, ‘Constitutions and contagion. European constitutional systems and the COVID-19 pandemic’ (2021) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 81, 147 <<https://www.nomos-elibrary.de/10.17104/0044-2348-2021-1-147>>.

under the civil protection legislation provisions and, in case of emergencies of a supra-regional dimension, by the Civil protection department of the Presidency of the Council of Ministers, which is the body best equipped to carry out the relevant organizational tasks. That department, acting in close cooperation with the Minister of Health, was given such tasks: allocation of funds, and collection of citizens' donations in support of the national health system, hiring of staff, as well as the purchase of medical devices. The latter task was subsequently entrusted to the extraordinary Commissioner for the COVID-19 emergency, due to the difficulty of finding such instruments in the national territory⁶². As the Civil protection department does not have specific competence in health matters, it was assisted by the Technical-Scientific Committee set up by a civil protection ordinance (*Comitato tecnico scientifico* – CTS)⁶³.

Secondly, the Government issued few decree-laws to redesign the emergency system to manage the COVID-19 pandemic and to typify the containment measures to be used by itself and by the other public authorities involved (consisting of stringent limitations on personal freedom, freedom of movement, economic freedoms, freedom of assembly, and so on), to regulate the methods of carrying out judicial activity, to allocate funds, as well as to establish measures aimed at alleviating the economic and social impact of the epidemic. With the decree-laws, in particular, an attempt was made to coordinate the possibility of intervention of the presidents of the regions and of the mayors, in order to avoid the issue of regional and local measures contrasting with the national ones, establishing, according to the different stage of the pandemic, the measures which regional and local authorities would be able to issue.

Thirdly, the main normative instrument used by the Government during the first and second wave of COVID-19 was the decree of the President of the Council of Ministers (DPCM). Such instrument was issued not on the basis of the civil protection discipline (which actually provides for the possibility to use such instrument), but following the procedure established by the decree-law n. 6 and then n. 19 of 2020. The DPCM were used to establish the concrete measures limiting the freedoms of citizens deemed necessary to ensure personal distancing and thus contain the spread of the epidemic, as well as to establish some

commissioners or commissions acting in support to the Presidency of the Council, such as the extraordinary Commissioner for the COVID-19 emergency or the committee of experts for the start of “phase two”.⁶⁴

Fourthly, various measures have been adopted with ministerial orders, as well as with ministerial circulars (which, especially those issued by the Ministry of Health and of the Interior have a strong regulatory relevance). In particular, the ordinances of the Minister of Health (or of the Minister of Infrastructure and transport) were used to establish restrictive measures, often pending the adoption of the same measures with DPCM, or as technical decisions to execute the rules established by the DPCM.

13. The Legal Issues Concerning the COVID-19 Response

The management of the COVID-19 has been challenged not only from an organizational perspective (which will be addressed below) but also from a normative point of view, challenging the legality of the measures under at least four different perspectives. First, it was contested that the Government had the power to intervene in the field of health, which is a competence that it shares with the regions. Secondly, it was challenged that the Government was infringing the rules of the Constitution protecting the personal freedom. Thirdly, the use of DPCM (instead of decree-laws) has been contested. Fourth, the proportionality of the measures has been questioned.

The issues have been the object of public debate, thus creating some uncertainties in the public opinion. They have been the object of decisions of administrative courts (which held the powers to have been exercised according to the Constitutional principles and, usually, according to the principles of administrative action) and of civil and criminal judges (one of which doubted about the constitutionality of the DPCM, thus referring such an issue to the Constitutional Court).

The first problem concerns the legislative competence. The Italian National health system is managed at the regional level, and the twenty regions (one of which is divided in two autonomous provinces with the same legislative powers and competences of the regions) have legislative and administrative powers in the field of the so-called

⁶² The commissioner was established with art. 122, the legislative decree 18, (2020) and appointed with the Prime Minister Decree, (18 March 2020).

⁶³ Order of the Head of the Civil protection department (3 February 2020), 630.

⁶⁴ The DPCM 10 April 2020 set up a “Committee of economic and social experts”, headed by Dr Vittorio

Colao, with the task to provide recommendations regarding the methodology to be followed and the conditions to be implemented in order to decide on the openings of the industrial and production activities in the month of May 2020 and so on. The reports have been published on the website of the Italian Government.

exclusive and concurrent competences as defined by the Constitution. In the field of health regulation the State maintains exclusive competence only as concerns the “international prophylaxis”.

With the decree-laws n. 6 (and especially n. 19) of 2020 the Government tried to coordinate the emergency powers at disposal of regional and local authorities, defining the measures that could be adopted (which may be interpreted as prohibiting to enact measures not enlisted in the decree-law). However, this caused both political and legal problems.

Putting it simply, especially at the beginning of the emergency, local authorities wanted to issue orders to show their voters that they were not sitting on their hands, and, later on, when the situation was improving, that they were willing to re-open the commercial activities before the dates established by the Government. The Government, on the opposite, took the hard task to keep the pandemic under control, enacting tough measures as progressively restricting the free movement of persons, following the evolution of the pandemic⁶⁵.

So, the Government had to counteract regional orders contrasting with the national decisions in front of the administrative tribunals (beginning with one of the earliest orders taken to counteract the pandemic, i.e. the order of the President of the Marche Region of 25 February 2020, n. 1)⁶⁶ or to counteract orders of the mayors by annulling them through a special annulment power conferred to the Minister of the Interior (as such emergency powers are issued by the major acting as local representative of the Minister of the Interior).⁶⁷ Finally, in order to counteract decisions taken by the regions with regional legislation, the Government had to challenge the competence of the regions in issuing such decisions in front of the Constitutional Court.

The Constitutional Court, for the first time of its history, issued a preliminary order and finally a judgment, establishing that the area of “international prophylaxis” is an area of

indisputable State-level competence, which necessarily entails “uniformity at the national level” and that the duties of regions with regard to the COVID-19 response were delegated to them by the State legislator, and did not entitle the regions to act independently in fighting the virus.⁶⁸

The second issue concerns the legal qualification of the “lockdown” measures enacted nationwide in March-May 2020 and locally even more recently (so called “red areas”, which may be established also by administrative order of the competent authority, usually the President of the concerned region). In case the measures that prevented people to get out from their homes (except for reasons of work, necessity or health) would be considered as a limitation of “personal freedom”, protected by article 13 of the Constitution, not only a specific legal rule would be necessary, but even a specific order of a judge. In case such measures are considered as limiting only the freedom to freely circulate, protected by article 16 of the Constitution, the judicial order is not required by the constitution, and only a legal provision empowering the administration is necessary.

Although administrative judges considered the measures adopted as a limitation to circulation (and also of other rights, not of the personal freedom), some ordinary (i.e. civil and criminal) judges (called to judge on administrative sanctions or for the crime of false declarations to the police officers) considered such measures as a breach of personal freedom (and/or that the DPCM was not an appropriate instrument to establish such measures) and deemed such measures as being illegal.⁶⁹

The third issue concerns the use of DPCM, as some judges and legal writers assumed that the restrictions should be imposed by decree-law.

Both issues have been faced by the Constitutional Court, which established that the decree-law n. 19 of 2020 did not confer upon the President of the Council of Ministers legislative

⁶⁵ The restrictive measures taken by the Government have been criticized especially by the entrepreneurs whose activities have been closed, which organised demonstrations and protests under the hashtag #IoApro (i.e. “I open”). On the opposite, a criminal investigation is being carried out by the public prosecutor of the town of Bergamo (which has been strongly hit by the pandemic, with a huge number of deaths) for the delays in establishing the lockdown. It has been discussed if an earlier adoption of such a measure could have saved lives: see e.g. Raffaele Palladino, Jordy Bollon, Luca Ragazzoni and Francesco Barone-Adesi, ‘Excess deaths and hospital admissions for COVID-19 due to a late implementation of the lockdown in Italy’ (2020) *International Journal of Environmental Research and Public Health* 17, 5644.

⁶⁶ See order of the president of the Administrative Tribunal of the Marche Region, 56 (27 February 2020), and order of the Administrative Tribunal, 63, (5 March 2020)

⁶⁷ See opinion of the Council of State, (7 April 2020), 735, concerning the annulment of the order of the mayor of Messina, 105, (5 April 2020), which restricted access to Sicily in a more stringent way than that provided by the State rules.

⁶⁸ Constitutional Court, order 4 (14 January 2021) and judgment 37, (12 March 2021) available (also in English) on the website of the Constitutional Court, <www.cortecostituzionale.it>.

⁶⁹ See judgments of the justice of peace of Frosinone 515 and 516 (15 July 2020); Tribunal of Reggio Emilia, judgment 54 (27 January 2021).

functions in breach of Articles 76 and 77 of the Constitution. Rather, those provisions have been considered as simply vesting the President of the Council of Ministers with the task to execute, with general administrative acts, measures that were sufficiently detailed therein, so that the DPCM were used simply as administrative acts to execute the measures that the decree-law had previously typified.⁷⁰

Finally, the proportionality of the measures has been challenged in front of the administrative judges, who have almost always upheld the decisions taken by the public authorities and, in the case of conflicts between State authorities and regional authorities, usually in favour of the State.

For example, the Council of State upheld the decisions imposing quarantines on workers who had close contacts with infected persons⁷¹ or those imposing the curfew and an early closing time for restaurants, considering the interest of public health as superior to the right to work and to exercise an economic activity, taking in account that the economic loss would have been compensated by the Government⁷² and also the decision to impose the use of facial masks to the students (older than 6 years old and except in case of health problems) at school.⁷³

On the opposite, in some cases administrative judges condemned the public administrations for lack of transparency, ordering them, and especially the Minister of Health, to disclose information, health plans, the minutes of the technical bodies involved in the decision-making process.⁷⁴

Final section: problems and lessons for the future

14. The Problems of the Italian Response to COVID-19

The measures which were devoted more attention (also because they limited the fundamental rights of people, even the possibilities to go to the church or to vote) and which were probably the most effective

in containing and mitigating the pandemic were the rules providing for personal and social distancing.

Such measures were accompanied by other prophylactic measures. On the one hand, those aimed at tracking and isolating the contacts of affected people (“contacts of cases”), and, on the other hand, the care, at home (for the less serious cases) or in the hospital (for the severe cases) of patients. Such measures needed a re-arrangement of the health system, with the institution of special mobile care units (in order to visit patients at home and thus limiting the pressure and crowds at the emergency departments of the hospitals) and the simplification of procedures to acquire personal protective equipment (i.e. PPE, such as face masks, gloves, protective coveralls or eyewear protection, as well as for medical devices such as surgical masks, and exploration gloves and gowns) and breathing devices, which were not sufficient to deal with the huge amount of patients.

Lot of mistakes were found to have occurred. For example, residences for the elderly people have been used to take care of less serious COVID-19 patients, thus spreading (through the healthcare personnel) the virus in the whole structure; hospitals became an outbreak place for the virus; the contact tracing system adopted did not work, both because the number of cases was too high and because the app was too complex to be effective;⁷⁵ and the face masks imported from abroad had to follow special simplified and faster procedures, so derogating to the rules established at the EU level. Such simplification had been envisaged by the European Commission,⁷⁶ however, the misinterpretation and misapplication of both EU rules and national emergency legislation led to the distribution of millions of defective and unsafe facemasks.

15. Lessons From the COVID-19 Pandemic

At least four lessons may be learned from the COVID-19 pandemic.

⁷⁰ Constitutional Court, 198, (22 October 2021).

⁷¹ Council of State, Sect. III, presidential decree 1553, (30 March 2020).

⁷² Council of State, Sect. I, opinion 850, (3 May 2021); and Sect. III, order 2493, (11 May 2021)

⁷³ The first instance administrative courts had some doubts on the necessity to impose the use of facial masks at school; however the Council of State upheld the obligation to use facial masks with the only exception of students with certified problems of breathing caused by the prolonged use of facial masks: see Council of State, order 304 (26 January 2021), Administrative Court of Lazio, order 837 (13 February 2021) and judgment 2102 (19 February 2021) (declaring the administrative decision to be disproportionate) and Council of State decrees 1804, (2 April 2021), 1832 (7 April 2021), and

1840 (8 April 2021)(upholding the obligation to use facial masks, also because it had been re-established by law).

⁷⁴ See e.g. Council of State, Sect. III, judgment (9 July 2021), 5213.

⁷⁵ Contact tracing was based on both the traditional interview system to trace the contacts of the cases and on the use of an App (named *Immuni*) that had to be voluntarily downloaded and installed by the people on their mobile phone. However, in order to respect the privacy of the infected person and to avoid misuse of it, it was too complicated to be used and did not get enough users to be effective.

⁷⁶ Cf. Commission recommendation (EU) 2020/403 (13 March 2020) on conformity assessment and market surveillance procedures within the context of the COVID-19 threat.

First: it is necessary to rethink or re-evaluate the relationship between science and technology, on the one hand, and politics and administration, on the other. And, above all, the role of judges, repeatedly called upon to resolve the complex conflicts that have arisen between the various political decision-makers concerned, citizens and economic activities.

Second: it is necessary to carefully analyse the legal management of the emergency, as it was necessary to set up a brand-new legal system to face it, based on administrative acts that suspended legislation and citizens' rights.

Third: attention must be paid to the medical-health management of the emergency, especially as regards its organizational issues, relating to the tools used to contain and mitigate the epidemic.

Fourth: with reference to the "administrative" management of the emergency, attention must be paid to the application of pandemic plans, to the (excessive) administrative simplifications, to the procurement of medical devices and medical equipment, as well as to the tools necessary to keep the most important activities going (as educational activities).⁷⁷

⁷⁷ See Matteo Gnes, 'La risposta italiana all'epidemia da COVID-19' (2021) *Giornale di diritto amministrativo*, 277.

Political Rights in Times Of Pandemic – A Code of Conduct for City Governance

Irene Antonopoulos, Andrea Bruscia, Ronald Car, Stephanie Mackenzie-Smith

Abstract. This paper discusses the implementation of a COVID-19 related Code of Conduct for local urban governments and argues that the code should consider a line-up of complementary political rights: Right to Political Participation and the related Access to information, as well as the Right to Health as the cornerstone of the Right to Life. The disconnect between day-to-day local policymaking and consideration for human rights appears inconsequential in the event of COVID-19 pandemic. Urban governments bear the in-depth understanding of the intricacies of their communities, which make them uniquely positioned to manage such a fast-moving and ever-changing emergency. Despite their vast and onerous responsibilities, they do so without the benefit of a human rights framework, which leaves local governments vulnerable to not only potential violations of political rights of the urban population but may also negatively impact the ability of public officials to effectively protect citizens in their response to the pandemic.

Keywords: *Local Urban Government, Code of Conduct, Right to Political Participation, Access to Information, Right to Life*

1. Introduction

The following article discusses the implementation of a COVID-19 related Code of Conduct for local urban governments. A Code of Conduct should consider a line-up of complementary political rights: Right to Political Participation and the related Access to information, as well as the Right to Health as the cornerstone of the Right to Life.

While local governments are widely considered to be the most accessible form of government, as opposed to centralized and national governments, they are widely ignored from conversations regarding the protection and promotion of human rights. City, municipal and local governments in several countries around the world have traditionally acknowledged their responsibility to protect human rights during policymaking processes and the delivery of services. However, the day-to-day work of local governments is rarely done using a human rights lens. Consideration for human rights in policymaking and the

understanding and awareness of international human rights laws sit at the national level of most governments¹. This traditional approach is challenged nowadays by the rise of what is known as “human rights cities” (mostly in the United States), with several cities adopting resolutions that they are “human rights cities”. Nevertheless, there is little follow-up to these resolutions and little understanding of how a human rights framework could be useful in developing and implementing local policies². Therefore, there is a persistent disconnect between local policymaking and human rights. The disconnect may be somewhat inconsequential in the day-to-day running of cities and local governments. However, it presents substantial and somewhat alarming consequences in the event of a global pandemic.

Local governments are uniquely positioned to managing pandemic response, being the closest level of government to citizens and bearing the in-depth understanding of the intricacies of their communities. Cities, towns, villages, and even rural

¹ Martha F. Davis, 'Cities, Human Rights and Accountability' in Barbara Oomen, Martha F. Davis And Michele Grigolo (eds.) *Global Urban Justice: The Rise of Human Rights Cities* (Cambridge University Press, June 2016).

² Michele Grigolo, *The Human Rights City: New York, San Francisco, Barcelona* (Abingdon, Oxon; Routledge, Routledge Advances in Sociology, 2019).

areas are heterogenous communities with vast differences in demographics, socio-economic challenges and infrastructure resources. Uniform policymaking at the level of centralized governments often does little to address this diversity, which is at best inefficient, at worse limits the effectiveness of policies aimed at the prevention and management of the COVID-19 pandemic.

2. Political Rights Responsibilities at Local Level – A Need for Consistency

While much discussion has focused on national issues, the reality of responding to a pandemic is very much an issue of multi-level governance, that involves a coordinated action of authorities at the international, national, regional and local level. Local governments are predominately, at least in Western democratic countries, at the heart of COVID-19 response, bearing responsibilities for public health promotion, the delivery of healthcare services, including vaccine rollouts, and for the enforcement of public health measures aimed at preventing the spread of disease. Covid-19 is a fast-moving and ever-changing emergency that requires urgent and immediate public response from governments. Therefore, it presents a unique challenge for multi-level governance systems where decisions are being made at the global level through the UN and World Health Organization (WHO) as well as at the national and local levels.

In many countries, as for example in Italy, local governments are at the forefront of pandemic response managing hospitals, public health education, and vaccine rollouts. An examination of Italy's pandemic response by Malandrino and Demichelis illustrates the uncertainty and confusion that can arise because of the multi-level governance, and how this confusion directly impacts citizens. The study noted a lack of alignment between the central government and regional and mayoral measures, which created uncertainty for officials, administrative bodies, and subsequently citizens³. Malandrino and Demichelis note that local-level governments are favourable for managing many aspects of the pandemic response as they have greater and more direct knowledge of the communities and the needs of their jurisdictions.

While not a criticism of multi-level governance structures, it is important to recognize the need for consistency across all levels of government, particularly when it comes to guaranteeing the fundamental human rights of citizens. Despite the vast and onerous responsibilities local governments have when it comes to implementing the policies set by centralized governments, they have limited input in the broader policymaking processes of COVID-19 response. Furthermore, when given the freedom to set and manage their responses, local authorities may be doing so without the benefit of a human rights framework.

The Council of Europe released a second edition of their Human Rights Handbook for Local and Regional Authorities with the aim to provide additional guidance to member communities in light of the COVID-19 pandemic⁴. The document acknowledges that local authorities are best positioned to understand citizens' needs. The Council also recognizes the challenges of multi-level governance when it comes to protecting the civil, political, and social rights of citizens. That said, the document is specific to members of the Council of Europe and similar guidance documents do not appear to exist for other liberal, western democratic countries. The lack of a framework leaves local governments vulnerable to not only potential violations of human rights but may also negatively impact the ability of public officials to effectively protect citizens in their response to the pandemic. Two main questions arise. Firstly, do local representatives receive the same education on human rights as decision makers? Secondly, in times of emergency, how is this multilevel enforcement of human rights manifested in the formulation of human rights obligations?

The Council of Europe's Human Rights Handbook for Local and Regional Authorities issued by the Congress of Local and Regional Authorities (Volume II) discusses the protection of social rights, with a consideration of the effects of the coronavirus pandemic.⁵ Despite its status as European soft law, the Handbook can be considered a source of inspiration for the future interaction between local authorities, their local residents and the central government. Similarly, in a more detailed manner, the United Nations' 'Policy Brief on Covid-19 in an Urban World' lists those issues

³ Anna Malandrino and Elena Demichelis, 'Conflict in Decision Making and Variation in Public Administration Outcomes in Italy during the COVID-19 Crisis' (2020) 6, 2, *European Policy Analysis* 138–46.

⁴ Council of Europe, *Human Rights Handbook for Local and Regional Authorities* (February 2019), <<https://rm.coe.int/human-rights-handbook-for-local-and-regional-authorities-vol1/168093aaf2>> accessed 8 February 2021.

⁵ Council of Europe, News 2020, *Social Rights: The Monitoring Committee adopts a Human Rights Handbook for Local Elected Official* (Strasbourg, 17 September 2020) <<https://www.coe.int/en/web/congress//social-rights-the-monitoring-committee-adopts-a-humanrights-handbook-for-local-elected-officials>> accessed 8 February 2021.

that require action at a time when “cities are bearing the brunt of the crisis”.⁶ The Policy Brief tackles politically delicate issues, such as: adequate housing to ensure social distancing, the need to protect public transport, as well as ensure the tackling of the increasingly evident inequalities.⁷

Crucially, the ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis’ toolkit⁸ stipulates that curbing the spread of COVID-19 in order to ultimately protect life, allows bypassing ‘normal’ processes necessary for distinguishing the functions of local and central governments. Derogations in ensuring the protection of life in the current global public emergency can cause interferences with civil and political rights. It can also blur the lines between the obligations of local authorities and the state obligations in ensuring protection of the right to life.

A final relevant aspect relates to the interactions between political and socio-economic human rights. A recent enquiry about the protection, interpretation and enforcement of socio-economic rights on the level of national constitutions has rightly observed that these rights

are not interpreted or implemented in an institutional, ideological, or political vacuum. Specifically, the prospects for advancing economic and social rights in a given polity cannot be reduced to the constitutional domain alone, and may not be effectively analyzed in isolation from the concrete fiscal realities, legacies of welfare provision, historical influence of leftist political forces, public opinion on core matters of health care and education, or patterns of judicial behavior and executive-judiciary relations in that polity.⁹

While adhering to that view, this article claims that we also need to investigate the trajectories of intersections of political and socio-economic human rights on the level of local city governments.

3. Right to Political Participation and Access to Information

Participation rights are inextricably linked to other rights, such as the rights to education, information,

peaceful assembly, association, freedom of expression, opinion and vote. Among these rights, the COVID-19 related health risk is directly endangering the actual access to the rights to peaceful assembly (intended as non-digital, face-to-face gathering) and vote (except for the very limited number of countries which allow e-voting) because of the need of social distancing.

Furthermore, the prevalent view in the relevant literature is that participation in the democratic life of a polity is not just a matter of formal adherence to procedural aspects but of the quality of the democratic process. Citizen’s access to information and capability to evaluate the governmental action are crucial to it. A timely, relevant, and accurate information is critical to maintaining citizen’s trust in public officials. It ensures compliance with rules and regulations designed to prevent the spread of disease and guarantees the right of citizens to participate in governance processes while also holding governments accountable. Moreover, the access to information is indirectly endangered due to high level of scientific uncertainty about COVID 19. Citizen’s capability to evaluate the governmental action is hampered by 3 factors: gradual improvement of scientific knowledge about the virus; the related communicative complexity of scientific dissemination, and last but not least the intentional or unintentional misinformation.

Local city governments in several countries have successfully applied digital technology, using top-down strategies of population control and health measures enforcement. However, a balance of such strategies with a bottom-up approach is needed to allow the citizens to take their democratic rights back, realizing the provisions of art. 25 of the International Covenant on Civil and Political Rights¹⁰. Concretely, a bottom-up approach means that smart cities can become places where digital technology will allow citizens to take part in the conduct of local public affairs, to vote and be elected at genuine periodic elections and have access, on general terms of equality, to public service.

On the European level, the European Charter of Local Self-Governance acknowledges the

⁶ António Guterres, ‘Launch of Policy Brief on COVID-19 and Cities, COVID-19 in an Urban World’ <<https://www.un.org/en/coronavirus/covid-19-urban-world>> accessed 20 July 2021.

⁷ *Ibidem*.

⁸ Council of Europe, *Respecting Democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis* (SG/INF(2020)11, 7 April 2020) <<https://rm.coe.int/sg-inf-2020-11-respecting-democra>

[cy-rule-of-law-and-human-rights-in-th/16809e1f40](https://www.un.org/en/coronavirus/covid-19-urban-world)> accessed 15 February 2021.

⁹ Courtney Jung, Ran Hirschl & Evan Rosevear, ‘Economic and Social Rights in National Constitutions’ (2014) 62, 4, *The American Journal of Comparative Law*, 1089.

¹⁰ International Covenant on Civil and Political Rights, <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 20 July 2021.

democratic role of communities.¹¹ The reliance on the Charter during the pandemic raised multiple questions that were discussed during the 'Covid-19: local and regional authorities on the frontline' event, in relation to four key points.¹² These include: 1) the maintenance of 'the legitimacy of elected councils and elected representatives'; 2) striking 'the right balance between centralised and decentralised action'; 3) ensuring proportionality between taking restrictive measures and maintaining democratic control; and 4) ensuring communication with citizens.¹³ This list can be summarised in one key point: the need to ensure the continuation of democratic processes in an increasingly restricted environment for the purposes of safeguarding life. The political tensions observed during the latest United States presidential election over the need for alternative voting systems to ensure protection of the population, together with a consistent misinformation campaign on the effects of the virus or the transparency of postal vote, was evidence of the potential political manipulation of the effects of this global emergency for the fulfilment of political aspirations.

Evidence from Israel shows an until now successful vaccination roll out, combined with a well-organized voting system. The overall outcome could be the precursor of the safeguarding of democratic processes in the next few months and years.¹⁴ Preparing for a national election in a pandemic, Israel has placed 38 polling stations in COVID-19 wards. According to the "Times of Israel", Israeli government has set up 409 polling stations for sick people and 342 for the quarantined. They stipulated that people should vote at stations for the quarantined if they are feeling unwell — even if they aren't officially in isolation. Some of the special stations are drive-through venues, where people won't need to leave their cars [...] The number of people registered at each ballot box has been lowered from the regular

800 to 600 in order to reduce crowding. [...] Mask wearing will be compulsory, though officials may ask people to remove masks briefly, in order to check that their face matches the picture on their identity card¹⁵.

The procedures adopted by the Israeli government match the requirements of the UN Committee on the Rights of Persons with Disabilities. As it states in its Comment No. 1, para. 49, the states have positive obligations to create and promote accessible and non-discriminatory voting and electoral procedures, as well as support for the choices of people with disabilities in voting by secret ballot. Thanks to polling stations in COVID-19 wards, Israeli government has extended to the infected persons the guarantees that allow to the persons with disabilities "to stand for elections, to hold office effectively and to perform all public functions at all levels of government".¹⁶ Similar practices should be adopted by other governments around the world that have to hold elections during pandemic. The local governments have a particularly important role in it, because of their direct knowledge of the communities and the needs of their jurisdictions.

In general terms, in the absence of legally binding instruments that specifically address the pandemic, case law and legally binding provisions that relate to other transboundary disasters (e.g. climate change, environmental degradation) and soft law instruments¹⁷ informs local governments over their responsibilities amidst such global life-threatening perils. In addition, the list of local governments' duties includes ensuring the protection of the Right to Information and the Right to Participation amongst other procedural rights, are aligned with 'the right to the city' which includes the safeguarding of the quality of life.

There is an increase of legal action on the basis of human rights protection related to regulation and deregulation on curbing the pandemic, that inevitably will touch on the responses by local

¹¹ European Charter of Local Self-Governance <<https://www.congressmonitoring.eu/#:~:text=The%20European%20Charter%20of%20Local,with%20a%20number%20of%20principles>> accessed 15 February 2021.

¹² Council of Europe, Congress of Local and Regional Authorities, *Covid-19: local and regional authorities on the frontline* (7 December 2021) <[https://www.coe.int/en/web/congress/covid-19-local-and-regional-authorities-at-the-frontline#{"77302803":2}](https://www.coe.int/en/web/congress/covid-19-local-and-regional-authorities-at-the-frontline#{)> accessed 15 February 2021.

¹³ *Ibidem*.

¹⁴ Felicia Schwartz, 'Israel's Netanyahu Pins Election Hopes on Covid-19 Vaccine Drive' <<https://www.wsj.com/articles/israels-netanyahu-pins-election-hopes-on-covid-19-vaccine-drive-11616410842>> accessed 31 March 2021.

¹⁵ Nathan Jeffay, 'Socially distanced democracy: Israel votes in a pandemic' (22 March 2021) *The Times of Israel* <<https://www.timesofisrael.com/socially-distanced-democracy-israel-prepares-for-pandemic-poll/>> accessed 26 August 2021.

¹⁶ For the Convention on the Rights of Persons with Disabilities see <<https://www.ohchr.org/en/hrbodies/crpd/pages/conventionrightspersonswithdisabilities.aspx>> accessed 26 August 2021.

¹⁷ UCLG Committee on Social Inclusion, Participatory Democracy and Human Rights, *European Charter for the Safeguarding of Human Rights in the City* (October 2012) <https://www.uclgcisdp.org/sites/default/files/CISDP%20Carta%20Europea%20Sencera_baixa_3.pdf> accessed 9 February 2021.

authorities. For example, in multiple jurisdictions, the requirement to vaccinate if one is a worker in social care and medical facilities, has become compulsory.¹⁸ Such rules, could inevitably affect local authorities, which in certain states are tasked with managing the social care and health care facilities within their authority. For example, the onus of such decision making at the local authority level is reflected by the fact that several Italian families are bringing action against local elected representatives for the handling of the pandemic in three severely affected Italian regions.¹⁹ They attribute the blame for the lives lost to the handling of the crisis.

In the absence of specific guidance, the case law serves as an example of the responsibilities of the local government in protecting the right to life as an emanation of the state. For example, the European Court of Human Rights has previously decided that the failure to inform community residents adequately over potential risks to their lives, ultimately led to a violation of the right to life. For example, in *Özel and Others v Turkey* the lack of information over the risk to life amidst environmental destruction led to a violation of the right to life (Article 2 of the European Convention on Human Rights).²⁰ Similar successful claims were raised in the case of *Öneryıldız v Turkey*, where the lack of measures at local level led to the fatal consequences of a methane explosion.²¹ The Court decided that these failings of the local authority ultimately led to a violation of the Right to Life by Turkey. Beyond the issue of taking measures to protect one's life including informing those under threat over the risks to their rights, the local authorities should also ensure that they take responsibility for their failures when these lead to an interference with one's rights.²²

Access to information is also a major hurdle in guaranteeing the right to health. The United Nations has called on countries to address the spread of misinformation, calling it an "infodemic". The critical knowledge of local governments in responding to pandemics can be key to guaranteeing the right to life. Further to the lack of

guidance regarding human rights at a local level, even less information or guidance related to the right to Access to Information exists. With the focus often on key rights such as right to life or right to privacy, the role access to information can play in the management of COVID-19 has been widely ignored.

Access to information is a qualified right, which may very much be to the detriment of the preservation of other rights. A clear interrelationship between the right to life and the right to access information can be drawn: if citizens cannot access information to inform potentially life-saving decisions, how much are governments really acting in a way that protects that right to life? If citizens are unable to access information due to their socio-economic position or lack of internet access, how can they access healthcare, housing, and education information and, thus, preserve those absolute rights? While Covid-19 might be the first global pandemic of our time, it is unlikely to be the last²³, which is why it is so important to address the ways in which access to information, or lack thereof, have led to deaths and, as such, are intimately tied to the right to life.²⁴ If governments seek to protect the lives of individuals, that response requires more than medical care and vaccines, it requires a coordinated approach to ensuring all peoples have unencumbered access to the information that can save lives. Given the rise of misinformation and populist ideologies, access to timely, relevant, and accurate information is even more critical to combat the deadly consequences of current and future "infodemics". The fact that the UN currently allows for the suspension of access to information in emergencies poses challenges for both the protection of life and the protection of democracy, as access to information is key to holding governments accountable for their actions. Therefore, it is fair to ask the question of whether Covid-19 should be a prompt for reconsidering the importance of access to information as a human right and for asking how local governments can contribute to the protection and promotion of this right.

¹⁸ 'Germany introduces mandatory vaccination for healthcare workers' (10 December 2021) Euronews <<https://www.euronews.com/2021/12/10/germany-introduces-mandatory-vaccination-for-healthcare-workers>> accessed 9 February 2021.

¹⁹ 'Relatives of Italian Covid victims to file lawsuit against leading politicians' (22 December 2020) The Guardian <<https://www.theguardian.com/world/2020/dec/22/relatives-of-italian-covid-victims-to-file-lawsuit-against-leading-politicians>> accessed 20 June 2021.

²⁰ *Özel and Others v Turkey*, App nos 14350 and 2 others, ECHR 17 November 2015.

²¹ *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII, 30 November 2004.

²² *Ciechońska v. Poland*, no. 19776/04, 14 June 2011 and *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII, 30 November 2004.

²³ Jennifer Edge, 'Issue Brief: Strengthening National Health Systems' Capacity to Respond to Future Global Pandemics' *Issue Brief* (Hamilton, Ontario: McMaster Health Forum, 2013).

²⁴ Kelly C. Vranas and Meeta Prasad Kerlin, 'Looking to the Past, Learning From the Present, and Preparing for the Future: Toward Understanding Critical Care Strain During a Global Pandemic' (2021) 159, 2, *Chest*, 469–70 <<https://doi.org/10.1016/j.chest.2020.10.035>> accessed 20 June 2021.

Local governments are uniquely positioned to address the digital divides that impact access to information, particularly during a pandemic. Local services, particularly public libraries, have spent the last decade or more seeking to bridge the digital divide for citizens by offering public internet access and a range of e-government services. As noted by Bertot, Jaeger, Langa & McClure, public libraries are increasingly serving as agents of e-government and increasingly play significant roles in emergency response by connecting to citizens to family and critical resources via the internet²⁵. This role of public libraries in providing access to information is particularly impactful in rural communities where broadband internet access may be limited. Petri argues that internet access through public libraries and other government-provided means should not be a privilege, but a human right that local governments can not ignore²⁶.

We have an additional challenge in that there are multiple sources of information related to the pandemic. This can also feed into misinformation and lack of trust in information coming from government sources or global bodies, such as the World Health Information. Before many governments were distributing information, universities were. Johns Hopkins University was really the first organization to begin collecting and sharing real-time cases of Covid around the globe. It does, however, beg the question of – is more information better? When there are multiple sources of information between the government, academia, private sector and the media, there are bound to be inconsistencies. Data is defined in different ways, and this can lead to distrust in information if sources are not consistent with each other.

Local governments are able to offer increased transparency in how data is collected and can reduce delays in the sharing of key data that may impact not only policy measures but the individual behaviours of citizens. Throughout the pandemic, local governments have been the primary collectors of data, particularly when it comes to hospitalization rates and death rates. As data moves upstream to centralized governments, there are inherently delays in reporting. Additionally, data collection and reporting methods differ from healthcare system to healthcare system added to

discrepancies as data from multiple sources is combined at the higher levels of government.

In 2021, the Organization of Economic Co-operation and Development (OECD) urged governments to focus on three key areas in order to increase preparedness for future pandemic: tackling misinformation, enhancing representation and improving governance²⁷. Access to information plays a critical role in addressing all three of these challenges, although it has largely been ignored, it warrants much consideration as either an absolute human right or an effective tool for pandemic management. Given the increased trust in local government over centralized governments, the immediacy of data availability and the specialized knowledge of citizens and the unique challenges communities face at a granular level, local governments are uniquely positioned to ensure the right to access to information and to use information as a measure in ensuring the right to life of its citizens.

4. Impact of Social-Economic Rights on the Right to Life

Focusing on the protection of the 'life of the nation' element of human rights law, this article aims at identifying the obligations of local governments in ensuring and examining human rights protection. The social determinants of health, namely food security, housing, safe potable water and sanitation issues have been highlighted and exacerbated by the pandemic in urban environments in a unique and peculiar way. A question seems mandatory: should supra-national and national governments pay extra-attention to the right to life of the city population, given that normal shortcomings usually result in even worse outcomes in large urban settlements?

The UN Office for the High Commissioner for Human Rights has previously given guidelines on the role of the local governance authorities in implementing and enforcing human rights obligations.²⁸ By recognising that the protection of human rights is primarily the responsibility of the central government, local governments bear the responsibility to promote human rights within their services rights within their services and the respect for human rights in society as a whole.²⁹ This role

²⁵ John Carlo Bertot, Paul T. Jaeger, Lesley A. Langa and Charles R. McClure, 'Public Access Computing and Internet Access in Public Libraries: The Role of Public Libraries in e-Government and Emergency Situations' (2006) 11, 9, First Monday <<https://ictlogy.net/bibliography/reports/projects.php?idp=1437>>.

²⁶ Claire Petri, 'Rural Libraries and the Human Right to Internet Access', in Brian Real (ed.) *Rural and Small Public Libraries: Challenges and Opportunities*, vol. 43,

Advances in Librarianship (Emerald Publishing Limited, 2017), 13–35.

²⁷ OECD, *Government at a Glance 2021* <<https://www.oecd.org/gov/government-at-a-glance-22214399.htm>> accessed 28 July 2021.

²⁸A/HRC/RES/24/2; A/HRC/RES/27/4; A/HRC/RES/33/8; A/HRC/RES/39/7.

²⁹ United Nations, Office for the High Commissioner for Human Rights, Local Government and Human Rights

includes awareness raising, education and training of public officials in the promotion and protection of human rights at a local level.

In a more detailed manner, the United Nations' Policy Brief on Covid-19 in an Urban World, lists those issues that require action at a time when 'cities are bearing the brunt of the crisis'.³⁰ The Policy Brief tackles specific issues as adequate housing to ensure social distancing, the need to protect public transport, as well as ensure the tackling of the increasingly evident inequalities.³¹ Major cities with millions of inhabitants are partially vulnerable: not infrastructurally, linguistically, or legally, but in its social practises, in its redistributive policies, in the everyday commute, in its nightlife, in its public transportation, in its use of the public spaces, in its organisation of space, in its norms of cohabitation. The codes of conducts of the cities decree a general inconsistency in terms of how rights, freedom, and social practises are perceived and implemented. Furthermore, health and the right to health do not coincide with having the best possible hospitals, possessing the brand-new technological equipment. Of course, that helps, but having a good system of health protection is something more than the health care in and of itself. A person, in order to enjoy the highest attainable standard of health, needs efficient social dynamics, running organisational networks, existing and effective goods, services, and facilities. This last understanding is not altogether that different from Amartya Sen's theorisation of capabilities: "The capability of a person reflects the alternative combinations of functioning the person can achieve, and from which he or she can choose one collection."³²

However, during a pandemic outbreak, the focus becomes the protection of the right to life and the interest in protecting life. Measures designed to curb the spread of the virus, are placed within the objective of protecting the life of the population and the life of the nation. The two are not synonymous. The former is adequately defined in international, regional and constitutional formulations. The latter is a more contested term. According to Fitzpatrick, a threat to the life of the nation is one that threatens "some fundamental element of statehood or

survival of the population".³³ Lord Hoffman clarifies that the use of 'the life of the nation' should be understood in a metaphorical sense, to mean the protection of the nation as a whole but not necessarily the protection of individual lives.³⁴ The distinction between the two and the discussion around the right to life through the eyes of critics and supporters of human rights are particularly relevant in light of derogations and exceptions whether under the international covenant or regional human rights systems.

Nyamutata suggests that the 'apocalyptic' language used to describe the pandemic by various state leaders, led to an assumption that life of the nation could be synonymous to life of the population.³⁵ He adds that the interpretation of the 'threat to the life of the nation' is significant in determining whether derogations should be allowed or not. In essence, the apocalyptic language, as Nyamutata describes it, leads to an assumption that the life of the nation is under threat of eclipse and therefore derogations should be allowed. But, what is the position on derogations when the 'life of the nation' is interpreted as the lives of the individual members of the population?

Nevertheless, at an international level we are able to identify the threshold set in relation to allowing derogations of human rights. More specifically, the Siracusa principles that set out the conditions under which rights can be limited, clarify that

public health may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.³⁶

If we choose to interpret the threat to 'life of the nation' as a threat to the lives of the members of the population by following the Siracusa Principles, then the Right to Life in the time of COVID-19 is discussed as a potentially absolute right, not dissimilar to how

<<https://www.ohchr.org/EN/Issues/LocalGovernment/Pages/Index.aspx>> accessed 8 February 2021.

³⁰ António Guterres, 'Launch of Policy Brief on COVID-19 and Cities, COVID-19 in an Urban World' <<https://www.un.org/en/coronavirus/covid-19-urban-world>> accessed 20 July 2021.

³¹ *Ibidem*.

³² Amartya Sen, *Capability and Well-Being: In the Quality of Life* (Oxford University Press, 1993) 31.

³³ Joan M Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency* (Philadelphia, University of Pennsylvania Press, 1994) 8.

³⁴ *A v. Secretary of State for the Home Department* [2004] UKHL 56, para 91.

³⁵ Conrad Nyamutata, 'Do Civil Liberties Really Matter During Pandemics? Approaches to Coronavirus Disease (covid-19)' (2020) *International Human Rights Law Review* 9, 62-98, 8.

³⁶ *Siracusa Principles on the Limitation and Derogation Principles in the International Covenant on Civil and Political Rights* (April 1985) American Association for the International Commission of Jurists, para. 25 <<https://documentsddsny.un.org/doc/UNDOC/GEN/G84/182/73/PDF/G8418273.pdf?OpenElement>>.

we address freedom from torture. The measures taken to protect life followed the rhetoric of war aligning the protection of the life of the population with the life of the nation. The decision to derogate from other human rights obligations in order to protect one's right to life fulfils some of the long standing criticisms of human rights. The right to life is treated as a natural right to which all individuals are entitled to, but other rights lose their 'entitlement' status in times of emergency and potentially their significance as human rights, if they fulfil long standing desires by the respective state such as curbing the right to freedom of expression. In addition, social and economic rights, which are highly relevant amidst the pandemic, are particularly hard to define as 'natural rights'. The goal of safeguarding life is the key goal here.

The burden is ultimately left on local city governments, which in the case of Covid-19 is executing the will of the central government. However, it has been demonstrated³⁷ that higher mortality rates due to Covid 19 in urban areas usually depend on socio-economic factors and not upon urban density: "COVID-19 is hitting hardest not in dense Manhattan but in the less-dense outer boroughs, like the Bronx, Queens, and even far less dense Staten Island"³⁸. This is an illuminating example of what exactly are the inequalities in the city and how Covid-19 has revealed them. The city can be dangerous in terms of health, not because of how many people live in it but for its unequal distribution of wealth, benefits, and costs:

the structural economic and social conditions of cities making them more or less able to implement effective policy responses. For instance, cities marked with inequalities, inadequate housing conditions and a high concentration of urban poor are potentially

more vulnerable than those that are better resourced, less crowded and more equal.³⁹

Covid-19 is, firstly, a revelatory agent and, secondly, an exacerbator of the inequalities within the city (and beyond). The virus reveals the existing deficiencies of contemporary social order: it accelerates them, magnifies them, and exacerbates them.⁴⁰

For example, to fight the spread of the virus it is necessary to wash your hands for at least 20 seconds. However, "2.5 billion people lack access to safe drinking water; equally distressing, 4.5 billion people, or more than half of humanity, have no access to adequate sanitation facilities"⁴¹. In terms of sanitary conditions of the city, the role of the pandemic is again that of revealing the existing inequalities. For instance, it has been clarified that Covid-19 virus can be transmitted through faecal sludge. To prevent contagion, the presence of an optimal management of water is fundamental (i.e., the usage freshwaters or the disposal of wastewaters). However, that does not seem to be the case for many highly dense urban areas, especially in developing countries and in poorer sectors of developed countries, with persistent and pre-existent issues of disposal facilities. Covid-19 is revealing the importance of the issue of wastewaters disposal:

It was estimated that about 829,000 deaths can be attributed to inadequate drinking water, sanitation and hygiene behaviours. Overly crowded, closely packed, decrepit housing units, devoid of basic needs such as clean water, toilets, sewers, drainage and waste collection, urban slums and informal settlements foster ideal environments for eruption and propagation of infections.⁴²

³⁷ See Shima Hamidi, Sadegh Sabouri and Reid Ewing, 'Does Density Aggravate the COVID-19 Pandemic?', (2020) *Journal of the American Planning Association*, 86, 4, 495-509; 506: "In this early and preliminary study, we find that density is not linked to rates of COVID-19 infection, after controlling for metropolitan area population, socioeconomic, and health care infrastructure in U.S. counties. Surprisingly, we find that COVID-19 death rates are lower in denser counties and higher in less dense counties, at a high level of statistical significance. This is likely due to better access to health care facilities and easier management of social distancing interventions such as sheltering in place."

³⁸ OECD, *City Policy Responses* (2020) 16 <https://read.oecdilibrary.org/view/?ref=126_126769yen45847kf&title=Coronavirus-COVID19-Cities-Policy-Responses>.

³⁹ *Ibidem*.

⁴⁰ See Lisa Forman, 'The Evolution of the Right to Health in the Shadow of Covid-19' (HHR Journal, 1 April

2020) <https://www.hhrjournal.org/2020/04/the-evolution-of-the-right-to-health-in-the-shadow-of-covid-19/#_edn11> "In many respects, this pandemic is deepening crises of social, economic, and health inequities created by decades of neoliberal economic supremacy. The neoliberalism which was only nascent 25 years ago now dominates global decision-making, manifesting in reduced health spending for all countries (including under austerity) and the growing deregulation, privatization, and commodification of health care like other social sectors" (quotations omitted)

⁴¹ Lyla Mehta and Claudia Ringler 'Covid-19 reveals and further increases inequalities in water and sanitation' Institute of Development Studies, 20 April 2020 <<https://www.ifpri.org/publication/covid-19-reveals-and-further-increases-inequalities-water-and-sanitation>>.

⁴² Deepshikha Pandey, Shelly Verma, Priyanka Verma, Biswanath Mahanty, Kasturi Dutta, Achlesh Daverey and Kusum Arunachalamc 'SARS-CoV-2 in wastewater: Challenges for developing countries' (2021)

This is a patent litmus test of how people in different socio-economic situations are affected differently by the pandemic. The pandemic is intensifying its effects to the vulnerable for “[g]ood nutrition is an essential part of an individual’s defence against Covid-19”⁴³. The issue is not only focused on shortages of food but even on how to organise the emergency:

In many countries, food prices are rising in cities, where the highest concentration of consumers can be found, even while food prices are declining in rural areas, where food is produced, aggregated, sorted, distributed and transported to urban and semi-urban markets. This disparity results because rural food supply is unable to connect with demand in cities and food-importing countries.⁴⁴

Furthermore, “the urban poor, whose dietary quality and conditions of living are seriously degraded”⁴⁵. Urban areas “with populations between 500 000 and 5 million inhabitants and [...] of more than 5 million inhabitants”⁴⁶, for their intrinsic complex system of food distribution, are more akin to be unable to respond efficiently and efficaciously to the challenges proposed by the virus:⁴⁷ In Dhaka, Bangladesh, one of the impacts of the COVID-19 crisis was a food crisis suffered by the urban poor due to large-scale economic losses that resulted from the closure of businesses and restrictions on movement across the city. Without opportunities to earn income, the poor faced unprecedented challenges to find enough food and became dependent on government assistance.⁴⁸

5. Conclusion

This article has tried to highlight the difficulties that city clusters experience when conveying their necessities, their own particular and unique difficulties and problematics with the national or

supra-national community. Their line of communication is mostly inconsistent with political dynamics of national parliaments or deliberative forums of international organizations.

On the other side, local urban governments lack a proper legislative power to promote policies consistent with their specific problems. Usually, the power (or burden) of city administrators relies exclusively upon administrative and budgetary control over various forms of economic and social allocation and distribution.

Yet, recent experiences have shown the benefits of relying on local authorities to address the crisis. Data from Asia suggests that local authorities are better placed to respond to the individual needs of their constituencies that could go beyond the pandemic itself.⁴⁹ This is manifested in developed large cities as well, where tier systems have been employed to respond to the varied threat to life faced in different geographic regions within each country. According to Dutta and Fischer, obvious link between the local authority and its constituents, as well as the desire to succeed in elections or re-elections, fear of public judgment as well as threat of loss of reputation, creates a heightened sense of accountability.⁵⁰ On the other hand, limiting the enjoyment of political rights by local authorities could lead to equal threats to the personal and political reputation of local authorities.

The significant role that local authorities play in strengthening the protection of human rights should be recognised. According to Durmuş, the local government is better placed to ‘localise human rights and bridge the gap between the universality and cultural relativism poles’.⁵¹ This ability becomes even more relevant during the pandemic, when information over the spread and address of the virus differed amongst communities, enhancing the differences (i.e. sources of information, cultural characteristics, language barriers) between different communities and the economic inequalities that can exist within the same locality.

International journal of hygiene and environmental health, 231, 113634, 3.

⁴³ Global Nutrition Report, *The 2020 Global Nutrition Report in the context of Covid-19* (2020) <<https://globalnutritionreport.org/reports/2020-global-nutrition-report-context-covid-19/>>.

⁴⁴ UN, *The Impact of COVID-19 on Food Security and Nutrition* (2020) p. 6-7 <https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_covid_impact_on_food_security.pdf>.

⁴⁵ *Ibidem*.

⁴⁶ FAO, *Cities and Local Governments at the Forefront in building Inclusive and Resilient Food Systems: Key results from the FAO survey “Urban Food Systems and COVID-19”* (2020), 4-5 <<http://www.fao.org/3/cb0407en/CB0407EN.pdf>>.

⁴⁷ *Ibidem*.

⁴⁸ *Ibidem*, 9 and 10: “Davao city government is purchasing food from local producers, repackaging and distributing it to the most vulnerable. This strategy, named “Buyback, Repack and Distribute” was designed to assist both small farmers and households living in urban areas, whose incomes have been affected by restrictions posed by COVID-19.”

⁴⁹ Anwasha Dutta and Harry W. Fischer, ‘The local governance of COVID-19: Disease prevention and social security in rural India’, *World Development* 138 (2021) 2.

⁵⁰ *Ibidem*.

⁵¹ Elif Durmuş, ‘A typology of local governments’ engagement with human rights: legal pluralist contributions to international law and human rights’ (2020) *Netherlands Quarterly of Human Rights* 38(1) 37.

Global Pandemic and the Role of Courts. Opening Survey

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Abstract. While policymakers, legislators, and scientists have been in the front line in designing the institutional and regulatory framework of the preparedness strategy, the role of courts has emerged as a vital component of the institutional response to the challenges brought by the current pandemic. Not only have courts overseen statutory legislation and administrative acts to assess their conformity with constitutional norms and the rule of law, but, on a more substantive level, have also acted as custodians of fundamental rights, ensuring the right balance between conflicting ones.

This article introduces a section of Legal Policy and Pandemics, the new Global Pandemic Network Journal, devoted to litigation with a view to addressing a possible need for inter-institutional cooperation and establish an ideal dialogue among courts and policymakers of different world regions facing similar issues in the context of the current pandemic.

Moving from a comparative analysis of some of the decisions taken by courts in the first year of the pandemic, a research agenda is proposed, mainly looking at the impact of the health and economic crises upon the effective protection of fundamental rights and freedoms and their reciprocal balancing. Future contributions will feed this debate. These will provide comparative analyses across different world regions, and show to what extent some of the changes brought by the pandemic will remain as drivers for new balancing of rights.

Keywords: *Pandemic, Fundamental Rights, Judicial Review, Balancing*

1. Introduction. Global Pandemic and the Distinct Roles of Courts and Regulators

While policymakers, legislators, and scientists have been in the front line in designing the institutional and regulatory framework of the preparedness strategy, the role of courts has emerged as a critical component of the institutional response to the challenges brought by the current pandemic. Not only have courts overseen statutory legislation and administrative acts to assess their conformity with constitutional norms and the rule of law, but, on a more substantive level, courts have also been custodians of fundamental rights, ensuring the right balance between conflicting ones. This task has

been particularly relevant when the hectic pace of regulatory and administrative decision-making has not always allowed enough room for an *ex ante* deep fundamental right check, and the legislators themselves have had a more limited space of intervention in favor of the executive power.¹ Interestingly, in some jurisdictions, an *ex ante* judicial authorization procedure has been recently relaunched, thereby emphasizing the role of courts as guardians of fundamental rights in times of emergency.²

Emergency has strongly influenced the institutional setting. Emergency has been determined by the lack of knowledge about the pandemic and by the speed it developed. Both

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¹ Tim Ginsburg, Mila Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2020), Virginia Public Law and Legal Theory Research Paper No. 2020-52, U of Chicago, Public Law Working Paper No. 747 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608974> accessed 1 December 2021.

² This is the case for Spain, where judicial *ex ante* ratification of has been added for all measures adopted by health authorities as urgently needed to fight the pandemic and 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 Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num. 719/2021 of 24 May JUR\2021\157658; Tribunal Superior de Justicia TSJ de Madrid (Sala de lo Contencioso-Administrativo, Sección 8ª) Auto num. 93/2021 of 7 May JUR\2021\142006.

executives and courts have been asked to take (fast) decisions having a high impact on society, both at individual and collective levels. They both have heavily relied on science, certainly to a greater extent than out of emergency. While designing specific rules and addressing highly technical issues, they have sought guidance in general principles to cope with unprecedented questions in extraordinary circumstances.

The features of the decision-making process have also changed over time, moving from temporary and segmented decision-making to more structured and medium-term planning, with contingent decisions based on both the evolution of the pandemic and the availability of data concerning the expected effects of the measures. Regulatory practices concerning the use of medical devices, drugs, and vaccines have changed to ensure prompt and effective responses to the pandemic. Monitoring and enforcement practices have included both public and private surveillance. Courts have taken these contextual elements into account when examining the choice of regulatory instruments by public authorities and the

alternatives between short-term executive decisions and more comprehensive framework regulations to define different sets of measures on a contingency basis.³

At the same time, courts' actions have departed from that of policymakers and legislators in many respects.

Firstly, courts have a limited chance to intervene promptly despite the frequent recourse to urgency and injunctive procedures. Measures challenged before courts have been often modified or replaced by the executives before the judicial review becomes final. And, whereas urgent decisions have gained much weight, their features do not always allow a full assessment of the interests at stake. The judicial power to address the long-term consequences of unlawful measures may also be limited if new standards are adopted meanwhile, somewhat blurring the link between each measure and its effects.⁴ As a response, courts have adopted an expansive interpretation of norms concerning applicants' standing so that in many instances, courts have evaluated measures' lawfulness even after their expiry.⁵ In fact, the role of courts has

³ See Italian Council of State, 13 May 2021, n. 350: 'In the first year of the pandemic, in 2020, the absolute novelty and the unprecedented severity of this global emergency, as well as the still scarce knowledge of this pandemic phenomenon, have understandably required the adoption of particularly rapid and ductile emergency legal measures, appearing, in that context, hardly feasible the recourse only to the emergency decree, with the definition, within the decree-law itself, of the entire framework of application details of the necessary measures. By contrast today, after more than one year from the explosion of this epochal natural calamity, also on the basis of the experience accumulated up to now, of the greater acquired knowledge and of the same normative production developed, it appears reasonably possible to concentrate directly in the decree-law the articulation of all the restrictive measures to put in field' (unofficial translation).

⁴ See, eg, for France, Council of State, order n. 439693 of 28 March 2020: 'It is true, on the one hand, that only some of the masks made available to doctors and nurses are currently FFP2 masks, although these are necessary to ensure satisfactory protection and must be changed at least every eight hours, and, on the other hand, that the supply of surgical masks is still quantitatively insufficient for them to be worn by the patients being treated. However, this situation should improve significantly over the coming days and weeks, given the measures mentioned in point 7. There is therefore, and in any case, no reason to pronounce the measures that the applicants are requesting and that could not be usefully taken to increase the volume of masks available in the short term, as some of these measures have already been implemented' (unofficial translation).

⁵ See Italian Council of State, 13 May 2021, n. 850: 'the circumstance that, to date, they have ceased to be effective, as *ad tempus* acts, then replaced by other, similar and

subsequent emergency acts, if it can be relevant and decisive to the effects of the precautionary phase (for the obvious lack of the precondition of the *periculum in mora*), cannot deploy similar effects preventing access to the treatment of the merits of the case, since, otherwise, the time taken by justice (although, in the case in question, undoubtedly rapid and respectful of the principle of the reasonable duration of the trial), which is not available to the plaintiff, would end up turning against him, thus nullifying the request for protection, which must, if possible, be satisfied by a decision on the merits of the censure proposed, so as to provide, in any case, beyond the outcome of the case, an answer of justice to the request of the private individual.' (unofficial translation).

See also, in the US case law, Superior Court of California, County of San Diego, North County, A.A. v. Newsom, 15 March 2021: 'As courts have explained, applications to enjoin orders are not rendered moot where the plaintiffs remain subject to the real possibility that evolving circumstances may lead to the resurrection/imposition of the same restrictive orders in the future. (See County of Los Angeles Department of Public Health v. Sup. Ct. (2021) 2021 DJDAR 1969, 1971 citing Roman Catholic Diocese v. Cuomo (2020) 592 U.S., [141 S.Ct. 63, 68,208 L.Ed.2d 206, 210].) In this case, the State Defendants do not confirm or otherwise guarantee that once the County moves into the Red Tier, students may be free from concerns about future distance learning mandates. This case presents the classic example of a 'substantial and continuing public interest' that is capable of repetition yet could evade review, a conclusion supported by the State Defendants' acknowledgment that the existing framework is 'continually adjusted to account for evolving scientific understanding and changing conditions ...'. (See Amgen Inc. v. California Correctional

remained pivotal in many respects, and a few times, judges had even prepared the floor for policymakers' intervention, clarifying the principles' framework applicable to issues that have been addressed in courts before they made their way through legislation.⁶

Another distinction between rule-makers and courts concerns the coordination between local, national, and supranational authorities. A call for coordination and cooperative decision-making has arisen among regulators, well beyond the emergence of possible conflicts concerning the allocation of powers between centers and peripheries.⁷ Whereas depending on institutional varieties, competencies have been allocated in

different ways, more substantial responsibilities in the design and coordination of emergency management have been often assigned to central powers.⁸ Even supranational institutions have played a more active role in this respect.⁹ For example, the European Union has developed an unprecedented Health Union policy in the framework of art. 168 TFEU.¹⁰ After declaring the outbreak a public health emergency of international concern on the 30th of January 2020, the WHO has provided technical guidance to governments in developing responses to fight the pandemic.¹¹

By contrast, local courts often address pandemic-related litigation first, with a more limited chance for supreme courts to intervene¹²

Health Care Services (2020) 47 Cal.App.5th 76, 728; State Defendants' Supp. Oppo., p. 14, 11. 10- 12).

⁶ E.g., compulsory vaccination for health professional has been ruled in Italy (Law decree no. 44/2021, converted into law no 76/2021) when first instance courts had already decided over the suspension of healthcare workers refusing vaccination (see Trib. Belluno, 19 March 2021, n. 12).

⁷ Whereas, at supranational level, the courts have acknowledged the relevance of this cooperation (see, e.g. the Italian Const. Court. 23 February, 2021, n. 37: 'any decision to reinforce or lift restriction measures falls on the ability to transmit the disease beyond national borders, thus involving profiles of collaboration and confrontation between states, whether neighboring or not', unofficial translation), at national level the conflicts among central and local powers have been subject to judicial review; see, for example, Brazil - Federal Supreme Court, 6 May 2020, ADI 6343 MC-REF, where the Court holds that the Federal Constitution ensures that States and Municipalities have administrative autonomy and joint power (with Federal Government) to rule and legislate on matters of health protection and defence and that States' and Municipalities' autonomy in ruling about the right to travel must be preserved in order to take regional specificities into account.

⁸ See, e.g., in Italy, Const. Court. 23 February 2021, n. 37: 'In the face of highly contagious diseases capable of spreading globally, 'logical reasons, before legal' (judgment no. 5 of 2018) root in the constitutional system the need for a unitary regulation, of national character, suitable to preserve the equality of people in the exercise of the fundamental right to health and to protect simultaneously the interest of the community' (unofficial translation). Other factors may have courts to seek a different balance between centre and periphery, where national or federal governments have been more reluctant to take stronger measures to ensure a high protection of public health. This is the case of Brazil, where, in a case concerning the definition of vaccination policy, the Federal Supreme Court has concluded that the Union (Federal Government), the States, Federal District and Municipalities, have the power to implement such measures within their respective spheres of competence.

⁹ This has been the case for the European Union (see footnote here below, no. 11). For the American region, see

the role of the Organization of American States (OAS), as played, e.g., in the Inter American Commission on Human Rights, COVID-19 vaccines and inter-American human rights obligations, Resolution 1/2021, <<https://www.oas.org/en/iachr/decisions/pdf/Resolucion-1-21-en.pdf>> accessed 3 August 2021.

¹⁰ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions. Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats. COM(2020) 724 final Available at https://ec.europa.eu/info/sites/default/files/communication-european-health-union-resilience_en.pdf accessed 3 August 2021. On these important changes see Alberto Alemanno (ed.), *Beyond COVID-19: Towards a European Health Union*, (Special Issue 4, Vol. 11, EJRR, December 2020); see A. Alemanno, 'Towards a European Health Union: Time to Level Up' in A. Alemanno (ed.), *Beyond COVID-19: Towards a European Health Union* (EJRR, 2020) 721-725.; A. Alemanno 'The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?' (2020) 11 EJRR 307-316; K.P. Purnhagen, A. De Ruijter, M.L. Flear, T.K. Hervey, A. Herwig, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak' (2020) 11 EJRR 297-306.

¹¹ At the global level the role of WHO has been of course relevant. See WHO *Covid-19 Strategic Preparedness and Response Plan*, (WHO, January 2021) <<https://apps.who.int/iris/handle/10665/340073>> accessed 3 August 2021.

¹² In fact, a wider involvement of Supreme courts emerges in cases in which urgency proceedings may be started before first instance courts with swift right to appeal before the supreme court. An interesting example is the 'en référé' proceeding before the administrative courts in France for the protection of fundamental rights infringed by the exercise of public powers (see, e.g., in relation with Covid19 litigation: Council of State Ordonnance du 22 march 2020 n. 439674; Conseil d'Etat, 18 May 2020, no. 440442). Comparable proceedings exist in most Latin American Countries within the so called *amparo* procedure due to protect constitutional rights impaired by governmental acts. These procedures have played an important role during the pandemic with a relevant

and with even more a limited role for supranational courts, at least so far.¹³ Yet, on an informal level, a need for judicial dialogue and cooperation has emerged primarily within countries but to a limited extent between countries in relation to freedom of movement and issues related to criminal and asylum cooperation. In specific fields (e.g., asylum or access to court), supranational agencies have collected judgments and guidelines adopted by courts in the context of the pandemic, and more initiatives are arising over time.¹⁴ Of course, this transnational judicial dialogue may be favored by regulatory coordination at the supranational level when courts of different jurisdictions are confronted with a common regulatory framework.¹⁵ Yet, even if this is not the case and regulatory action lacks coordination among States, courts could cooperate to ensure a high level of protection of fundamental rights despite these divergences. For example, they could examine the proportionality of a restrictive measure, taking into account that more or less stringent standards have been adopted in neighboring States,¹⁶ or they could refer to other courts' assessments of evidence-based measures adopted in other States when deciding on similar measures based on the same scientific evidence (e.g., in respect of the effectiveness of a therapy or a vaccine's side effects).

A need for dialogue may also emerge between regulators and courts within the boundaries of power separation. Courts are not the only entities that may show higher or lower deference to

governments (as is described below), as governments may also learn from a judicial review when deciding about future action or inaction. Whereas the former aspect has emerged in current litigation, the latter is harder to observe unless a clear divergence occurs between political, administrative, and judicial decision-making, setting aside any space for institutional cooperation. The issue of science-based measures and proportionality will show how courts' rulings have influenced the quality of administrative decision-making. When the relationship is rather conflictual, judicial orders for positive action have been poorly received.¹⁷ In authoritarian regimes, courts have not always had the chance to exercise their role, being the judicial oversight extremely limited or null.¹⁸

The section of the new Global Pandemic Network Journal devoted to litigation is intended to address a possible need for inter-institutional cooperation and to establish an ideal dialogue among courts and policymakers of different world regions facing similar issues in the context of the current pandemic. The contributions presented within this section are primarily developed in the 'Covid-19 Litigation Project' framework, started by the University of Trento in late 2020. Based on a unique cooperation with an International Network of Judges and Scholars, the Project aims at facilitating inter-institutional dialogue, fostering mutual learning among courts and regulators, enabling universal protection of fundamental rights with full respect to the rule of law within a health

involvement of supreme courts, too (see, e.g., in Argentina, Supreme Court ruling, 19 November, case 'L. C. y otro c/Provincia de Formosa s/Amparo Colectivo'; Supreme Court ruling of 10 September 2020, case 'P. N., L. C. c/ Formosa, Provincia de s/ amparo - habeas corpus'; in Chile, Supreme Court, 17 April, 2020, Rol. No. 39.696-2020) and in Spain (see, e.g., Constitutional Court Resolution 40/2020 of 30th April dictated in *amparo* appeal 2056/2020).

¹³ See, however, European Court of Human Rights, *Vavříčka and Others v. the Czech Republic* [GC], no. 47621/13 (8 April 2021), ECLI:CE:ECHR:2021:0408JUD00476211; CJEU XX (C-220/20, of 10 December 2020); OAS, Statement of The Inter-American Court of Human Rights, Covid-19 and Human Rights: The Problems and Challenges must be addressed from a Human Rights Perspective and with Respect for International Obligations, Resolution 1/20, 9 April 2020, <https://www.corteidh.or.cr/tablas/alerta/comunicado/Statement_1_20_ENG.pdf> accessed 3 August 2021.

¹⁴ See, e.g., EASO, *COVID-19 emergency measures in asylum and reception systems* (Public, Issue No. 3, 7 December 2020), <https://easo.europa.eu/sites/default/files/publications/COVID-19%20emergency%20measures%20in%20asylum%20and%20reception%20systems-December-2020_new.pdf> accessed 3 August 2021

¹⁵ Future developments may, e.g., concern the application of the Digital Green Certification EU Regulation, that will involve all EU MSs and courts. See Proposal for a Regulation Of The European Parliament And Of The Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate) COM/2021/130 final available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0130>> accessed 3 August 2021.

¹⁶ So, e.g., for Germany, Higher Administrative Court of the Land of Nordrhein-Westfalen, 13 B 2046/20.NE, 07.01.2021, 13. Senat., where the Court upheld the restrictive measure observing that the German Federal Government enforced a very strict lockdown, which was not implemented by every foreign country.

¹⁷ This is the case for Brazil, where the federal Government has remained quite reluctant to adopt restrictive measures despite the active role of courts.

¹⁸ See Tom Ginsburg and Mila Versteeg (n. 1); Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, administrative decision making and judicial review. The courts' perspectives' (2021), EJRR 792.

crisis such as the present one. To this end, the Project is built for collecting, selecting, organizing, and publishing, within an open access online database, the case law concerning disputes arising from the governments' adoption of public health measures to address COVID-19 at regional, national or sub-national level. Creating an open-access database will enable policymakers, lawyers (including but not limited to government lawyers), judges, and NGOs to learn from experiences in different jurisdictions and contribute to adequate, effective, and proportionate government responses to health risks effective balancing of rights.

2. The Main Questions Addressed: an Open Agenda for the Litigation Section of This Journal

What role have courts played, and will they play in the pandemic crisis and on the effects of the crisis?

Courts have been and will be relevant during the crisis. Cooperation with governmental authorities rather than conflict has mainly characterized judicial intervention. This Section of the Journal explores the role of courts in pandemic crisis management and after-crisis effects, evaluating whether the legal changes introduced in the case law are likely to persist after the emergency is over.

Litigation differs depending on whether it occurs:

1. between public authorities (e.g., disputing about institutional competencies);
2. between private and public actors (e.g., when a private party challenges restrictive measures adopted by the public administration, or a public authority enforces a sanction upon an individual, infringing a restrictive measure);
3. between private actors (e.g., disputing private claims based on allegedly unlawful measures adopted by public authorities to regulate private relations in times of pandemic).

When private parties are involved, an important distinction concerns whether individual or

representative organizations are parties to the proceedings.

The nature of parties involved may change both the content and the objectives of litigation and, ultimately, the effects on governmental policy. Indeed, whereas under (1) the objective is usually to scrutinize the correct allocation of powers among public institutions in compliance with the constitutional order and with full respect for the rule of law, under (2) the applicant or plaintiff usually seeks either injunctions to undertake measures not adopted by public authorities (or that could have been adopted differently) or suspension and annulment of the administrative decision, in some cases also claiming compensation or restitution as concurring or alternative measures. Here, in light of national specificities, the effects of the judicial decision will vary depending on whether individuals or representative organizations challenge the measure. For example, when the latter seeks annulment of general interest acts, the decision may usually have *erga omnes* effects.¹⁹ By contrast, under (3), the effects are limited to the litigant parties. The same may occur under (2) if, for example, an administrative sanction against an individual infringer is deemed disproportionate and therefore annulled.²⁰

The balancing between public health and other fundamental rights and freedoms, including freedom of movement, right to education, and access to justice, to name a few, is at the core of governments' responsibility when defining adequate measures against the pandemic. Indeed, governmental intervention aims to suppress transmission, reduce exposure, counter misinformation and disinformation, protect the vulnerable, reduce mortality and morbidity, and accelerate equitable access to new COVID-19 tools, including vaccines.²¹ The pursuit of these objectives has called for a complex set of measures having a significant impact on individual and collective freedoms as well as on fundamental rights. Once

¹⁹ See, e.g., the case launched by the Human Right League before a first instance court in a summary proceeding in Belgium, where the ministerial acts adopted to fight the pandemic were challenged because they supposedly lacked a valid legal basis; the first instance judge ordered the Parliament to adopt a comprehensive Pandemic Law (summary judgment of 31 March 2021 of the President of the Brussels Court of First Instance, *Ligue des Droits Humains e.a. / L'Etat belge*, case n° 2021/14/C). As a response, the Parliament is preparing a Pandemic Law due to be voted before the summer 2021. Meanwhile, the first instance decision has been reverted by the appeal judge, concluding that a legal basis for the contested acts exists, whereas the assessment of its compatibility with Constitution and the rule of law is pending before the

Constitutional Court, which is the only Court eligible for such declaration (see Appeal decision of 7 June 2021 of the Brussels Court of Appeal (chamber 18F – civil cases), *Etat belge / Ligue des Droits Humains A.S.B.L. and Liga voor Mensenrechten V.Z.W.* (case n° 2021/KR/17)).

²⁰ See, e.g., for Russia, Tuimazinsky Interdistrict Court of the Republic of Bashkortostan, Case UID 03RS0N-29, 5-448 / 2020, in which, however, the sanction was deemed proportionate and upheld.

²¹ These are the six objectives envisaged by the WHO, 'COVID-19 Strategic Preparedness And Response Plan' (WHO 2021) available at <<https://www.who.int/publications-detail-redirect/WHO-WHE-2021.03>> accessed 3 August 2021.

struck by governments, this balance is often challenged by individuals, groups of citizens, or institutions asking courts to assess:

- (i) whether the governments (or any public authority involved) had the power to rule on the matter;
- (ii) whether that power has been exercised lawfully, with full respect for the rule of law and respect of the fundamental rights impacted by a government decision;
- (iii) whether the measure has protected the individual and collective rights, ensuring adequate judicial protection.

a. Institutional varieties and the impact on judicial review. From a comparative law perspective, one of the relevant issues is whether the different institutional contexts have generated a different role for courts and a different approach to litigation. Indeed, legal systems may or may not provide for mechanisms of constitutional review of legislative acts and instruments of judicial review of administrative acts. The intensity of judicial review may be lower or higher depending on the national procedural rules and the specific effects stemming from the principle of separation of powers. It may be limited to a formal oversight or include a substantive review, sometimes enabling the court to rule on the matter therein addressed and modify the content of the administrative decision. In some jurisdictions, courts may adopt orders directed at administrative authorities, infringing a legal duty, and, depending on legal traditions, they may impose positive obligations. How, and to what extent, the pandemic has changed these institutional varieties are questions worth examining further. *Through thematic and country-specific surveys, this Journal Section will deal with both the impact of institutional varieties on*

pandemic-related litigation and the impact of the pandemic on those varieties.

Based on a preliminary analysis, not only do we observe remarkable differences in the extent to which individuals and organizations have accessed courts,²² but we also contend that the purpose of litigation has varied across jurisdictions and over time. Whereas in most contexts, the primary aim has been a judicial review of administrative decisions (including those having regulatory effects), in other contexts, this type of litigation has been limited while compensatory claims are making their way to the court, also within class actions.²³ Whereas in some contexts judicial review has been mainly aimed at substantive scrutiny focused on the balancing of rights and interests of involved parties,²⁴ in others, the focus has instead been on the scope of powers exercised by the contested authority, their legal grounds, and procedural compliance, sometimes in the light of a broader discretion assigned to the executive power by the emergency legislation.²⁵ Moreover, whereas in most contexts litigation tends to question whether the adoption of restrictive measures has duly considered the respect of (fundamental) rights and freedoms, in some contexts, courts have scrutinized compliance with these measures by individuals and whether the administrative authorities have correctly exercised their enforcement powers against the infringers.²⁶ In these situations, the former is a right-based approach, and the latter is a duty-based approach.²⁷

b. Emergency judicial oversight or a long-lasting change? One of the issues emerging in current litigation is whether, when adjudicating cases in the context of the current pandemic, courts are relying on rooted traditions, as developed at national or regional levels in past decades or developing new rules and principles that depart from ordinary methods of judicial review to meet the demand for

²² E.g., based on evidence gathered within the Covid-19 Litigation International Network of Judges and Scholars, we can compare South America (high litigation rate), USA (high litigation rate) and Canada (low litigation rate); France (high litigation rate) and Spain (relatively low litigation rate); India (high litigation rate) and China (low litigation rate).

²³ See, e.g., in Australia, *Hotel Quarantine Class Action - Business (Stage 3 And 4 Lockdowns)*, 5 Boroughs NY Pty Ltd v State of Victoria - S ECI 2020 03402, Supreme Court of Victoria.

²⁴ Such as in most cases presented in this article and in the ones by Chiara Angiolini, Gianmatteo Sabatino and Sébastien Fassiaux, in this Issue. See, part. sub lett.(e) in this paragraph, paragraph 4 and corresponding footnotes.

²⁵ See, for example, for Austria, *Verfassungsgerichtshof Österreich, V 436/2020-15*, 10.12.2020, *Covid-Massnahmen in Schulen* (Covid-measures in schools),

where the Court observed that, according to the Austrian Basic Law provisions on rule of law, the Ministry should have sufficiently determined the objectives guiding its action in the context of the legislative authorisation to issue an Ordinance.

²⁶ This latter approach clearly characterizes Chinese litigation. See, for example, *Wugang People's Court (Hunan Province)*, 18th September 2020, First Instance Decision (Administrative) no. 127, where the question concerned the lack of a legal basis for the sanction imposed to the infringer and consisting in the cessation of business activities; *Yanbian Intermediate People's Court, Jilin, China [L.X. v. Police officer of Police Department in Wangqing, Yanbian, Jilin]2020, Sep.29,2020*.

²⁷ Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, administrative decision making and judicial review. The courts' perspectives' (n 19).

emergency-based solutions. Even more interestingly, if and whenever the latter was true, are these approaches likely to disappear as soon as the emergency is over, or will they impact future trends in both policymaking and litigation?

Courts have been mostly faced with these issues when dealing with the allocation of regulatory powers and the relationship between legislative and executive bodies or between (federal) states and local municipalities. The declaration of a state of emergency, whether based on constitutional rules or ordinary norms, has often justified new or exceptional forms of rule-making as well as new procedural rules for judicial proceedings.²⁸ New forms of judicial review have also been introduced or reshaped because of the pandemic emergency, especially related to urgent procedures.²⁹ From a more substantive point of view, the *pandemic turn* is less clear. When aimed at balancing fundamental rights and freedoms in the light of general principles (such as proportionality, reasonableness, etc.), courts' reasonings seem to follow traditional methodologies, taking emergency into account as a contextual factor more than introducing new methodologies.³⁰ However, in emergency procedures, available when the protection of fundamental rights is at stake, courts have been ready to intervene.³¹ Still, the significant weight of public health in relation to other fundamental

rights, the necessity to provide for quick and life-saving responses, the need for global solidarity are among the signs of a 'pandemic turn' that might soon become more apparent in judicial review.

Indeed, being uncertain the extent to which some of the changes will remain, such intensive experience of fundamental rights' limitation might provide long-lasting lessons for both regulators and courts.

We predict that the rules will be superseded, but the principles will stay. Differences concerning both scope and width of general principles between emergency and ordinary times remain an open question. Only in the aftermath of the crisis will be possible to fully understand the depth and scope of legal changes brought about by the pandemic.

Moving from this perspective, possible varieties across current litigation will be explored in future contributions to this Journal Section.

c. Judicial review and the pandemic's evolution. The role of courts shows some distinct characteristics in times of pandemic compared with its position before and after the health emergency period. It also seems to have dynamically evolved throughout the pandemic waves and the scientific milestones.

Firstly, the outcomes of litigation appear to be quite sensitive to the different phases of the pandemic.³²

²⁸ See in relation to France, Bruno Lasserre, 'Le juge administratif, juge de l'urgence', <www.conseil-etat.fr>, accessed 10 August 2021. See, for example, with regard to the latter relationship, High Court of Australia, 10 December 2020, M104/2020, Gerner & Arnor. v Victoria [2020] HCA 48; High Court of Australia, 6 November 2020, B26/2020, Palmer & Anor v. The State of Western Australia & Anor; Supreme Court of Victoria, B26/2020, Loielo v Giles, S ECI 2020 03608. More generally, on the impact of the pandemic on procedural rules and access to justice, OECD, *Access to justice and the COVID-19 pandemic: Compendium of Country Practices* (Law and Justice Foundation, 25 September 2020) <<https://www.oecd.org/governance/global-roundtables-access-to-justice/access-to-justice-compendium-of-country-practices.pdf>> accessed 11 August 2021.

²⁹ See, for Spain, (n. 2), and, for Italy, Italian Council of State, 13 May 2021, n. 350, (n. 3). For Italy see also Filippo Patroni Griffi, 'Il giudice amministrativo come giudice dell'emergenza' (Giustizia Amministrativa, 2021) <<https://www.giustizia-amministrativa.it/documents/20142/4267397/Paroni+Griffi++Il+giudice+amministrativo+come+giudice+dell'emergenza.docx/cb4dde87-351c-8396ce13d31b48c2aa9e?t=1618321039697>> accessed 3 August 2021, stating that administrative courts have operated as emergency courts issuing judgments on the legality of administrative decisions impinging on fundamental rights.

³⁰ See, for example, Oslo tingrett, TOSLO-2020-176591, 05.02.2021, where the Court acknowledged its duty to

ensure that the fundamental rights of individuals were safeguarded by the government, also in emergency situations, through a basic assessment of the proportionality of the disputed restrictive measure.

³¹ See above, fn n 3. More specifically, in the case of France, see art. L. 511-1 of the Code of administrative justice: «Le juge des référés statue par des mesures qui présentent un caractère provisoire. Il n'est pas saisi du principal et se prononce dans les meilleurs délais.»; art. L. 521-2: «Saisi d'une demande en ce sens justifiée par l'urgence, le juge des référés peut ordonner toutes mesures nécessaires à la sauvegarde d'une liberté fondamentale à laquelle une personne morale de droit public ou un organisme de droit privé chargé de la gestion d'un service public aurait porté, dans l'exercice d'un de ses pouvoirs, une atteinte grave et manifestement illégale. (...)». These procedures do not include compensation or indemnification but suspension or annulment of administrative and private measures infringing fundamental rights. See for example Conseil d'Etat, Ordonnance du 21 mai 2021, N°s 452294, 452449 '12. Enfin, il n'entre pas dans l'office du juge des référés, statuant sur le fondement de l'article L. 521-2 du code de justice administrative, de statuer ni sur des demandes tendant à l'indemnisation d'un préjudice ni de constater l'absence de mesures de compensation financière suffisantes pour les établissements de nuit.'

³² Clearly, while the pandemic evolution has followed different paths depending on the dynamics of contagion and the institutional and sanitary responses the

The reference to phases incorporates both the evolution of the pandemic and its scientific understanding.³³ The former directly impacts risk assessment by policymakers and reviews by courts, while the latter influences the decision makers' capacity to interpret that risk and accurately evaluate the effects and consequences of the governmental measures.³⁴ Both aspects are relevant in judicial review, directly impacting the proportionality and reasonableness of restrictive measures.

In the first phase, when the perception of risk was high, but the knowledge about its characteristics and evolution was minimal, courts have shown high deference to the governments, acknowledging their wide margin of appreciation in assessing risks and designing adequate measures.³⁵ As the knowledge about the pandemic's evolution increased, courts have been more stringent in

development of knowledge has been relatively uniform and shared.

³³ On the latter, see WHO, *COVID-19 Research and Innovation Achievements* (13 May 2021) <<https://www.who.int/publications/m/item/covid-19-research-and-innovation-achievements>> accessed 3 August 2021 providing a summary of global research initiatives and achievements to tackle COVID-19 agreed at the outset of the pandemic, measuring research progress on all the knowledge gaps, and identifying key R&D achievements and the gaps that still exist. See also, 'COVID research: a year of scientific milestones' (Nature, 5 May 2021) <<https://www.nature.com/articles/d41586-020-00502-w>> accessed 3 August 2021.

³⁴ See J. Breyer's dissenting opinion in 'public's serious health and safety needs, which call for swift government action in ever changing circumstances, also mean that it is far from clear that 'the balance of equities tips in [the applicants'] favor,' or 'that an injunction is in the public interest.'

³⁵ See, in the US South Bay United Pentecostal Church, et Al. V. Gavin Newsom, Governor of California, et Al. on Application for Injunctive Relief (May 29, 2020) Roberts concurring: 'Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' Jacobson v. Massachusetts, 197 U. S. 11, 38 (1905). *When those officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'* Marshall v. United States, 414 U. S. 417, 427 (1974). *Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people.* See Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 545 (1985)' (*emphasis added*).

See also, for Switzerland: Bundesgericht - Tribunal fédéral, 1C_169/2020, 22.12.2020, about the cancellation and postponement of municipal elections for the period 2020-2024 and the appeal against the executive decree

assessing legislative and administrative discretion, calling for clearly grounded scientific evidence.³⁶ The extent to which litigation has reflected the different phases of the pandemic in various contexts is another issue worth examining in the surveys and reports of this Journal Section.

d. Judicial decision-making and scientific evidence. Secondly, the dialogue between law and science has been crucial for both policymakers and courts. Indeed, because of the high uncertainty characterizing the different phases of the pandemic and the effects of the contrasting measures gradually available, including vaccines, science has usually been conceived as a necessary ground, though not sufficient, for public decision-making.³⁷

The impact evaluation of the restrictive measures depends on the level of knowledge and the lack of certainty. The evolution of scientific knowledge requires decisions contingent upon the

issued on the 18th of March 2020 by the State Council of the Canton of Ticino, where the Court acknowledged that, at the time of the challenged measure, the state of the pandemic did not allow reliable forecasts of the severity of its consequences for the future, and therefore a different assessment of proportionality was needed compared with that applicable in a situation in which more information is available.

For China, Tianjin Intermediate People's Court, Final Decision n. 166, 12 May 2020, where the dismantlement of a pigeon shed was considered an appropriate measure for the purpose of ensuring and protecting people's right to health and right to life on account of the fact that during the first wave of the pandemic, its nature and transmission chain were still unclear.

³⁶ This evolution has been observed by scholars across different timelines; for Belgium, Patricia Popelier et al., 'The role of courts in times of crises: a matter of trust, legitimacy and expertise', European Journal of risk regulation, (2021); for Israel, Einat Albin and others, 'Israel: Legal Response to Covid-19', The Oxford Compendium of National Legal Responses to COVID-19, (2021) <<https://oxcon.oup.com/view/10.1093/law-occ19/law-occ19-e13>> accessed 3 August 2021.

³⁷ Italian Council of State, order 3 March 2021, RG 1899/2021, where the Court bases its decision on the consideration that 'balancing between rights - to health and education - having constitutional rank and protection, must be based on precise, specific - and updated to the course of the infection - scientific evaluations from which emerge data consistent with the extent of the restriction' (unofficial translation). In some cases, the scientific ground has been deemed more important than the institutional one, referred for example to federal authorization for the exercise of local authorities' powers; see Brazil - Federal Supreme Court, 6 May 2020, ADI 6343 MC-REF, where the court concludes that the contested local measures must be preceded by a technical and scientific justification, and federal government authorization is not necessary anymore.

state of the art. There is a learning component over the effects of measures to be incorporated in the principle of precaution and proportionality, whose application must be judicially scrutinized. The features of algorithms shaping administrative decision-making have changed over time to help predict the effects of governmental measures. The algorithms must incorporate the measured scientific evidence and the correct application of precaution and proportionality.³⁸

Indeed, risk assessment related to the precautionary principle, which is at the core of public decision-making in times of pandemic, strongly relies on sciences. Science is not limited to medicine. In fact, despite the centrality of epidemiology and linked medical domains, different sciences have soon contributed to support decision-making in the pandemic context, spanning from data science, information technology, sociology, economics, and psychology, to name a few.³⁹ Moreover, even within the same field of science, divergences may emerge in terms of both methodology and contents among scholars and scientific communities. The need to combine different forms of knowledge within interdisciplinary analyses has enormously

increased decision-making complexity, posing new challenges for judicial review.

The need for high protection of public safety and health, and also the awareness about the consequent threat imposed upon fundamental rights different from health have induced public authorities, on the one side, and judges, on the other side, to rely on science as a priority lens to examine the adequacy, reasonableness, and proportionality of public decision-making.⁴⁰ The extent to which courts have used science as a procedural requirement, mainly aimed at ensuring governments' transparency and accountability, or as a substantive benchmark to assess the decisions' adequacy and soundness, may vary in different contexts and is worth examining further.⁴¹

Among the relevant aspects feature (i) the extent to which governments have shown deference towards science(s) in relation to the evolution of the pandemic and the increased knowledge, and (ii) the scope of tasks that they have assigned to scientific and technical committees supporting legislative and administrative action. Depending on the level of deference, courts have often highlighted that decision-making should be evidence-based⁴² and that the scientific basis

³⁸ The search of epidemiological models able to predict the pandemic developments has been at the core of scientific debate, combining medicine, data science, physics, information technology, etc. Although most scientists have referred to the so called SIR model, developed by Kermack et al. at the beginning of the 20th century, some of the assumptions of this model have been revised in the context of the current pandemic. See Nikos Askitas and others 'Lockdown Strategies, Mobility Patterns and COVID-19', CESifo Working Paper, No. 8338, Center for Economic Studies and Ifo Institute (CESifo), Munich (2020). For a critical view on the SIR model and its shortcomings in relation with the Covid-19 pandemic, see Shiva Moein and others 'Inefficiency of SIR models in forecasting COVID-19 epidemic: a case study of Isfahan'. *Sci Rep* 11 (2021) 4725 <<https://doi.org/10.1038/s41598-021-84055-6>> accessed 3 August 2021. How may these predictive models support decision making about countering countering measures is a complex challenge. For a review of available methodologies for accessing epidemiological data sources, monitoring epidemic phenomena, modelling the effects of containment measures, through a holistic approach based on data science, epidemiology, and systems-and-control theory: Teodoro Alamo and others, 'Data-Driven Methods for Present and Future Pandemics: Monitoring, Modelling and Managing' [2020] 2 Preprint arXiv:210213130 ArXiv<<https://arxiv.org/pdf/2006.01731.pdf>> accessed 3 August 2021.

³⁹ For a review of available methodologies for accessing epidemiological data sources and monitoring epidemic phenomena through a holistic approach to the epidemic, such as data science, epidemiology, or systems-and-control theory Teodoro Alamo and others (n. 38).

⁴⁰ See, for example, *Verfassungsgerichtshof Österreich*, V 436/2020-15, 10 December 2020, COVID-Massnahmen in Schulen (COVID-measures in schools), where the court assessed proportionality based on the absence of data on infection rates in school districts and the existence of data on masks' effectiveness in limiting the spread of contagion.

⁴¹ See, for example, Italian Council of State, 7097/2020 on the use of hydrossichlorochine: 'Without retracing the long evolutionary path that has led to the guarantee of a more intense and effective judicial protection (...), the judicial review of the administration's technical assessments may now be carried out not on the basis of a mere formal and extrinsic control of the logical process followed by the administrative authority, but rather on the basis of a direct verification of the reliability of the technical operations in terms of their consistency and correctness, as regards technical criteria and application procedures. (...) On the technical side, in relation to the modalities of judicial review, the latter is aimed at verifying whether the authority has violated the principle of technical reasonableness, without allowing the administrative judge, consistent with the constitutional principle of separation of powers, to replace the assessments, even questionable, of the administration with judicial ones.' (unofficial translation).

⁴² See, e.g., Brazil, Federal Supreme Court, 17 December 2020, Direct Action of Unconstitutionality n°6.586, available at: <<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6586vacinaobrigatoriedad.pdf>> where, in the context of the Brazilian Federal Government's reluctance in the launch of vaccination campaign, the Court has established that a possible decision on compulsory vaccination should be based on

should be incorporated into the decision-making process with full respect for transparency, procedural fairness, and logical consistency.⁴³ The focus has been more on the 'how' of science-based administrative decisions than on the 'if' question.

The preliminary conclusion, subject to further examination, is that reliance on science *should* be more robust in times of pandemic emergency than in ordinary times. Although reliance on scientific evidence does not immunize policymakers and public institutions, a clear departure from science shifts quite a heavy burden onto the unwilling authority in terms of political justification and legal responsibility.

e. The role of general principles. Science- and evidence-based reasoning is not the only tool in the hands of judges. As discussed, courts tend to incorporate reference to scientific data within principle-based reasoning. General principles have been used to scrutinize fundamental rights balancing when health protection and other freedoms were conflicting. They have also been deployed to solve conflicts among private parties in contract law when performances had become impossible or much more expensive for the pandemic. During times of emergency, their application has partly modified their content and consequences, leading to judicial decisions incorporating uncertainty about the evolution of the pandemic and the potential impact of the challenged measures.

Even when reference to scientific evidence is not at stake, general principles, such as solidarity,

proportionality, reasonableness, rationality, and effectiveness, play a significant role in the judicial review of COVID-related measures.⁴⁴ Though with significant variations linked with different legal traditions, they all confine judicial discretion, guiding courts' reasoning in their complex task of balancing the interests at stake.⁴⁵

One of the most innovative dimensions of judicial review is represented by the use of general principles to assess the legality of administrative decision-making under uncertainty. Both the level of risk connected to the contagion and the effects of the protective measures are *ex ante* uncertain. Judicial review has started accounting for such uncertainty when applying the principles.

As a first relevant example, reliance on science may not be disconnected from the precautionary principle. Indeed, where there is uncertainty about the existence or extent of risks to human health, protective measures may be taken without waiting until those risks materialize. Moreover, the precautionary principle does not suggest that restrictive measures should not be based on scientific evidence. On the contrary, it implies a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research.⁴⁶ Yet, when the latter are inconclusive or insufficient, and it proves impossible to determine with certainty the existence or extent of the alleged risk, but the likelihood of real harm to public health persists should the risk materialize, the precautionary principle justifies the adoption of

scientific evidence. For a wider discussion, see Sébastien Fassiaux, 'Comparative Survey. Vaccination', in this Issue.

⁴³ See, e.g., Italian Council of State, decree 1006/2021: 'The responsible bodies cannot be allowed to postpone or merely refer to previous - and by the Regional Administrative Tribunal considered insufficient - scientific documents, including those of the CTS, since a new, urgent, motivated and specific survey of the impact of the prolonged use of PPE, also in the light of the criteria dictated by the WHO, is required. It remains clear that the unjustified imposition of a device such as PPE on very young schoolchildren requires the issuing authority to scientifically prove that its use has no harmful impact on the psycho-physical health of the recipients, except (...) the occurrence of liability for delay, omission or otherwise harmful consequences produced in the event (...) of a persistent lack of scientific investigation, which, however, the Judge cannot provide for in any case' (unofficial translation).

⁴⁴ On the use of rationality as a criterion for judicial review, see for example, in South Africa, High Court of South Africa (Gauteng Division, Pretoria), *De Beer and Others v Minister of Cooperative Governance and*

Traditional Affairs [2020] ZAGPPHC 184, on the irrationality of blanket bans as opposed to the imposition of limitations and precautions.

⁴⁵ See, for example, Hamburgisches Oberverwaltungsgericht 5. Senat, 21.07.2020, 5 Bs 86/20.

As far as the interference of the mask obligation with personal fundamental rights is concerned (specifically human dignity and free development of personality), the Court stated that this interference was tolerable and justified by the outweighing public interest in protecting people's fundamental right to health and bodily integrity. The obligation was limited in time and space: namely, it was applicable only in shops and shopping centers until the 31 August 2020. Thus, it did not represent an unbearable encroachment on the aforementioned fundamental personal rights. For all these reasons, in the opinion of the High Court, the obligation to wear a mask was a legitimate protective measure. The regulation appeared to be suitable, necessary, proportional and reasonable, too.

⁴⁶ *Criminal proceedings against Mathieu Blaise and Others* [2019] Judgment of the Court (Grand Chamber) of 1 October 2019, ECLI:EU:C:2019:800

restrictive measures even in a condition of uncertainty.⁴⁷

National courts have primarily relied on the precautionary principle.⁴⁸ However, the extent to which they have applied it to ensure high protection of public health in contexts of high uncertainty or, regardless of the letter, to simply provide evidence-based reasoning with a stronger legal basis may be the subject of future comparative analysis in this Journal Section⁴⁹.

It is rare that courts explicitly refer to the principle of solidarity. In contrast, it plays a significant role in the global debate when scarce resources (such as vaccines) must be distributed and invaluable goods (such as freedoms) need to be limited in their use.⁵⁰ Solidarity refers to duties and responsibilities on governments and private actors to contrast the pandemic and reduce the spread of contagion. It reflects the high degree of interdependence among decisions by individuals and by administrations located at different levels to manage contagion risks related. These responsibilities may be defined either in hard law instruments or in recommendations with a lower degree of bindingness. Hence, the principle of solidarity may

influence the content of governmental measures and the balancing between fundamental rights and the content of the duty of care regulating private parties' conduct.

By distinguishing between individual and collective interests, the principle of solidarity enables courts to ensure higher protection of public health through restrictions affecting individual interests.⁵¹ Definitively, this principle (or any functional equivalent of it) is likely to gain relevance in crisis management when new challenges emerge as to the distribution of costs generated by the current pandemic.

The principle of proportionality is among the most often referred to, sometimes together with the precautionary principle.⁵² It is often applied along with the three-step test, consistent with the German tradition but, in fact, is similarly used in several legal systems. Indeed, when limiting fundamental rights and freedom, courts assess whether the measure is *suitable* (or adequate in respect of objectives pursued), *necessary* (since no less intrusive measures would be adequate), and *strictly proportionate* under a cost-benefit analysis.⁵³

⁴⁷ *Ibidem*.

⁴⁸ See, e.g., in Belgium, Council of State Schoenaerts, n. 248.162 20 august 2020; in Italy, Adm Trib. of Catanzaro, Sec. I, 18 December 2020, n. 2075; Adm Trib. of Pedimont, Sec. I, 3 December 2020, n. 580; Adm Trib. of Lazio, Sec. III-quater, 4 January 2021, n. 35.

⁴⁹ See, e.g., Labour Court of Teruel, Section 1, Judgment 60/2020 of 3 June, dictated in appeal No. 114/2020, in which the judge rejects the argument of the administrations presenting the current health crisis as a case of force majeure or catastrophic risk, concluding that the Administration should have acted in accordance with the precautionary principle, in accordance with the repeated announcements made by the WHO (more particularly, the need for a large number of PPE masks for health workers should have been foreseen in order to protect them against the risk of contagion by Covid-19, which would result in the protection of the rest of the public).

Cfr. French Council of State, 13 November 2020, No. 248.918, for which the precautionary principle is addressed to public authorities in the exercise of their discretionary power; it implies a political choice on the level of acceptable risk, and it does not as such create a right of individuals or legal persons.

⁵⁰ WHO 'Covid-19 Strategic Preparedness and Response Plan' (n 12).

⁵¹ European Court of Human Rights, judgement of 8 April 2021, Vavříčka and Others v. the Czech Republic, cit. At national level, see, e.g., for Portugal 1896/10.3TXCBB-AB-3, Tribunal da Relação de Lisboa (Lisbon Court of Appeal), 9 November 2020, where parole was denied to a prisoner, not meeting the requirements established in a 2020 piece of legislation, enabling partial release of

prisoners aimed at containing the spread of contagion within prisons and deemed by the court as an application of the duty of solidarity.

⁵² See also Italian Council of State, Advice, sec. I, 13 May 2021, no 850: 'If it is true, as reiterated by the recent case law formed on the subject of restrictive measures to counter the covid-19 pandemic (...), that the precautionary principle cannot be invoked beyond all limits, but must be reconciled with the proportionality, as recalled both, in matters within the competence of the European Union, by the Court of Justice (see CJEU, Sec. I, 9 June 2016, in Case C-78/2016, Pesce) and by the case law of the Constitutional Court in the 'Ilva di Taranto' case (Corte cost, May 9, 2013, no. 85, on the balancing between values of the environment and health on the one hand and freedom of economic initiative and the right to work on the other), it is equally true that the test of proportionality and strict necessity of the limiting measures must be compared to the level of risk - and therefore to the proportional level of protection deemed necessary - caused by the extraordinary virulence and diffusivity of the pandemic' (unofficial translation).

⁵³ See, for example, for Germany. Verwaltungsgericht Frankfurt am Main, 12 February 2021, 5 L 219/21.F., where the Court assessed the government's decisions for the vaccination campaign through the lens of proportionality, considering them suitable, necessary and proportional given the state's duty to protect public health (and to guarantee a fair healthcare system) and the extremely scarce availability of anti-covid19 vaccines. See also, for Colombia, Constitutional Court, 25 June 2020, C-201/20, for which the aim of the proportionality test is to determine whether the decree under review is reasonable, based on an assessment of (i) the constitutionality of the purpose sought to be satisfied and the suitability of the

Proportionality has been recast in light of uncertainty and the different forms of administrative decision-making to contrast the pandemic. The necessity and the adequacy of the measure are defined in light of the uncertainty concerning the expected benefits of the measure.⁵⁴ What would not have been proportionate in ordinary times has often been considered proportionate in times of emergency. Principles are emergency-sensitive legal categories.

From a comparative law perspective, despite some common trends, no homologation may be endorsed. Nevertheless, the extent to which courts concretely use general principles and open-ended assessment criteria depending on national traditions and socio-economic contexts is worth exploring in essays and surveys proposed for this Journal section.

measure to achieve the proposed objectives; (ii) its necessity in the absence of other less harmful but equally suitable means; and (iii) its proportionality in the strict sense.

⁵⁴ See, e.g., in the US case law, *AA vs NEWSOM* [2021] Superior Court Of California, 7-2021-00007536-CU-WM-NC (Superior Court Of California). 'Given that Plaintiffs have demonstrated the likelihood of prevailing on the merits as to the claims discussed above, the Court must analyze the relative harm to the parties from the issuance or nonissuance of the provisional relief requested. Initially, the Court is perplexed by the State Defendants' contention that the 'Plaintiffs have not shown that any interim harm they may suffer is irreparable.' (State Defs' Opp., p. 12, I. 24.) To the contrary, the Plaintiffs have submitted numerous declarations, many of which are uncontradicted, detailing the substantial harm that has been inflicted and will continue to be inflicted if, at a minimum, a temporary restraining order is not issued. The evidence submitted demonstrates that the January 2021 Framework and the Approval with Conditions, which perpetuate remote learning for some students while not for others, has created an impermissible divide in access to education as otherwise guaranteed by the California Constitution and as otherwise prescribed by the California Education Code. As the California Supreme Court in *Serrano* noted, 'unequal education . . . leads to . . . handicapped ability to participate in the social, cultural, and political activity of our society.' (*Serrano*, supra, at 606.) At a minimum, the declarations of the named Plaintiffs demonstrate just how significantly the January 2021 Framework has adversely impacted secondary students' abilities to fully and in a meaningful way

3. A First Overview on Global Litigation on Measures Countering the COVID-19 Pandemic

Litigation concerning measures adopted by governments to prevent and counter the effects of the pandemic has arisen in most countries, although to a very different extent, even in the same region.⁵⁵

For example, in the Asian continent, litigation has been very intense in India, much less so in China. Whereas in India, individuals and organizations have challenged the government's action and inaction, seeking measures that the competent authorities could have adopted,⁵⁶ Chinese litigation has mainly involved public authorities enforcing restrictive measures and sanctions against infringers.⁵⁷

In Europe, courts have decided many cases in France, Italy, Germany, Belgium, Slovenia, Romania, Spain, less in the U.K., definitively less in Austria, fewer in Switzerland, and in the Nordic countries to name a few. Where involved, courts have been somewhat deferential to governments in the first phase while engaging in a deeper check and balance role once knowledge about the pandemic has increased.⁵⁸ Nevertheless, even in this case,

participate in an education system that should be equally available to all students. In contrast, the State Defendants have offered no evidence to suggest that the harm the State will suffer, if any, as a result of the issuance of injunctive relief outweighs the harm that will befall the Plaintiffs if the injunctive relief is not granted.'

⁵⁵ See Tom Ginsburg and Mila Versteeg (n. 1), in which a group of countries is identified where the courts do not appear to be involved at all in the inter-institutional dialogue about the choice of measures countering the pandemic, with special regard to authoritarian countries.

⁵⁶ See, e.g., Supreme Court of India, 23 March 2021, NO. 476 OF 2020, *Small Scale Industrial Manufacturers Association vs Union of India*, requesting banks to apply moratorium in favour of small businesses in light of the pandemic crisis and in relation to powers assigned by the Disaster Management Act 2005, enabling the National Authority to seek assistance from other bodies for performing its legal duties; Karnataka High Court, 14 August, 2020, No.8651 OF 2020, upholding a petition filed to enable non-Covid patients to access healthcare.

⁵⁷ See fn 27 above.

⁵⁸ The Belgian caselaw is rather comparable to the Italian one in this regard. See Patricia Popelier and others (n. 36) 1 with extensive caselaw analysis along phases. For Italy, one may, e.g., compare the decisions of the Council of state concerning school closures in the first, the second and the third stage of the pandemic. See Council of State decree 1234/2021 on school closure (in the UMBRIA region); Council of State, decree 1034/2021 on education and school closure (in the CAMPANIA region). But see also Italian Council of State decree 1031/2021 on school closures (Abruzzo region) where it appears less

oversight has often focused on governments' ability to provide a sound scientific basis for their decisions.⁵⁹

Very similar patterns may be observed in Israel, where since early 2020, litigation has been quite intense, but courts have strongly refrained from a substantive oversight on government's decisions, mainly focusing on procedural safeguards and the application of the separation of powers principles; only in 2021 courts have been more prone to exercise a substantive constitutional review.⁶⁰

North America and South America have shown very different patterns, too. In North America, U.S. litigation has been much more intense than in Canada. Moreover, U.S. courts have usually been quite deferential to governmental authorities⁶¹ and keen on procedural oversight rather than substantive.⁶² In South America, Brazilian, Argentinian, and Colombian courts have been quite active. The existence of urgent procedures enabling individuals to challenge the exercise of public

powers infringing fundamental rights has proved to be an essential tool in pandemics.⁶³ In countries such as Brazil, in which the government has been reluctant to take measures countering the pandemic, courts have used injunctions and imposed affirmative orders, including judicial lockdown.⁶⁴ In the context of a very ineffective vaccination campaign, the Federal Supreme Court of Brazil has provided a constitutionally oriented interpretation of a statutory provision vesting the Federal Government with the power to rule on compulsory vaccination, concluding that (i) such power must be shared with the States, Federal District and Municipalities, within their respective spheres of competence, and that (ii) making vaccination compulsory through indirect sanctions, such as through restrictions imposed on entry or traveling, is not unconstitutional, if such measures are based on scientific evidence, respect human dignity and fundamental rights, are reasonable and

deferential as to the application of proportionality and zoning.

⁵⁹ See fn 39-39 above.

⁶⁰ Einat Albin and others (n 37).

⁶¹ See, e.g., *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020), Supreme Court of Pennsylvania, 13 April 2020, where the Court upheld the Governor's decision to declare the State of Pennsylvania a 'disaster area' under the Emergency Code, having properly exercised its police powers for the protection of health and lives of the Pennsylvania citizens although viral illness is not in the specific list of applicable disasters provided by the law.

However, in other decisions a more substantive scrutiny emerge for the balancing of interests at stake; see, e.g.: *United States District Court for the Central District of California, McDougall v. County of Ventura*, No. 2:20-cv-02927-CBM-AS, 2020 WL 6532871 (C.D. Cal. Oct. 21, 2020), where the Court refers to the standard applied in *Jacobson v. Massachusetts* (197 U.S. 11, 31 (1905)), in order to examine '(1) whether the County's orders 'ha[ve] no real or substantial relation' to the County's objective of preventing the spread of COVID-19; or (2) whether the County of Ventura's orders affect 'beyond all question, a plain, palpable invasion of rights secured by' the Constitution.', and, based on it, concludes that: 'The stay well at home orders meet the first test under *Jacobson*. The stated objective of the stay well at home orders 'is to ensure that the maximum number of persons stay in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the maximum extent possible.... The County elected to achieve this goal by deeming certain businesses, travel, and services 'essential' and restricting businesses, travel, and services that were not deemed essential. Because those limitations restrict in-person contact, they are substantially related to the objective of preventing the spread of COVID-19. ... Under the second test of *Jacobson*, the stay well at home orders must not affect 'beyond all question, a plain, palpable invasion of' the Second

Amendment.' *Id.* at *6-7. 'Here, the Court finds the stay well at home orders did not amount to a plain and palpable violation of the Second Amendment, as required by *Jacobson*. Unlike the total prohibition of handguns at issue in *Heller*, the stay well at home orders are temporary and do not violate the Second Amendment... [T]he effect of the stay well at home orders was to delay Plaintiffs' ability to acquire and practice with firearms and ammunition and not to prohibit those activities. Thus, Plaintiffs have not demonstrated that the temporary closure of firearms retailers constitutes a plain and palpable violation of their Second Amendment right.' *Id.* at *7-8.

In another case (*Big Tyme Investments, LLC v. Edwards*, No. 20-30526 (5th Cir. 13 January 2021)), the United States Court of Appeals for the Fifth Circuit held that the restrictions did not violate the equal protection clause as there was a rational basis to distinguish between bars and restaurants and the restrictions were substantially related to the public health interest of preventing the spread of COVID-19. See also *United States Court of Appeals, Sixth Circuit, No. 20-Civ-1815*, (6th Cir. 2 September 2020), *Castillo v. Whitmer*, on the Michigan Department of Health and Human Services emergency order requiring certain agricultural workers to undergo mandatory COVID-19 testing; the Court found that the district court did not abuse its discretion in finding that, although there was disparate impact to Latino agricultural workers, plaintiffs did not show that the order was improperly racially motivated. The state has a legitimate public interest in testing agricultural workers because it helps protect migrant workers, their families, their communities, and the food supply.

⁶² This is the view of Tom Ginsburg and Mila Versteeg (n. 1), although examples exist of substantive oversight on restrictive measures based on balancing among the interests at stake.

⁶³ See fn 30 above.

⁶⁴ Tom Ginsburg and Mila Versteeg (n. 1).

proportionate, and vaccines are distributed equally and free of charge.⁶⁵

Relevant differences also emerge across African countries. For example, while quashing several regulations based on the initial severe lockdown due to the lack of rationality in extreme limitations regarding the objectives pursued,⁶⁶ South African courts have often been quite deferential to the government, both in the first and in more recent phases of the pandemic.⁶⁷ On the other hand, a more critical oversight has emerged in other countries, such as Kenya⁶⁸ or Malawi,⁶⁹ where courts have imposed precise standards for governments' actions.

Litigation in Australia and New Zealand has been relatively limited and focused mainly on the freedom of movement.⁷⁰

Looking forward, a future stream of cases might concern the use of class actions. Several have already been filed in Australia, New Zealand, Canada, and South Africa, but their evolution is hard to predict. Nevertheless, the role of class actions

might be particularly relevant for compensating individuals and organizations for losses suffered due to the measures countering the pandemic.

4. Courts, Fundamental rights and Freedoms: Balancing Rights and Remedies

Although to a different extent depending on legal contexts and traditions, the pandemic has highlighted the relevance of courts in the enforcement and balancing of fundamental rights and freedoms in most jurisdictions. This is particularly noticeable in systems where human or fundamental rights are essential drivers for access to courts and where the right to health is considered itself a fundamental right. However, even where this is not the case, judges had to pursue the general interest to counter the pandemic-related measures aimed at protecting health with other rights and freedoms affected by the restrictions. In some cases, the judicial outcome is interestingly comparable.⁷¹

⁶⁵ Brazil, Federal Supreme Court – Supremo Tribunal Federal, 17 December 2020, Direct Action of Unconstitutionality n. 6.586.

⁶⁶ High Court of South Africa (Gauteng Division, Pretoria), 2 June 2020, 21542/2020, *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184, where the court declared the national containment measures unconstitutional and added that 'courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved'.

⁶⁷ See, for example, on religious gatherings: High Court of South Africa (Gauteng Division, Pretoria), 21402/2020, 30 April 2020, *Mohamed and others v President of the Republic of South Africa and Others* (21402/20) [2020] ZAGPPHC 120; [2020] 2 All SA 844 (GP); 2020 (7) BCLR 865 (GP); 2020 (5) SA 553 (GP); on limitation on tobacco sales, High Court of South Africa (Gauteng Division), June 26, 2020, 21688/2020, *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*, [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP). More recently: Supreme Court of Appeal of South Africa, 28 January 2021, 611/2020, *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others*: 'it is not for a court to prescribe to the national executive just how truncated the public participation process should be in the regulation-making process. (...) i) absent any evidence of the existence of less restrictive means of slowing the spread of covid-19, the court cannot interfere with the discretion of the Minister in achieving that objective; ii) the Disaster Management Act notionally is broad enough to intrude upon existing legislation ... in a disaster situation; iii) the primary objective of the regulations is to save lives and health'.

⁶⁸ High Court of Kenya, 3 August 2020, Petition 78,79,80,81/2020 (consolidated), *Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others*, where

the court issued an interdict to compel the government to present to the Court a plan of action detailing the appropriate responses towards the management and control of the outbreak of COVID-19 in the country as a means to discharge its constitutional duty and protect the socio-economic interests of the country. The decision is considered a remarkable change in Kenyan jurisprudence in the field of protection of the rights and freedoms enshrined within the Constitution of Kenya (2010); see the opposite view taken by the same court in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) where the court capped the use of structural interdicts.

For Kenya, see also High Court of Kenya at Siaya, June 15, 2020, Petition NO. 1 of 2020, *Joan Akoth Ajuang & other v Michael Owuor Osodo the Chief Ukwala Location & 3 others*; *Law Society of Kenya & another* [2020] eKLR (the Court has ordered the local government to properly bury a deceased man whose relatives had claimed a violation of human dignity in respect of the way the man was buried in the context of the pandemic).

⁶⁹ High Court of Malawi, September 3, 2020, 1/2020, Lilongwe District Registry, *The State on application of Kathumba and others v President of Malawi and others* (2020) MWHC 29, where the Court found that the lockdown was ordered without a legal basis and without sufficient concern for poor and vulnerable people, and urged parliament to pass new legislation, that would allow the regulations needed in a national health emergency such as the current pandemic.

⁷⁰ See: High Court of Australia, 10 December 2020, M104/2020, *Gerner & Arnor. v Victoria* (2020) HCA 48; High Court of Australia, 6 November 2020, B26/2020, *Palmer & Anor v. The State of Western Australia & Anor*; Supreme Court of Victoria, B26/2020, *Loiolo v Giles*, S ECI 2020 03608 (on curfew).

⁷¹ We can compare, in this regard, the relatively similar responses provided, in the field of freedom of religion, by a US court and a German one, both concluding that a

As seen above, when balancing rights and freedom, courts use general principles differently depending on their legal traditions. At the same time, they all tend to adopt a *contextual approach*, refraining from a purely abstract prioritization of rights. While strongly fostered by the global emergency and the precautionary principle where invoked, even public health protection is subject to balancing based on several factors. Among these, the level of epidemiologic risk and the uncertainty about its development have played a significant role.⁷² Other factors include the structure of healthcare management systems, the density of population(s) across areas, and the vulnerability of the target population, such as the elderly or persons with disabilities. On the side of competing interests (such as economic or personal freedoms), the nature of rights has been taken into account (distinguishing, e.g., between economic and non-economic interests), the costs or losses imposed by measures on target groups (such as small businesses v. large businesses), and the duration of restrictive measures.

As seen above, these elements have often been factored into the proportionality test (e.g., to assess whether the measure was suitable for the pursued

purpose and did not impose an excessive burden on target groups) or the one of reasonableness or rationality.

COVID-19 litigation also shows that the nature and content of judicial remedies are relevant when balancing rights and freedoms. The balancing exercise is, in fact, instrumental to different types of judicial outcomes, from those aimed at injunctive relief⁷³ to those aimed at suspension or annulment of administrative acts⁷⁴ through those aimed at establishing liabilities and addressing claims for damages or other types of compensation.⁷⁵

Whether this balancing is differently structured depending on the judicial remedy sought is a question to be explored in future analysis. Indeed, not only are courts requested to assess the legitimacy and legality of government's decision-making (regardless of the remedy sought, one could assume), they also need to enforce rules and principles that have been possibly violated, providing (effective) protection of interests at stake and therefore a new balancing.

In a few cases, judicial scrutiny has regarded action or inaction by parliaments as legislative bodies and, exceptionally, legislative action has been stimulated by judicial decisions⁷⁶.

complete ban against religious services is disproportionate since precautions may be adopted for a better balancing. See, eg, *Agudath Israel of America v. Cuomo*, Nos. 20-3572, 20-3590, 2020 U.S. App. LEXIS 40417 (2d Cir. Dec. 28, 2020): 'No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal.' *Id.* at 32; for Germany, Federal Constitutional Tribunal, 29 April 2020, 1 BvQ 44/20, concluding that an absolute ban on religious services is in breach of the proportionality principle and constitutes a breach of the religious freedom of the claimant (see the case summary by D. Strazzari <<https://www.fricore.eu/fc/content/germany-federal-constitutional-court-29-april-2020-1-bvq-4420>>).

⁷² Higher Administrative Court of the Land of Nordrhein-Westfalen, 13 B 2046/20.NE, 07 January 2021, 13. Senat., where the Court examined the proportionality of the insulation measure based on the infection rates, the state of the intensive care units, the emergence of variants in the UK and South Africa.

⁷³ See, eg, for France, Council of State, order n. 439693 of March 28, 2020 concerning a petition filed requesting the judge of summary proceedings to enjoin the State to adopt all decisions (purchases, orders, international collaborations) and urgent measures, in particular regulatory measures, which are necessary in order to ensure an adequate supply of equipment, both quantitatively and qualitatively, for all the most exposed health professionals and in particular private nurses, in order to enable them to provide satisfactory care to their patients. The claim is dismissed (since meanwhile the Government has provided sufficient response) but full account is given to fundamental freedoms involved ('3. For

the application of article L. 521-2 of the Code of Administrative Justice, the right to respect for life constitutes a fundamental freedom within the meaning of the provisions of that article. Moreover, a characterized failure of an administrative authority to use the powers conferred on it by law to implement the right of any person to receive, subject to his or her free and informed consent, the treatment and care appropriate to his or her state of health, as assessed by a physician, may, for the application of these provisions, constitute a serious and manifestly unlawful infringement of a fundamental freedom when it is likely to result in a serious deterioration in the state of health of the person concerned'.

⁷⁴ See, for example, for Italy: Order of the Council of State, 17 July 2020, no. 5013, on the suspension and annulment of acts ruling on the laboratories that were eligible for molecular testing for the detection of the virus SARS-CoV-2. The claim is dismissed since, among other reasons, the judge considers that the consequences of a duty to quarantine may affect fundamental rights and therefore justifies the public institution's choice of taking the responsibility, through the most qualified network of health facilities, for the management of such consequences, including false results.

⁷⁵ See, for example, for China, Tianjin Intermediate People's Court, Final Decision n. 166, 12 May 2020, where a compensation for the allegedly illegitimate dismantlement of a pigeon shed was claimed; the Court dismissed the claim, considering the measures appropriate for the purpose of ensuring and protecting people's right to health and right to life.

⁷⁶ This is the case for Belgium described above, fn 20.

Most often, litigation has regarded administrative action or inaction. In this framework, judicial scrutiny related to the remedial side includes:

- a) whether administrative action or inaction is necessary and adequate;
- b) in the case of administrative inaction, whether a measure should have been taken and, in case of an affirmative answer, which action may also include a duty to act upon the administration;⁷⁷
- c) Administrative decisions may be too restrictive or too lax. The case law developed so far suggests that litigation arises more with restrictive measures than flexible measures. But there are cases where courts have quashed acts permitting reopening and ordered facilities kept closed.⁷⁸ In administrative action limiting rights and liberties, courts have been asked to decide whether the restrictive measure is proportionate and strikes the right balance between conflicting fundamental rights. When a violation of proportionality has been detected, what are the most appropriate decisions, whether quashing with or without modifications of the measure.

C1) Judicial decisions may lead to annulment, suspension, modification, and positive action.⁷⁹ Effects may be radical, such as annulment, or more moderate, such as modifying the

administrative measure.⁸⁰ The transformation of the measure is generally aimed at defining a more appropriate balance between health protection and other rights or freedoms. Sometimes modification is steered by the court through the use of general principles.⁸¹ At other times, it is clearly identified in the judgment.

C2) Depending on the procedure, judges may be allowed to modify the measure directly or send it back to the administration should the implementation require the exercise of discretionary power. Courts have used their power in emergency procedures to change the measure's content when returning to the administration. The ability to decide would have irreversibly harmed the protected interests.

C3) If the measure is deemed unlawful, courts have to decide whether, in addition to quashing the measure, governmental liability should be applied and compensation be granted.⁸² In theory, compensation can be awarded both in case of annulment and modification of the action. In practice, compensation has been given in the former case much more frequently than in the latter.

d) Whether the parties, whose rights have been limited by legislation or administrative decisions, should enjoy some forms of indemnification or mitigation has been decided by courts

⁷⁷ See, e.g., for the UK, Lomas de Zamora Commercial and Civil Appeals Chamber, Judgment 10/2020 of 19 May, issued in the case SS.C. c/UP (OSUPCN) s/Amparo, where the court orders the relevant authorities to provide assistance to a child with disability in order to ensure that he can adapt to the new educational methods that schools were forced to adopt due to the Covid-19 pandemic; for India, High Court of Manipur, *All Manipur School Student Transporter Association v. The State of Manipur and Ors.*, - WP (C) No. 459 of 2020, where, lacking support actions for school student transportation's drivers during the lockdown and considering this omission unconstitutional, the Court requests the state government to take an appropriate decision for providing financial help within a month and to constitute a committee to verify the genuineness of the claims and submit a report to state government.

⁷⁸ See, in the US case law, *A vs NEWSOM* [2021] Superior Court Of California, 7-2021-00007536-CU-WM-NC (Superior Court Of California): 'The Court issues a temporary restraining order enjoining and restraining the Defendants from: (1) applying and enforcing the provisions of the January 2021 Framework, which framework prevents Plaintiffs' children and other children in TK-12 public schools from receiving in-person instruction; and (2) applying and enforcing the 7 March 2021 'Approval with Conditions' of Safety Review Requests by SDUHSD, CUSD, and PUSD.'

⁷⁹ See, e.g., for Spain, Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020, where, via interim relief, the court's ruling causes school reopening.

⁸⁰ See, for example, for France: Council of State, 30 December 2020, no. 448201; for Israel: Supreme Court of Israel, HCJ 6939/20 Idan Mercarz Dimona Ltd.v. Government of Israel, decision of 2 February 2021.

⁸¹ See, e.g., the Belgian Council of State, 8.12.2020, n. 249.177: 'The Council of State orders, as an interim measure, that the Defendant no later than December 13, 2020, replaces the articles 15, §§ 3 and 4, and 17 of the Ministerial Decree of 28 October 2020 'on urgent measures to limit the spread of the coronavirus COVID-19', as amended by Ministerial Decrees of 1 November 2020 and November 28, 2020, with measures that do not disproportionately affect the collective exercise of worship not disproportionately restricted.' (unofficial translation, emphasis added).

⁸² For Poland: Olsztyn District Court, Wyrok Sądu Okręgowego w Olsztynie z dnia 02 września 2020 r. (sygn. akt IV U 1195/20), holding that a business operator in the fitness sector, whose activity had been closed down, was entitled to obtain compensation related to the closure of the activity even though she did not strictly meet all the conditions literally specified in the Covid Act

according to general principles and specific rules regulating the pandemic.⁸³ Depending on the nature of the affected interests, compensation may be monetary (for example, restaurants, and recreational activities) or non-monetary (for example, education). In the latter case, compensation may provide students with additional teaching hours, personalized tutoring, and specialized programs.

Does the choice of remedies influence the balance among fundamental rights? Some hypotheses, subject to further investigation, may be drawn in this regard. For example, courts may

- 1) only quash an administrative act without being able to modify it, or
- 2) uphold an existing over-protecting measure to avoid the risk of under-protection linked to mere annulment when administrative inaction or inadequate action is likely to occur.⁸⁴

By contrast, in the same situation (challenge against a disproportionately restrictive measure, being alternative proportionate measures available), a judge asked to decide over a compensatory claim may strike a balance against the over-protecting measure and award damages accordingly, without fear to leave public health unprotected.

When non-economic interests are at stake, courts tend to be more inclined to quash the measure than when economic interests must be balanced with health protection.

Indeed, when annulment and injunctions are sought, the balancing aims to ensure that governmental action (or inaction) generates the expected outcome that would have arisen had full respect of the rule of law and fundamental rights materialized. The primary purpose is a substantive correction (by suspension, deletion, modification, or positive action, depending on cases and procedural rules). By contrast, when compensation is at stake, corrective justice operates through surrogates and does not usually prevent succumbing interests from being legally protected, though at a 'price'; moreover, when a public authority's liability is at stake, this price is paid by public money, being therefore redistributed among citizens.

In this first massive wave of litigation, the former type of claims has prevailed. Soon, courts will likely be flooded by compensation claims, largely grounded on unlawful administrative action claims or recovery plans providing for indemnities. Though in a different way than the damages *v.* indemnities questions, courts will need to strike new balances, being fully aware that in both cases, not all the 'costs of the *accident*' will be eligible for corrective (damages) or redistributive (indemnities) justice.⁸⁵ Compared with courts dealing with annulment and injunction cases in 2020, they will have better information, and this will help them to: (i) more clearly define the level of uncertainty in which governments have acted in the light of the precautionary principle; and (ii) take the consequences of alternative actions into consideration, e.g., in terms of saved lives, other contextual elements being equal. The allocation of costs related to scientific uncertainty will undoubtedly be a daunting task. The increasing number of liability claims may likely lead to the establishment of no-fault regimes (or indemnification funds) that may ensure effectiveness and uniformity to a more considerable extent than litigation.

Not only balancing among rights and freedoms can be affected by the type of remedies sought, and also by their combination. Indeed, judicial remedies are not necessarily alternative. Instead depending on substantive and procedural applicable rules, they can be combined. This combination may be relevant when, for example, economic interests are at stake, and these may be easily compensated through monetary remedies (being damages or indemnities). In these cases, the availability of compensation may influence the strict proportionality of the disputed measure, where indemnities at least mitigate the costs of the restrictive measure. This reasoning may be applied differently to interests not compensable with monetary sums, such as access to education, religious services, or the like.⁸⁶

Further specificities will emerge in surveys and studies to be published in this Journal's sections. However, the analysis below provides a few examples in some of the main areas in which this type of litigation has emerged worldwide with the primary purpose of giving hints for future research and analysis.

⁸³ On indemnities, see e.g. for Scotland, Outer House, Court of Session, decision (2020) CSOH 74 P352/20 of 23 July 2020; for Italy, Council of State, 28 April 2021.

⁸⁴ See, e.g., for Israel, Supreme Court of Israel, HCJ 6939/20 Idan Mercaz Dimona Ltd.v. Government of Israel, decision of 2 February 2021, where the court highlights the need for caution when deciding over the quashing of an

emergency measure, since the harm of its removal could outweigh the correspondent benefits.

⁸⁵ Guido Calabresi, 'The costs of accidents. A legal and economic analysis' (Yale University Press, 1970).

⁸⁶ Fabrizio Cafaggi, Paola Iamiceli, 'Uncertainty, administrative decision making and judicial review. The courts' perspectives' (n. 18).

5. Balancing Fundamental Rights and Freedoms Across Different Areas: an Agenda for Future Research

The pandemic has highlighted the strong interdependence among fundamental rights and freedoms. Ensuring strong protection of health has forced governments to impose limitations upon the freedoms of movement, religion, education, private and family life, and economic initiative, to name a few. Some of the latter are themselves interconnected, since, for example, limiting movement has resulted in a reduced enjoyment of private and family life, or restrict the freedom to conduct one's business has determined more limited access to employment, and so on. Even within the same domain (such as healthcare), measures aimed at fostering medical services for COVID-19 patients might have undermined health care access to other patients. This interdependence has enormously increased the complexity of policymaking, being then reflected in the role of courts and the scope of judicial review.

Future research on pandemic-related litigation will then benefit from a holistic approach that, while focusing on single areas of interest (e.g., freedom of movement, religious liberty, and right to education), will look at the interconnectedness across areas.

Some cross-cutting questions can stimulate such research.

1. Economic and non-economic freedoms. This is a key distinction from the perspective of judicial review. The limitation of non-economic freedoms (such as movement, expression, education, and religion) mainly determines irreversible losses that may not be compensated in economic terms (e.g., through indemnities or damages). For example, being unable to attend an Easter celebration with full respect to ordinary rituals and spirituality can hardly be compensated by a monetary sum. The same is true for the learning experience that millions of children lost, especially in the first wave of the pandemic.

Of course, this distinction does not deny the role that compensation may play to redress non-economic losses when a damages claim may be established within liability regimes. Yet, such

redress could not fully reinstate the enjoyment of rights and freedoms that have been irreversibly lost.

Nor does this distinction ignore the possibility of mitigating the above losses through alternative means. The use of digital technology has been the main source of mitigation in almost all thinkable areas: from education to personal and family life, through religion and tourism, to access to services (including healthcare) and the market in general. In fact, this mitigation is less than perfect and also comes at a price, starting with, but not limited to, data protection.

To what extent have courts considered the distinction between compensable and not compensable losses when balancing rights and duties? To what extent have they taken mitigation into account, possibly considering the costs and effects of mitigation when deciding the lawfulness of restrictive measures? Have these elements been factored within the proportionality or the rationality test? For example, have restrictive measures been considered proportionate when compensation was available and disproportionate when compensation was not available?

2. Essential and non-essential activities. For most States, this distinction has been pivotal in the area of economic business activities. Indeed, essential business activities have not been subject to closure, and re-openings have been prioritized per essential classification. In most cases, essential activities have been defined by the executive, sometimes raising questions concerning the allocation of competence between the center and periphery.⁸⁷ Essential classification impacts proportionality and, in particular, on the requirement of necessity and adequacy. The courts have considered proportionate suspensions of recreational activities like games and lotteries also based on their non-essential character.⁸⁸ They have also contributed to taking equality into account when businesses have complained about stores' abilities to sell non-essential products.⁸⁹

A similar distinction has been applied in general interest services, such as healthcare, where limitations have been imposed based on urgency and priority levels. In fact, in almost all areas, comparable choices have been made. For example,

⁸⁷ See, in Brazil, Federal Supreme Court, Direct Action of unconstitutionality 6341 MC-REF, 15 April 2020, ADI 6341 MC-REF, concluding that the head of the federal executive branch can define essential public services by decree, but must necessarily safeguard the autonomy of other entities to take care of health in the framework of the Unified Health System, and carry out health and epidemiological surveillance actions.

⁸⁸ See for example Italian Council of State, 22 February 2021, decree no. 888/2021, on bingo, casinos, lotteries, where the non-essential nature of activities plays a certain but not determining role due to the income produced by such activities for staff and their families, and for the State in the form of taxes.

⁸⁹ The Supreme Court of Israel sitting as High Court of Justice, HCJ 6939/20 Idan Mercaz Dimona Ltd.v. Government of Israel, 2 February, 2021.

younger children have been prioritized over older ones in face-to-face schooling; essential professions or categories (such as physicians, judges, and police) have enjoyed wider freedoms than others. Similar categorizations have been deployed for access to vaccination, where vulnerability and exposure to risk have played a major role in identifying essential categories of beneficiaries.

Which type of judicial review have these classifications been subject to? Have courts applied the principles of equality and non-discrimination? Have courts taken a different approach depending on the legal traditions?

3. *Hard and soft law.* The use of regulatory instruments has been different between countries and across areas. In countries such as Sweden, there was a decision to first opt for a soft law approach and then have modified their approach to enact legislation.⁹⁰ In other countries, the approach has combined both hard and soft law from the outset. In relation to soft law, the issue is enforceability and the difference between recommendations to administrations and recommendations to individuals and private organizations. In the latter case, even if the recommendations were not binding, they certainly have and will play a role in the definition of the duty of care for civil liability.

Within countries. Whereas in some cases (e.g., freedom of movement), hard law has prevailed, in others (such as private and family life), soft law has been used. A mix of the two has been chosen in many areas, with hard law general principles and more detailed recommendations, often leaving space for self-regulation (examples span from education to economic activities, including sports facilities and cultural events). Vaccination is another example where hard law has been used to define priority access rights.⁹¹ In contrast, the choice to be vaccinated has remained chiefly free, with some exceptions linked to health-related professions.⁹²

The choice of instruments and also the enforcement policies have varied. At times, it has been clear that a soft compliance policy has backed a hard law instrument. However, even when hard law has been used in some areas and contexts, enforcement has not always been stringent.

Have these regulatory choices been challenged before courts? Has judicial review taken these varieties into account? Have courts applied stricter proportionality or rationality tests when measures have been imposed through hard law and been strictly enforced? Do we observe different trends depending on legal traditions?

4. *Individual and collective interests.* Some constitutional traditions highlight the double dimension of the right to health, encompassing both an individual and a collective component.⁹³ Indeed, even regardless of the very diversified structure of healthcare systems worldwide, the pandemic has shown that individual wellbeing turns into a collective good as much as individual impairment represents a collective social and economic concern.⁹⁴ The pandemic shows the relevance of the collective dimension of health protection and the interdependence of conducts related to prevention and cure. The effectiveness of restrictive measures and even more that of vaccination depends upon the coordinated actions of the community's members. Low compliance results in negative consequences for those who do not comply and those who have complied. The interdependence generates positive externalities in case of compliance, negative externalities in case of non-compliance. This high level of decisions' interdependence affects the allocation of decision-making power between governments and private parties, the choice of the regulatory instrument, whether hard or soft, the definition of the legal consequences of non-compliance. Theory suggests that a high level of interdependence requires centralized decision-making usually associated with hard law instruments. Yet, the example of

⁹⁰ See Henrik Wenander, 'Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism' EJRR, 12 (2021), 127–142; Titti Mattsson, Ana Nordberg, Martina Axmin, 'Sweden: Legal Response to Covid-19' (2021), in *The Oxford Compendium of National Legal Responses to COVID-19* <<https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19e12?rskey=MCXz1K&result=17&prd=OCC19>> accessed 10 August 2021.

⁹¹ So, e.g., for Germany; see *Verwaltungsgericht Frankfurt am Main*, 12 February 2021, 5 L 219/21.F; *Schleswig-Holsteinisches Verwaltungsgericht*, 17 February 2021, 1 B 12/21; *Verwaltungsgericht Gelsenkirchen*, 18. February 2021, 20 L 182/21.

⁹² This has been the case for healthcare staff in Italy under law decree no. 44/2021, converted into law on 13

May 2021. On the role of courts in the phase before the introductory of this law, see above n. 6.

⁹³ See art. 32, Italian Constitution ('The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent').

⁹⁴ See, e.g., Italian Constitutional Court, 23 February 2021, decision no. 37, concluding that 'in the event of highly contagious diseases capable of spreading globally, logical and legal reasons call for a national discipline, to preserve the equality in the exercise of the fundamental right to health and to protect the collective interest.' (unofficial translation).

vaccination shows that voluntary choices associated with soft law instruments have been used. Soft law can effectively manage interdependent decision-making concerning health protection when self-determination must be fully protected.

Have these specificities been adequately considered by courts, especially to distinguish between principles applied to individuals and principles involved to collective health protection?

Is this aspect taken into account by courts when balancing the right to health with other rights and freedoms?⁹⁵ Does the health protection prevail over the competing right depending on whether the latter is an individual or a collective right?

In fact, as with health and again depending on legal tradition, other rights may present a double connotation (individual and collective), and courts may be asked to strike a different balance depending on whether an individual or a collective right is invoked. For example, in the field of education, the balancing may request a different approach if an individual student claims the right to home-schooling for fear of contagion or if the student association claims the right to face-to-face teaching as a collective right to be balanced against the right to health. Similar dynamics may emerge in litigation brought by trade associations or individual businesses regarding the closure of economic activities. Though relevant, the individual nature of the applicant may exclude the collective interests at stake, such as in the case in which the participation of children with disabilities in face-to-face schooling is strictly connected with their right to inclusion in the school community and the right of such community to experience this inclusion.

⁹⁵ See, e.g., in Germany, *Verfassungsgericht Nordrhein-Westfalen*, 29 January 2021 (19/21.VB-1, 16/21.VB-1, 20/21.VB-2, 21/21.VB-3), concluding that in the disputed case the public interest to protect people's health and life outweighed the complainant's fundamental interest in the resumption of face-to-face teaching. From a different perspective, which is not focused on health as a right, see *United States District Court for the District of Connecticut Citizens Defense League v. Lamont*, 8 June 2020, 465 F.Supp.3d 56 (D. Conn. 2020): 'On the one hand, the public has an interest in limiting the transmission of COVID-19, preserving the resources of the emergency and police services, and using fingerprinting to preserve a robust and error-free criminal background check process for gun permit applicants (...) On the other hand are the interests of law-abiding Connecticut residents who lawfully seek to exercise their constitutional rights under the Second Amendment to acquire and possess handguns for self-defense. On review of the balance of equities, (...) [the court] conclude[s] that these concerns weigh in favor of plaintiffs, in light of the ample evidence as discussed above

One relevant area for the collective dimension is vaccination. Indeed, here, the line between the individual nature of the freedom of self-determination and the collective relevance of such choice is so fine that courts may struggle to disentangle the two.⁹⁶ Also, the extent to which legal representation of vulnerable persons, unable to directly exercise their self-determination, may be overcome in the best interest of the most vulnerable may reflect the collective dimension of individual freedoms in this domain.⁹⁷

6. Concluding remarks

The COVID-19 pandemic has called for a global commitment to fighting the virus and mitigating its effects. Since its early stages, the health crisis has generated a global economic crisis and severe local emergencies at social, political, and economic levels, depending on the context. Courts have been at the crossroad of health protection, fundamental freedoms, and the rule of law. In many cases, they have been active guardians of fundamental rights when other powers, including the legislators, could not exercise a full oversight on executives required to make decisions in a context of high uncertainty. Litigation has not disrupted the ability to respond quickly and effectively to the pandemic. On the contrary, it has contributed to steer and guide those policy decisions. This conclusion sheds new light on the more general question of the role of judiciaries in times of global crises.

Legal changes have occurred within the legislation, administration, and litigation, both at national and international levels. Are these changes permanent or temporary? Will they dissolve with the end of this pandemic, or will the necessity to organize

that a continuing categorical elimination of fingerprinting is not necessary.'

⁹⁶ European Court of Human Rights, judgement of 8 April 2021, *Vavříčka and Others v. the Czech Republic*, cit. ('The Court considers that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination. In the view of the Court, it was validly and legitimately open to the Czech legislature to make this choice, which is fully consistent with the rationale of protecting the health of the population').

⁹⁷ See, Court of Protection, United Kingdom (England and Wales), *E (Vaccine)* [2021] EWCOP 7 (20 January 2021).

See also, for Spain, Court of 1st Instance No. 17 of Seville, Resolution No. 47/2021 15 January 2021; Court of 1st Instance No. 6 of Santiago de Compostela, Resolutions 55/2021 of 19 January and 60/2021 20 January 2021.

appropriate institutional global answers to similar phenomena generate long-term changes, including a new role for global judicial cooperation? We predict that rules will be modified, but the new principles or the new version of consolidated principles will stay.

Ensuring respect for fundamental rights within a framework of emergency has been the most daunting challenge. Courts have operated along the line of continuity/discontinuity, using the consolidated legal categories to address new phenomena. It is mainly within the conventional framework that changes must be identified and their medium/long-term effects scrutinized.

Depending on the institutional contexts and applicable procedural rules, courts have not only ascertained the conformity of legislative acts with constitutional principles and fundamental rights, not only annulled administrative acts when unlawful or dealt with liability claims. Within the boundaries defined by applicable law in light of the principle of power separation and the rule of law, they have also guided the modes of balancing fundamental rights, sometimes steering the discretionary choices of executives throughout the challenging times of the pandemic. The differences between *in abstracto* and *in concreto* balancing have clearly emerged in the case law. The pandemic emergency has resulted in innovation in the legal interpretation of those principles.

With different intensity amongst States, the litigation shows, at least in democratic regimes, high trust in the judiciary as means for ensuring a high level of protection of fundamental rights and freedom and rebalancing powers that have been

largely affected by the pandemic. The role of both first instance courts and supreme and constitutional courts has been pivotal. New procedures have been introduced or revisited, including emergency ones, to ensure effective access to justice in times of pandemic.

More than other decision-makers, judges have often decided without coordinating or cooperating with other courts in their own or other countries. Yet, they have all faced very similar issues and had to balance similar rights and freedoms in comparable situations.

In the future, this Journal section is mainly aimed at establishing an ideal dialogue among scholars, judges, and policymakers on critical issues examined by Courts around the globe to feed a mutual learning experience and new inspiration for future reports in this Journal. Accordingly, the approach will be comparative. Although enough space will be devoted to country-specific case-analysis, the issues will be mainly examined, taking different legal traditions and different contexts into account.

Some of the key topics and the main questions have been discussed in this article, being aware that future developments will unveil new areas of litigation, for example, in the field of recovery measures or damages. The outcomes of litigation will partly depend on the extent to which different experts will establish a constructive and multidisciplinary dialogue across the globe. This Journal, and this Section within it, will foster this dialogue by identifying new perspectives for the future debate

A Comparative Survey on Vaccination

Sébastien Fassiaux¹

Abstract. Vaccination is considered the most effective way of ending the COVID-19 pandemic that has been raging since March 2020. As with other issues during the pandemic, vaccination has generated important litigation involving the balancing of fundamental rights. This article surveys four key areas in vaccination litigation around the world from a comparative perspective. First, the article analyzes the issue of compulsory vaccination and links it to the government measures that potentially discriminate citizens based on their vaccination status. The second issue relates to prioritization, which is also subject to extensive litigation because some categories of people believe they should be prioritized for vaccination. The third issue deals with the processing of vaccination data, in particular the extent to which authorities can collect and process citizens' health data linked to vaccination. Finally, the fourth issue is institutional, as it concerns litigation regarding which level of government is competent to lead vaccination campaigns. Overall, the survey shows the important role that courts have been playing in balancing fundamental rights in the context of ongoing vaccination campaigns worldwide.

Keywords: COVID-19, Pandemic, Litigation, Vaccination, Fundamental rights, Vaccine mandates, Personal health data

1. Introduction

Since the World Health Organization (WHO) declared the pandemic a public health emergency of international concern in March 2020,² the COVID-19 outbreak has become one of the most challenging issues for governments around the world. To alleviate the pressure on their respective health systems and save lives, public authorities have adopted measures restricting their citizens' fundamental freedoms. These measures virtually affected all areas of social, economic, and political life. As a result, individuals, firms, associations and, to a lesser extent, public authorities, have challenged government decisions, both in terms of competence to adopt them and on the substance. Courts have had to strike a balance between the fundamental right to health and a myriad of other fundamental rights and freedoms, including the

freedom of movement, the freedom of association, the freedom to conduct a business, the right to education and the right to privacy.

In 2021, governments also focused on vaccination to curb the infection rate, especially among the most vulnerable, and to reach herd immunity as soon as possible. While the vaccination campaigns have had a slow start in the European Union, countries such as Israel, Chile, the United Kingdom and the United States have rapidly reached high vaccination levels. By mid-May, Israel had fully vaccinated 56% of its population, while Chile, the United Kingdom, the United Arab Emirates, Bahrain, and the United States almost 40% of their populations.³ However, by mid-July, the share of people who received at least one jab became greater in the European Union than in the United States.⁴ Overall, by the end of November 2021, around 54% of the global population had

¹ PhD Candidate, Universitat Pompeu Fabra. This article was written in the context of the 'Covid-19 Litigation Database' research project coordinated by the University of Trento, in cooperation with the World Health Organization. This survey is the result of a team's effort, thanks to the cooperation of an international network of judges and legal scholars coordinated by Paola Iamiceli and Fabrizio Cafaggi.

² 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (*World Health Organization*, 11 March 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>> accessed 6 October 2021.

³ 'Understanding Vaccination Progress' (*John Hopkins University Coronavirus Resource Center*) <<https://coronavirus.jhu.edu/vaccines/international>> accessed 19 May 2021; 'Coronavirus (COVID-19) in the UK: Vaccinations' (*UK Government*) <<https://coronavirus.data.gov.uk/details/vaccinations>> accessed 19 May 2021.

⁴ Ritchie H and others, 'Coronavirus (COVID-19) Vaccinations - Statistics and Research' (*Our World in*

received at least one dose, and 43% was fully vaccinated.⁵ Nevertheless, high vaccination rates in high-income countries sharply contrast with the situation in low-income ones, where only about 6% of the population received at least one dose by the end of November.⁶

Just like other government measures during the pandemic, decisions related to vaccination are being litigated at a large scale. In an attempt to shield itself from critiques about the implementation of its vaccination campaign, the European Commission had initiated proceedings against AstraZeneca before a judge of the Brussels Tribunal of First Instance. The Commission was claiming that the pharmaceutical company had not fulfilled its obligations under the Advanced Purchase Agreement,⁷ signed in August 2020. In particular, the Commission asserted that the company only delivered a fourth of the doses it promised to deliver during the first trimester of 2021, and that deliveries for the second trimester would also be lower than expected.⁸ The Commission asked the judge to order that the company deliver the promised doses. The parties orally exposed their claims in summary proceedings on 26 May 2021. In the meantime, the Commission had initiated another action against the Anglo-Swedish company at the beginning of May 2021 to obtain economic compensation for breach of contract.⁹

Both parties ultimately reached an agreement in September 2021 and settled the pending suits before the Brussels tribunal.¹⁰

This study will survey four key areas in vaccination litigation around the world, in a comparative perspective. The report will first analyze the issue of compulsory vaccination and link it to the government measures that potentially

discriminate citizens based on their vaccination status. The second issue relates to prioritization, which is subject to extensive litigation because some categories of people believe they should be prioritized for vaccination.

The third issue deals with the processing of vaccination data, in particular to what extent can authorities collect, and process citizens' health data linked to vaccination. Finally, the fourth issue is institutional, as it concerns litigation about which level of government is competent to lead vaccination campaigns.

2. Compulsory Vaccination and Restrictions Linked to the Failure to Vaccinate

The issue of compulsory vaccination becomes all the more important when vaccination campaigns reach a level at which the most vulnerable groups have been vaccinated and some countries might experience difficulties in reaching herd immunity because of vaccine hesitancy. For instance, the EU's objective to vaccinate 70% of the adult population with at least one dose by the summer was reached in July 2021,¹¹ but some Member States have found it difficult to convince reluctant citizens to take the jab due to vaccine skepticism.¹² In fact, the WHO had already identified vaccine hesitancy as one of the ten threats to global health in 2019, before the pandemic.¹³

Governments might therefore decide to make COVID-19 vaccination compulsory, instead of nudging citizens into vaccinating by imposing the holding of health passes to enter certain public places.

Data) <<https://ourworldindata.org/covid-vaccinations>> accessed 30 November 2021.

⁵ *Ibidem*.

⁶ *Ibidem*.

⁷ 'Vaccines: contract between European Commission and AstraZeneca now published' (*European Commission*, 29 January 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_302> accessed 5 October 2021.

⁸ Jorge Liboreiro, 'EU's legal action against AstraZeneca: Why now? How will it play out? When will there be a ruling?' (*Euronews*, 28 April 2021) <<https://www.euronews.com/2021/04/26/eu-s-legal-action-against-astrazeneca-why-now-how-will-it-play-out-when-will-there-be-a-ruling>> accessed 5 October 2021.

⁹ Guillermo Abril, 'La UE abre la vía judicial para pedir daños y perjuicios contra AstraZeneca por el retraso de las vacunas' (*El País*, Brussels, 11 May 2021) <<https://elpais.com/sociedad/2021-05-11/la-ue-abre-la-via-judicial-para-pedir-danos-y-perjuicios-a-astrazene-ca-por-el-retraso-de-las-vacunas.html>> accessed 5 October 2021.

¹⁰ 'Coronavirus: The EU and AstraZeneca agree on COVID-19 vaccine supply and on ending litigation' (*European Commission*, 3 September 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4561> accessed 5 October 2021.

¹¹ 'Communication from the Commission to the European Parliament, the European Council and the Council: A united front to beat COVID-19' COM/2021/35 final; 'Statement by President von der Leyen on a new milestone in the EU Vaccines Strategy' (*European Commission*, 27 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/statement_21_3921> accessed 5 October 2021.

¹² 'Why is Europe so riddled with vaccine skepticism?' (*The Economist*, 10 December 2020) <<https://www.economist.com/europe/2020/12/12/why-is-europe-so-riddled-with-vaccine-scepticism>> accessed 5 October 2021.

¹³ 'Ten threats to global health in 2019' (*World Health Organization*) <<https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019>> accessed 5 October 2021.

That is the case of Indonesia, whose government mandated vaccination in February 2021,¹⁴ and Austria, who will most likely become the first European country to impose vaccination as of February 2022.¹⁵ In France, the debate over compulsory vaccination is also underway, with socialist parliamentarians supporting such mandate instead of extending the use of a “COVID pass” to access public spaces.¹⁶ However, political events such as the upcoming French presidential elections in April 2022 might make government think twice about adopting such unpopular measures.

2.1. The Possibility of Vaccine Mandates

Still, most countries today do not provide for general COVID-19 vaccination mandates. Instead, many governments are progressively imposing vaccination requirements for health workers, civil servants, large companies, or as a travel requirement. In September 2021, the President of the United States announced plans for federal vaccine mandates that would affect around a third of the population,¹⁷ including for federal employees through an executive order.¹⁸ He later limited the entry by air of all noncitizen nonimmigrants to those vaccinated.¹⁹

But federal courts suspended the application of both the federal mandate concerning companies

with at least 100 workers,²⁰ and the one concerning healthcare workers in facilities receiving federal funding,²¹ pending trial on the merits. Other federal courts have rejected challenged to federal or state mandates.

However, the global trend for mandating vaccination against infectious diseases in general hints that most countries might ultimately decide to impose one for COVID-19 as well. A comprehensive global review of mandatory vaccination policies recently found that 105 out of 193 countries (54%) made at least one form of vaccine mandatory at national level, as of December 2018.²² Among those, 62 (59%) countries impose at least one type of penalty in case of non-compliance with the mandate, while 34 (32%) impose no penalties and 9 (9%) of them lack sufficient information about penalties.

Countries that impose such mandates include Algeria, Argentina, Australia, Belgium, Brazil, Chile, China, Colombia, the Czech Republic, Egypt, France, Germany, Indonesia, Iran, Italy, Mexico, Morocco, Poland, South Korea, and Tunisia. But with regards to COVID-19 vaccination, courts have had to rule on a wide variety of regimes, as explained below.

2.2. Indirect Compulsory Vaccination

In Brazil, the Federal Supreme Court found that there was sufficient legal basis for indirect

¹⁴ Ardila Syakriah, ‘Get vaccinated or lose your social aid, Indonesian government says’ (*Jakarta Post*, 15 February 2021) <<https://www.thejakartapost.com/news/2021/02/15/get-vaccinated-or-lose-your-social-aid-indonesian-government-says.html>> accessed 30 November 2021.

¹⁵ Philipp Oltermann, ‘Germany’s chancellor-to-be Olaf Scholz ‘backs mandatory Covid jabs’ (*The Guardian*, 30 November 2021) <<https://www.theguardian.com/world/2021/nov/30/austria-pushes-on-with-plan-for-mandatory-covid-vaccines>> accessed 30 November 2021.

¹⁶ Sandra Cerqueira, ‘Les parlementaires socialistes favorables à la vaccination obligatoire plutôt qu’à l’extension du passe sanitaire’ (*Public Sénat*, 19 July 2021) <<https://www.publicsenat.fr/article/parlementaire/jugent-le-passe-sanitaire-inapplicable-les-parlementaires-socialistes-lui>> accessed 5 October 2021.

¹⁷ Zeke Miller, ‘Sweeping new vaccine mandates for 100 million Americans’ (*Associated Press*, 10 September 2021) <<https://apnews.com/article/joe-biden-business-health-coronavirus-pandemic-executive-branch-18fb12993f05be13bf760946a6fb89be>> accessed 5 October 2021.

¹⁸ US President Joe Biden, ‘Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees’ (*White House*, 9 September 2021) <[\[on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/\]\(https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/\)> accessed 30 November 2021.](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-</p>
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¹⁹ US President Joe Biden, ‘A Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic’ (*White House*, 25 October 2021) <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/>> accessed 30 November 2021.

²⁰ U.S. Court of Appeals for the Fifth Circuit, 12 November 2021, *B. e.a. v Occupational Safety and Health Administration*, No. 21-60845.

²¹ The mandate was first suspended in Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming (U.S. District Court, Eastern District of Missouri, Eastern Division, 29 November 2021, *State of Missouri et al. v Joseph R. Biden*, No. 4:21-cv-01329-MTS), and then extended to the whole nation (U.S. District Court, Western District of Louisiana, Monroe Division, 30 November 2021, *State of Louisiana et al. v Xavier Becerra et al.*, No. 3:21-cv-03970-TAD-KDM).

²² Katie Gravagna and others, ‘Global assessment of national mandatory vaccination policies and consequences of non-compliance’ Vol. 38, Issue 49, p. 7865, (*ELSEVIER*, 17 November 2020) <<https://www.sciencedirect.com/science/article/pii/S0264410X20312342?via%3Dihub>> accessed 5 October 2021.

compulsory vaccination and provided guidelines on how to implement measures that would incentivize citizens to vaccinate.²³ The Court expressly refers to this possibility as ‘compulsory vaccination’ (*obrigatoriedade da vacinação*) to distinguish it from ‘forced vaccination’ (*vacinação forçada*), because vaccination would always require the patient’s consent to be administered and the authorities cannot force patients to take the jab. This ruling is in sharp contrast with Bolsonaro’s skepticism about the harmfulness of the virus and the need to vaccinate,²⁴ especially as it recalls the importance of vaccination to achieve collective protection, in particular for the sake of the most vulnerable. Although it refers to ‘compulsory vaccination,’ the Court essentially provides the possibility for the authorities to impose indirect measures aimed at inciting vaccination, such as restricting the exercise of certain activities or the entry into some public places. The Court specified that, for such measures to be implemented, appropriate legislation must be adopted, which should be (i) based on scientific evidence; (ii) accompanied by extensive information on the effectiveness, safety, and contraindications of immunizers; (iii) respectful of human dignity and fundamental rights; (iv) reasonable and proportionate; and (v) geared toward ensuring that the vaccines are distributed universally and free of charge. At any rate, the Brazilian court did not make vaccination compulsory as such but provided these rather general guidelines for public authorities to adopt indirect measures to incentivize citizens to vaccinate.

Relying on that landmark judgment’s interpretation of the relevant legislation, the Brazilian Labor Public Ministry has stated that workers who refuse to take the vaccine without proper medical justification can be dismissed for just cause. In an interview, the Brazilian Attorney General stated that the vaccine was a collective

protection, not an individual one.²⁵ However, the Social Liberal Party (*Partido Social Liberal*), Bolsonaro’s former party, introduced a bill proposal that would ban such dismissals for refusing to vaccinate.²⁶ This proposal is still in the legislative pipeline, but shows how politically sensitive the issue of (even indirectly) mandating vaccination is.

In the current absence of many general compulsory regimes, governments in other jurisdictions are also using indirect restrictive measures for the non-vaccinated as an incentive for the population to vaccinate. After rapidly reaching high vaccination rates, Israel has been one of the first countries to impose such restrictions. Although the country had no legal mandate to vaccinate, the government decided to make leisure activities accessible only to vaccinated people, who need to show their vaccination certificate to enter places such as gyms, cultural events, sports games, restaurants, hotels and swimming pools – making such rules “both a carrot and a stick.”²⁷ However, the Israeli Supreme Court ruled that, despite a successful vaccination campaign, there are limits to how authorities can differentiate between vaccinated and non-vaccinated citizens in the context of air travel. In March 2021, the Court ruled that it was unconstitutional for the authorities to request pre-departure approval for outbound air passengers who are not vaccinated or recovering from the disease, and to impose a quota of 3,000 incoming air passengers per day.²⁸ The Court found that, despite high vaccination rates, the threat of COVID-19 and its new strains will not disappear in the foreseeable future. Therefore, authorities must strike a balance between the damage that may be caused by the intrusion of a new strain of the virus and the restriction of citizen’s basic rights, including their freedom of movement, which is a pre-condition for the exercise of several other fundamental rights.²⁹

²³ ‘Direct Action of Unconstitutionality n°6.586’ (*Federal Supreme Court*, Brazil, 17 December 2020) <<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6586vacinaobrigatoriedade.pdf>> accessed 5 October 2021.

²⁴ ‘Brazil’s Bolsonaro warns virus vaccine can turn people into crocodiles’ (*France 24*, 18 December 2020) <<https://www.france24.com/en/live-news/20201218-brazil-s-bolsonaro-warns-virus-vaccine-can-turn-people-into-crocodiles>> accessed 5 October 2021.

²⁵ ‘Trabalhador que negar vacina pode ser demitido por justa causa, diz MP’ (*Migalhas*, 9 February 2021) <<https://www.migalhas.com.br/quentes/340071/trabalhador-que-negar-vacina-pode-ser-demitido-por-justa-causa-diz-mp>> accessed 5 October 2021.

²⁶ Lara Haje, ‘Projeto proíbe dispensa por justa causa para empregado que não se vacinar contra Covid-19’ (*Câmara dos Deputados*, 22 February 2021)

<<https://www.camara.leg.br/noticias/728418-projeto-proibe-dispensa-por-justa-causa-para-empregado-que-nao-se-vacinar-contracovid19/#:~:text=Previdência%20Assistência-,Projeto%20pro%C3%ADbe%20dispensa%20por%20justa%20causa%20para%20empregado,se%20vacinar%20contra%20Covid%2D19&text=0%20Projeto%20de%20Lei%20149,vacinado%20contra%20o%20novo%20coronav%C3%ADrus>> accessed 5 October 2021.

²⁷ Isabel Kershner, ‘As Israel Reopens, ‘Whoever Does Not Get Vaccinated Will Be Left Behind’ (*New York Times*, 18 February 2021) <<https://www.nytimes.com/2021/02/18/world/middleeast/israel-covid-vaccine-reopen.html>> accessed 5 October 2021.

²⁸ Israel, Supreme Court, 17 March 2021, *Oren Shemesh v Prime Minister*, HCJ 1107/21.

²⁹ *Ibidem*, para 18.

With regards to restrictions linked to people's vaccination status, the Brazilian and Israeli Supreme Courts thus appear to have adopted different approaches. While the Brazilian court allows authorities to use such restrictions as an incentive for the population to get vaccinated, the Israeli court limits such restrictions, which it considered disproportionate, especially because the government did not rely on relevant data on the number of citizens abroad seeking to return to Israel and gave no explanation as to why the daily passenger quota was set at 3,000. The different outcomes appear to be commensurate with the very different situation of both countries in terms of infection and vaccination rates. Indeed, when the need to incentivize people to vaccinate is weaker (as in Israel, which achieved high vaccination rates), fundamental rights other than the fundamental right to health become more relevant. In contrast, it appears that the judicial focus in Brazil remains on safeguarding the fundamental right to health, in a context where vaccines for even priority groups have been crucially lacking.³⁰

Of course, vaccine mandates have been so controversial because individuals have had different political beliefs over their opportunity. For instance, claimants have already argued that requiring proof of vaccination to access events and businesses constituted discrimination based on political beliefs. But that claim was dismissed by the Human Rights Tribunal of the Canadian province of British Columbia.³¹ The Tribunal found that, while the claimant indeed had the right to hold a negative view of vaccination policies, but that protection from discrimination based on political belief did not exempt people from obeying those policies and was insufficient to challenge a public health measure.

However, claimants have challenged such mandates even when exemptions for religious and medical reasons exist. For instance, students at Indiana University (United States) argued that the university requirement to vaccinate unless they had religious or medical reasons not to do so (in which case they had to wear masks and test twice a week), violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The United States Court of Appeals for the Seventh

Circuit rejected that claim, finding that the university had foreseen exceptions, that students had ample educational opportunities if they wished to study at another university, and that imposing a measure that would help all students to remain healthy was no greater problem than the imposition of readings for learning, even though students would prefer not to read such pieces.³²

Beyond political beliefs, claimants have also challenged the scientific justifications behind COVID-19 vaccines mandates. For instance, an employee of the New Zealand Customs Service was fired for not complying with the vaccine mandate in place for specific employment positions. While the claimant argued that the vaccine should be considered medical experimentation and that the mandate was "irrational", the High Court of New Zealand rejected that view, holding that it could not question the merits of the executive's decision that was based on scientific information showing that vaccines were indeed effective and the best solution to curb the pandemic.³³ Similarly, the Civil and Administrative Tribunal of New South Wales (Australia) dismissed claims made by a nurse who refused to comply with an order for health workers to vaccinate, thus risking to be suspended and ultimately fired.³⁴ The Tribunal relied on scientific information proving the efficacy and safety of the vaccines, also based on data from other countries.

Overall, the Tribunal held that the public interest of protecting health (especially of colleagues and patients) trumped the potential prejudice suffered by the applicant. Likewise, the Indian Supreme Court rejected a doctor's claim that vaccines have not undergone sufficient trials for safety and efficacy, holding instead that clinical trials had been approved by the country's highest technical advisory body for immunization.³⁵

At the European Union level, the Parliament and the Council adopted a regulation establishing an EU Digital COVID Certificate, which entered into force on 1 July 2021.³⁶ The European Commission has argued that the certificate would facilitate the free movement of people across the Union, guaranteeing one of the EU's core principles. However, scholars have questioned the public health motives behind its adoption, warned that it could fragment the

³⁰ 'Brazil struggles with Covid-19 vaccine rollout as death toll spirals' (*France 24*, 16 May 2021) <<https://www.france24.com/en/americas/20210516-brazil-struggles-with-covid-19-vaccine-rollout-as-death-toll-spirals>> accessed 5 October 2021.

³¹ Canada, British Columbia Human Rights Tribunal, 9 September 2021, *Complainant obo Class of Persons v. John Horgan*, 2021 BCHRT 120.

³² United States, U.S. Court of Appeals for the Seventh Circuit, 2 August 2021, *K. v. Trustees of Indiana University*, No. 21-2326, 2021 WL 3281209.

³³ New Zealand, High Court, 24 September 2021, *GF v Minister of Covid-19 Response* 2021 NZHC 2526.

³⁴ Australia, New South Wales Civil and Administrative Tribunal, 8 October 2021, *D. v Minister for Health* 2021 NSWCATAD 293.

³⁵ India, Supreme Court, 14 October 2021, *Dr. J.P. v. Union of India*, Writ Petition (Civil) No. 607/2021.

³⁶ 'EU clears way for the EU Digital COVID Certificate' (*European Commission*, 14 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_2965> accessed 5 October 2021.

internal market, as well as create disproportionate discriminations in reopening economies and restoring free movement.³⁷ Paradoxically, the authorities' desire to lift restrictions and therefore restore a number of fundamental freedoms comes up against a host of new fundamental rights issues, making the return to normality as challenging as the confinement of the disease, if not more.

The introduction of health passes based or not on the EU Digital COVID Certificate already prompted important litigation, including from within EU institutions. Indeed, some elected Members of the European Parliament challenged before the President of the EU's General Court the Parliament's decision to impose the presentation of that certificate for anyone accessing its premises. However, the President rejected their request for interim measures in November 2021, mainly because (i) that measure has neither the object nor the effect of calling into question the exercise of the MEP's mandates as elected members of Parliament, but instead was meant to protect public health; (ii) the applicants did not show how that measure would affect their power of representation or their capacity to work usefully and efficiently; (iii) they do not demonstrate that their fundamental right to data protection was affected;³⁸ and (iv) they failed to explain why undergoing regular testing would seriously affect their health, especially because they can choose the type of test, the Parliament bears the testing costs and provides facilities to test, and there are exemptions for medical reasons.³⁹

In France, President Emmanuel Macron's announcement in July 2021 that people should hold a 'health pass' to be allowed in bars, restaurants, shops, some trains, and flights (to encourage a population more prone to vaccine hesitancy) prompted almost a million people rushing to get vaccinated the next day,⁴⁰ demonstrating the effectiveness of indirect measures.

A few weeks later, the French Constitutional Council confirmed the validity of the provisions of the law on health crisis management that imposed the 'health pass'.⁴¹ The Constitutional Council motivated its decision by the fact that (i) the legislature pursued the constitutional objective of the protecting health; (ii) the measure would apply temporarily, until 15 November 2021,⁴² during which the legislature considered there was a significant risk of the epidemic spreading through new virus variants; (iii) the pass would only be required in places where the activities carried out present a particular risk of spreading the virus; (iv) the obligations imposed on the public may be fulfilled by the presentation of proof of vaccination status, the negative result of a virological screening test, or a certificate of recovery from contamination, thus not imposing vaccination; and (v) the presentation of these documents is carried out in a form that does not allow the "nature of the document held" to be ascertained, and ID checks can only be carried out by law enforcement officials. Thus, the Constitutional Council held that the contested measure achieved an appropriate balance between the right to health and the freedom of movement, the right to respect for private life and the right to collective expression of ideas and opinions.

However, it held that, by providing that the failure to present a "health pass" constitutes a reason for terminating only fixed-term or assignment contracts (and not permanent contracts), the legislator has instituted a difference of treatment between employees according to the nature of their employment contract, which is unrelated to the objective of protecting health. Indeed, employees under fixed-term contracts and those under permanent contracts are exposed to the same risk of contamination or transmission of the virus. Interestingly, the Italian Council of State

³⁷ Dimitry Vladimirovich Kochenov and Jacquelyn Dietrich Veraldi, 'The Commission against the Internal Market and European Union Citizens' Rights: Trying to Shoot Down Sputnik with the 'Digital Green Certificate'?' (*European Journal of Risk Regulation*, 19 July 2021) <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/commission-against-the-internal-market-and-european-union-citizens-rights-trying-to-shoot-down-sputnik-with-the-digital-green-certificate/E7B59DDEE86D55F2FF1EAE8EF09C876C>> accessed 5 October 2021. See also Alberto Alemanno and Luiza Bialasiewicz, 'Certifying Health: The Unequal Legal Geographies of COVID-19 Certificates' (*European Journal of Risk Regulation*, 21 July 2021) <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/certifying-health-the-unequal-legal-geographies-of-covid19-certificates/3008E47448F01B2266E3FDF3B81B5495>> accessed 5 October 2021.

³⁸ See below, section 4.

³⁹ European Union, Order of the President of the General Court, 30 November 2021, *Roos e.a. v Parliament*, T-710/21 R.

⁴⁰ 'Why vaccine-shy French are suddenly rushing to get jabbed' (*The Economist*, 14 July 2021) <<https://www.economist.com/graphic-detail/2021/07/14/why-vaccine-shy-french-are-suddenly-rushing-to-get-jabbed>> accessed 5 October 2021.

⁴¹ France, Constitutional Council, 5 August 2021, No. 2021-824 DC, ECLI:FR:CC:2021:2021.824.DC.

⁴² Note that a new law extended the possibility for the government to impose the health pass until 31 July 2022 (loi No. 2021-1465 du 10 novembre 2021 portant diverses dispositions de vigilance sanitaire, JORF No. 0263 du 11 novembre 2021).

refers to this French case in a recent decision on mandatory vaccination for healthcare workers.⁴³

In Spain, governments in several Autonomous Communities have tried to pass regulation limiting the access of some public places to those people showing their EU Digital COVID Certificate. To pass such measures limiting fundamental rights in the context of the pandemic, the respective governments need to obtain judicial ratification.⁴⁴ Courts have suspended government measures imposing health passes to access a number of public places in the Canary Islands⁴⁵ and Cantabria.⁴⁶ But cases in which the governments of Andalusia and Galicia imposed similar measures reached the Spanish Supreme Court. While the court confirmed the suspension of the Andalusian measures because it disproportionately restricted access to nightlife venues to those holding an EU Digital COVID Certificate,⁴⁷ it upheld the Galician measure requiring a health pass to enter restaurants, bars, hotels, and nightlife venues.⁴⁸ The principle of proportionality is the key distinguishing feature between both cases. The Andalusian measure was disproportionate because it was indefinite in time and applicable to the entire territory, without linking the measure to the incidence of cases or the health situation and its evolution.

In contrast, the Galician measure is proportionate because it is limited in time, applicable only to those territories with a more severe health situation and its application might evolve over time.

2.3. A European Perspective on Vaccine Mandates

At any rate, a recent ruling of the European Court of Human Rights might inspire European countries to mandate COVID-19 vaccination, or at least would make it more difficult for applicants to judicially challenge such mandates, should they be adopted.⁴⁹

The case concerned the compulsory nature of standard and routine vaccination of children in the Czech Republic against nine diseases that are well known to the medical community. While the case did not concern COVID-19 vaccination, the Court, sitting in Grand Chamber, did find that states have a

wide margin of appreciation to impose compulsory vaccination on children. Despite recognizing that compulsory vaccination was an interference with the right to respect for private life, the objective of the state was to protect against diseases that cause a serious threat to health. The Court considered this objective legitimate because it aimed at guaranteeing the protection of health and the protection of the rights of others, as guaranteed by Article 8 of the European Convention on Human Rights. Like the Brazilian Supreme Court making a distinction between ‘compulsory’ and ‘forced’ vaccination,⁵⁰ the Czech law did not foresee the forced administration of the contested vaccines. However, it did foresee sanctions such as (limited) administrative fines or the non-admission to preschool.

The Court found that Contracting Parties to the Convention could choose between a spectrum of policies regarding compulsory vaccination because they had a wide margin of appreciation. In any case, the Court also stated that the Convention imposes a positive obligation on the Contracting Parties to protect the life and health of their citizens, and that international and national medical experts had recommended to maintain such a duty for children vaccination.

Finally, the Court found the Czech policy proportionate to its objectives because (i) an exemption was permitted based on a “secular objection of conscience;” (ii) no provisions allowed for ‘forced’ vaccination; (iii) one-off administrative fines were relatively moderate; (iv) non-admission to preschool was a protective rather than punitive sanction, and the loss of an opportunity to develop the children’s personalities is direct result of their parents’ decline to comply with a legal duty; and (v) national law established appropriate procedural safeguards.

Therefore, the Court considered the Czech policy as being “necessary in a democratic society.”

Ultimately, a key aspect of the Court’s findings is the one of social solidarity: “The Court considers that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practiced protective measure, as a

⁴³ Italy, Council of State, 14 October 2021, No. 08340/2021. See below, section 2.3.

⁴⁴ Pursuant to Article 10(8) of Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa, «BOE» No. 167, de 14/07/1998, as last modified by Disposición final 2.2 de la Ley 3/2020, de 18 de septiembre de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia, «BOE» No. 250, de 19/09/2020.

⁴⁵ Spain, High Court of Justice of the Canary Islands, 29 July 2021, No. 11/2021, ECLI: ES:TSJICAN:2021:11A;

High Court of Justice of the Canary Islands, 29 July 2021, No. 12/2021, ECLI:ES:TSJICAN:2021:12A.

⁴⁶ Spain, High Court of Justice of Cantabria, 6 August 2021, No. 25/2021, ECLI:ES:TSJCANT:2021:25A.

⁴⁷ Spain, Supreme Court, 18 August 2021, No. 3260/2021, ECLI:ES:TS:2021:3260.

⁴⁸ Spain, Supreme Court, 14 September 2021, No. 3298/2021 - ECLI:ES:TS:2021:3298.

⁴⁹ *Vavříčka and Others v. the Czech Republic* [GC], No. 47621/13 and 5 others, European Court of Human Rights, 8 April 2021, ECLI:CE:ECHR:2021:0408JUD004762113.

⁵⁰ See above, section 2.2.

matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination.”⁵¹

This could play in favor of European countries mandating COVID-19 vaccination. However, the Strasbourg court also reached these conclusions regarding “diseases well-known to medical science,” which arguably is not the case of COVID-19, the medical community having trouble reaching a consensus about many of its characteristics.⁵²

Still, the issue of mandating COVID-19 vaccination for children is already the object of ethical debates⁵³ and will become more relevant as vaccination progresses worldwide.⁵⁴

While no European country has yet imposed compulsory COVID-19 vaccination for the general population (except for Austria as of February 2022), this ruling could be relied on by national authorities to impose vaccination duties in their endeavor to protect their population from a disease that poses a “serious risk to health,” and to protect society at large, especially the most vulnerable. In fact, Italy is the first European country to have made COVID-19 vaccine compulsory for health workers, who risk being suspended if they refuse the jab.⁵⁵

Prior to the adoption of a Decree-Law on 1 April 2021,⁵⁶ which introduced that measure, the Labor Tribunal of Belluno had found that employers could suspend the effects of an employment contract of a healthcare employee who refuses vaccination, in

order to ensure health safety conditions in the workplace, which is an enforceable duty of the employer.

According to the Italian tribunal, guaranteeing a healthy workplace in the context of the COVID-19 pandemic prevails over the worker’s self-determination to get vaccinated and over its freedom to plan year leave, since the worker should be asked to enjoy year leave before being suspended. In a very detailed and scientifically backed decision, the Italian Council of State confirmed the validity of the Decree-Law in a case involving healthcare workers refusing to vaccinate.⁵⁷

The country’s highest administrative court motivates its decision based on a thorough scientific analysis of the safety and efficacy of the vaccines in the context of their conditional marketing authorization in the EU, rebuffing claims that vaccines are merely “experimental.” It also heavily relies on the principle of solidarity to justify the selective mandate, especially based on the European Court of Human Right’s decision in *Vavřička* described above, which already shows its influence in the COVID-19 context. The Council of State also explains that the doctors’ duty of care imposes an obligation to protect themselves and others, especially because of the trust that patients vest in them, leaving no legitimate space for vaccine hesitancy in a democratic society during such a health emergency.

⁵¹ *Ibidem*, para 306.

⁵² Frédérique Berrod and Pierrick Bruyas, ‘La Cour européenne des droits de l’homme et la vaccination obligatoire: le contexte Covid’ (*The Conversation*, 2 May 2021) <<https://theconversation.com/la-cour-europeenne-des-droits-de-lhomme-et-la-vaccination-obligatoire-le-contexte-covid-159384>> accessed 5 October 2021.

⁵³ Anthony Skelton and Lisa Forsberg, ‘3 reasons for making COVID-19 vaccination mandatory for children’ (*The Conversation*, 13 May 2021) <<https://theconversation.com/3-reasons-for-making-covid-19-vaccination-mandatory-for-children-160589>> accessed 5 October 2021. In France, the National Consultative Ethics Committee for health and life sciences recently issues an opinion on the ethical issues related to COVID-19 vaccination of children and adolescents. One of the questions it tried to answer was the following: “Knowing that a significant number of adults, including people with comorbidities, will not vaccinate, is it ethical to make minors bear the responsibility, in terms of collective benefit, for the refusal of a part of the adult population to vaccinate?” (Unofficial translation). The question is framed with reference to the collective dimension of vaccination and does an implied reference to the principle of solidarity. The Ethics Committee concluded that, so far, vaccination of children under 12 years of age did not seem ethically and scientifically acceptable, largely because there are no studies

evaluating the safety of COVID-19 vaccines in this population (‘Avis du CCNE: Enjeux éthiques relatifs à la vaccination contre la Covid-19 des enfants et des adolescents’ (*Comité consultative national d’éthique pour les sciences de la vie et de la santé*, 9 June 2021) <<https://www.ccne-ethique.fr/fr/actualites/enjeux-ethiques-relatifs-la-vaccination-contre-la-covid-19-des-enfants-et-des-adolescents>> accessed 5 October 2021.

⁵⁴ The debate has been topical in the United States, where vaccination levels are relatively high compared to lower income countries. See Yoree Koh, ‘Can Schools Mandate Covid-19 Vaccines for Children? What We Know’ (*Wall Street Journal*, 11 June 2021) <<https://www.wsj.com/articles/can-schools-mandate-covid-19-vaccines-for-children-what-we-know-11623412802>> accessed 5 October 2021.

⁵⁵ Silvia Sciorilli Borrelli, ‘Italy first in Europe to make jabs mandatory for health workers’ (*Financial Times*, 1 April 2021) <<https://www.ft.com/content/18791bdf-ad1a-4f5e-b99a-28aee18fe9f7>> accessed 5 October 2021.

⁵⁶ Decreto-Legge 1 aprile 2021, No. 44. Misure urgenti per il contenimento dell’epidemia da COVID-19, in materia di vaccinazioni anti SARS-CoV-2, di giustizia e di concorsi pubblici. (21G00056) (GU Serie Generale No. 79 del 01 April 2021).

⁵⁷ Council of State, Third Section, 20 October 2021, No. 7045, ECLI:IT:CDS:2021:7045SENB.

Similarly, the Greek Council of State found that the obligation for fire department personnel to vaccinate within a short timeframe of less than a month – on pain of being transferred to another unit where they would lose their special allowance – did not violate the principles of proportionality and equality.⁵⁸ The Council of State considered that it did not amount to forced vaccination because the workers had the possibility to be transferred to another unit, which was necessary because the personnel in the affected department had to be available at all times for reasons of public interest.

2.4. Forced Vaccination Already a Reality

Still, even in a context of (mostly) voluntary vaccination, individuals have already faced imposed vaccination in a number of jurisdictions, as this survey shows. In Spain, courts have mandated vaccination for residents of retirement homes who had refused the jab either themselves⁵⁹ or through their legal representatives.⁶⁰ The retirement homes had sued their residents who had refused the vaccine, to protect the elderlies with limited capacity, as well as the other residents and the residence workers. In all cases, the judges found that the benefits of the vaccine to protect vulnerable residents belonging to a risk group outweigh the risks of possible secondary effects, in line with recommendations from the European Medicines Agency. Similarly, in the United Kingdom, the Court of Protection of England and Wales reversed the decision of the legal representative of an elderly person suffering from dementia and schizophrenia and who had declined the vaccine in her name, after her children contested that decision.⁶¹ In both countries, the courts considered the elderly's best interest and concluded that the COVID-19 vaccine would dramatically reduce the risk of contracting the virus. While the judge in the English case focused on the individual protection of the resident, the judges in the Spanish cases also applied the principle of solidarity (although not expressly mentioning it) by highlighting the need to protect the other residents of the retirement homes and their workers.

At the same time, efforts to anticipate mandatory or forced vaccination already resulted in judicial decisions. In Argentina, for instance, the Federal Court of Appeals of Bahía Blanca upheld a

first instance judgment that dismissed a claim of a group of individuals requesting it to prevent them from being forced to take the vaccine.⁶² The Court found that these individuals could not prove that they had suffered a harmful situation, because the COVID-19 vaccine had not been included in the national vaccination schedule.

As vaccination campaigns progress in many jurisdictions, authorities are increasingly facing the issue of compulsory vaccination to reach their public health objectives. In jurisdictions without legislation expressly mandating vaccination, courts might continue to rely on general principles to rule on cases involving indirect restrictive measures.

That was the case both in the Brazilian and Israeli cases, where courts referred to the general principles of proportionality and reasonableness as guiding principles for the adoption of restrictive measures aimed at incentivizing citizens to vaccinate. The principle of solidarity, which might itself be a basis for adopting legislation on compulsory COVID-19 vaccination, is already used by courts to justify mandatory vaccination for children (as the European Court of Human Rights), for deciding to vaccinate vulnerable people under legal protection (in Spain, for example), and to reject challenges of vaccine mandates (as the Italian Council of State).

However, a more frequent issue in slow-starting vaccination campaigns is prioritization, as the next section explains.

3. Prioritization

In a context of vaccine scarcity for many jurisdictions, authorities have decided to prioritize certain groups of people considered more vulnerable to the disease caused by COVID-19. Here, the issue is opposite to that of mandatory vaccination, because instead of vaccine hesitancy, claimants have argued before courts that they should be prioritized for vaccination. That specific context prompted three German courts to deny the request for the prioritization of individuals suffering severe health issues.

In all three cases from February 2021 described below, the courts ultimately held that a fair healthcare management in the vaccination campaign outweighed the applicants' personal rights, despite their apparently acute health issues.

⁵⁸ Greece, Council of State, 29 June 2021, No. 133/2021.

⁵⁹ Spain, Court of First Instance of Santiago de Compostela, 20 January 2021, No. 60/2021, ECLI:ES:JPI:2021:1A.

⁶⁰ Spain, Court of First Instance of Seville, 15 January 2021, No. 47/2021, ECLI:ES:JPI:2021:18A; Court of First

Instance of Santiago de Compostela, 19 January 2021, No. 55/2021, ECLI:ES:JPI:2021:21A.

⁶¹ England and Wales, Court of Protection Decisions, 20 January 2021, No. 13434332 2021 EWCOP 7 <<https://www.bailii.org/ew/cases/EWCOP/2021/7.html>> accessed 5 October 2021.

⁶² Argentina, Federal Court of Appeals of Bahía Blanca, 2 March 2021, exp. No. FBB 11133/2020/CA1.

First, the Administrative Court of Frankfurt am Main (Germany) denied an 8-year-old girl's request to be included in the second-tier prioritization group, rather than the third-tier group, as defined by the federal Corona Vaccination Ordinance (*CoronaImpfV*).⁶³ She suffered from severe health issues and mental impairment. The Court recognized that this ordinance could not have foreseen all health conditions for the purpose of prioritization, so individual cases should be considered. However, the Court denied the application for two reasons. Firstly, the prioritization put in place by the ordinance was suitable, necessary, and proportionate, given the state's duty to protect public health and to guarantee a fair healthcare system, in a context of vaccine scarcity. Thus, the contested measure did not infringe the applicant's fundamental right to health and bodily integrity. Secondly, including the applicant in the third-tier group was reasonable enough, as she did suffer from severe health issues and could be administered the vaccine despite her young age, under an "off-label" exemption for vulnerable people.

Second, the Administrative Court of Gelsenkirchen denied the reclassification of a person suffering severe diseases from the second-tier group to the first-tier, highest priority group.⁶⁴ Although the applicant claimed that this classification was infringing his fundamental rights to life, health and bodily integrity, the Court emphasized on the importance to stick to the prioritization established by the federal ordinance to guarantee a fair vaccination campaign. Only absolutely necessary exemptions could be granted in exceptional cases – but the applicant had failed to sufficiently demonstrate the severe health conditions that would have justified an exemption from the established vaccination order. In particular, the Court pointed out that the federal Corona Vaccination Ordinance indeed foresaw that the relevant authorities could grant exemptions on a case-by-case basis. But the Court found that the applicant was not in a situation that warranted such exemption. According to the Court, relying on a recommendation of the Permanent Vaccination Commission, these exemptions could for example apply to people with rare, serious pre-existing diseases or severe disabilities, for whom there is

not yet sufficient scientific evidence regarding the contraction of the COVID-19 disease, but for whom a significantly increased risk must be assumed. The exemption would also apply to people who could no longer be vaccinated effectively at a later date, for instance because of imminent chemotherapy.

Third, the Administrative Court of Schleswig-Holstein held that, even though an individual suffered severe health issues, it could not be included in another higher priority group because he failed to demonstrate that he risked suffering from a severe or fatal form of COVID-19.⁶⁵ The fact that his wife was a nurse, thus included in the highest priority group, was irrelevant, since the federal ordinance had not foreseen that possibility but had done so for close contacts of individuals included in the second-tier priority groups. Relying on the principle of proportionality, the Court considered that the need to have a fair vaccination campaign for the whole population trumped the applicant's individual rights.

In contrast, a woman obtained a judgment from a Mexican federal court that she be vaccinated before her turn according to the government's prioritization schedule. She indeed suffered from comorbidities which entailed a high risk of suffering from a severe form of COVID-19.⁶⁶ Similarly, a Paraguayan claimant suffering an incurable disease with comorbidities successfully obtained the Court of First Instance of Asunción to order the health ministry to administer her the vaccine, because the prioritization schedule at the time excluded her from vaccination, then reserved to those over 60.⁶⁷ However, these decisions seem at odds with the German cases where courts were keen on respecting the prioritization established by law, especially given that the applicant had apparently contracted COVID-19 when the judge ruled on the case.

In other cases, judges have also had to rule in situations where the authorities adapted prioritization rules when individuals had already received a first dose of the vaccine without respecting the prioritization defined by competent authorities. For instance, the Regional Administrative Tribunal of Catania (Italy) ruled in February 2021 that the Sicilian authorities were indeed competent to suspend the second dose for individuals that had only received the first one

⁶³ Germany, Administrative Court of Frankfurt am Main, 12 February 2021, No. 5 L 219/21.F, ECLI:DE:VGFFM:2021:0212.5L219.21.F.00.

⁶⁴ Germany, Administrative Court of Gelsenkirchen, 18 February 2021, No. 20 L 182/21, ECLI:DE:VGGE:2021:0218.20L182.21.00.

⁶⁵ Germany, Administrative Court of Schleswig-Holstein, 17 February 2021, No. 1 B 12/21, ECLI:DE:VGSH:2021:0217.1B12.21.00.

⁶⁶ Manuel González Vargas, 'Una mujer demandó para obtener vacuna contra COVID-19 y juez le dio la razón' (*Infobae*, 11 January 2021) <<https://perma.cc/BDX5-KBBJ>> accessed 28 February 2021.

⁶⁷ Paraguay, 6th Civil and Commercial Court of First Instance of Asunción, 1 July 2021, *A. L., Nò S. v. Ministry of Public Health and Social Welfare s/Amparo*.

despite not being included in a priority group.⁶⁸ That suspension occurred less than a month after the applicants received the first jab. In line with the German courts' reasoning, the Italian tribunal highlighted the importance of continuing the vaccination campaign of those entitled to receive the vaccine because of their health conditions, in a context of vaccine scarcity. It rejected the applicants' claims that receiving only the first dose would be detrimental to their health, as they failed to scientifically demonstrate that it was the case.

Changing prioritization rules during an ongoing vaccination campaign happened in other jurisdictions as well, with arguably more harmful consequences in terms of fundamental rights. Amid Israel's successful vaccination campaign, the Minister of Public Security ordered the Israel Prison Service to delay the immunization of prisoners until all prison workers had been vaccinated. That order was contrary to the Ministry of Health guidelines, which prioritized prison staff and prisoners alike, especially the most vulnerable. However, a few days after an association filed a complaint with the Supreme Court, the executive reversed its decision and started vaccinating all prisoners that wanted to be immunized. Although the Court removed the petition, it criticized the Minister of Public Security's decision, stating that it had acted beyond its authority, the health minister having the authority alone.⁶⁹

The justices also stressed the importance of protecting the fundamental rights of the inmate population.

Similarly, the French Council of State considered that prisoners were not discriminated against for being vaccinated according to the same prioritization schedule as the general population.⁷⁰ The Council of State did not consider it necessary to prioritize prisoners' vaccination, as the risk of developing a serious form of COVID-19 did not appear to be higher for prisoners than for the

average population. The fact that prisoners had access to the vaccine based on the same criteria of age and state of health than for the whole population did not reveal any discrimination. While the attempt to change the prioritization order for a specific group came from the government in Israel, it was initiated by an association defending prisoners' rights in France.

Finally, prioritization has not only been litigated by individuals but also by whole categories of people. In India, claimants have successfully obtained a High Court to order the authorities of the State of Arunachal Pradesh to prioritize people with disabilities in the administration of the vaccine.⁷¹ Similarly, members of the legal profession in India have been seeking priority for to obtain the vaccine – less successfully. Several lawsuits were introduced before the Delhi High Court, and the Supreme Court of India joined all the matters but has since stayed proceedings.⁷² Likewise, the High Court of Justice of Catalonia (Spain) granted the request of national police trade unions to order the Catalan authorities to consider them essential public service for the purpose of the vaccination schedule, to avoid discrimination with the regional and local police forces in Catalonia that had been considered as such.⁷³ In Brazil, several judges authorized unions to directly purchase vaccines from pharmaceutical companies and proceed to the vaccination of their members.⁷⁴ However, these judicial decisions have little practical effects because the country has been experiencing vaccine shortages, in a context of political skepticism towards both the virus and the immunizers.

However, due to the constantly evolving situation regarding vaccination, some cases involving prioritization rapidly became moot. That was the case of a plaintiff in Idaho (United States) who challenged the state's vaccination schedule that prioritized healthcare workers and elderly residents of long-term care facilities over ordinary

⁶⁸ Italy, Regional Administrative Tribunal of Catania (Section 4), 13 February 2021, No. 102, ECLI:IT:TARCT:2021:102SENT.

⁶⁹ Israel, Supreme Court, 31 January 2021, *Physicians for Human Rights v Minister of Public Security* (HC 158/21).

⁷⁰ France, Council of State, 5 February 2021, No. 449081, ECLI:FR:CEORD:2021:449081.20210205.

⁷¹ India, High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh, 28 June 2021, Case No. PIL 11/2021.

⁷² India, Supreme Court, 18 March 2021, *Bharat Biotech International v Union of India*, Special Leave to Appeal, No. 4327/2021.

⁷³ Spain, High Court of Justice of Catalonia, 27 April 2021, recurso especial de protección jurisdiccional de los derechos fundamentales, SALA TSJ 1.298/2021 y Sección No. 162/2021.

⁷⁴ André Richter, 'Juiz autoriza mais entidades privadas a importar vacinas contra covid' (*Agência Brasil*, 30 March 2021) <<https://agenciabrasil.ebc.com.br/justica/noticia/2021-03/juiz-autoriza-mais-entidades-privadas-importar-vacinas-contracovid>> accessed 5 October 2021; Daniel Adjuto, 'Justiça autoriza sindicato de Campinas a comprar vacinas para funcionários' (*CNN Brasil*, 6 April 2021) <<https://www.cnnbrasil.com.br/nacional/2021/04/06/tribunal-autoriza-sindicato-de-campinas-a-comprar-vacinas-para-funcionarios>> accessed 5 October 2021; Ana Maria Campos, 'Justiça autoriza Sindicato dos Médicos a comprar vacina contra covid-19' (*Correio Braziliense*, 30 March 2021) <<https://blogs.correiobraziliense.com.br/cbpoder/justica-autoriza-sindicato-dos-medicos-a-comprar-vacina-contracovid-19/>> accessed 5 October 2021.

people of at least 65 years old.⁷⁵ In this case, the U.S. District Court dismissed the claim in parts because the plaintiff had been vaccinated in the meantime.

All in all, despite the Latin American exceptions, courts appear to have prioritized the general interest over individual rights. However, courts have applied different general principles, based on their respective legal traditions. In particular, the German courts relied on the principle of proportionality to justify its refusal to prioritize individuals, while the French Council of State applied the principle of non-discrimination to refuse the prioritization of prisoners in the vaccination campaign.

4. Collection and Processing of Vaccination Data

Beyond the issues of mandatory vaccination and prioritization, important litigation has been defining to what extent authorities can collect and process citizen health data linked to vaccination. During the pandemic, the collection and processing of health data has been a controversial topic. In April 2021, Apple and Google suspended an updated version of the United Kingdom's NHS COVID app, over concerns that the update would compromise users' location data.⁷⁶ The issues of data transfer and surveillance have been the object of two important cases in France and Israel.

In France, the Council of State held that French authorities could lawfully partner with a company that subcontracts the hosting of personal data for appointments to get vaccinated to a US company.⁷⁷ Associations and trade unions had asked the Council of State to suspend the partnership between the Ministry of Health and a company providing online medical appointment services, arguing that the firm used the Luxembourgish subsidiary of Amazon Web Services (a company incorporated in the United States) to host its appointment data, entailing risks with regards to access requests by US authorities, in the context of surveillance programs. Nevertheless, the interim relief judge of the Council of State dismissed the request, noting (i) that the data collected in the context of the vaccination appointments did not include health data on the possible medical reasons for eligibility for vaccination, but rather personal identification data and data relating to appointments; (ii) that guarantees had been put in

place to deal with a possible request for access by US authorities; and (iii) that the data was protected by sufficient security safeguards, for instance encryption procedures based on a trusted third party located in France. Therefore, the Council of State found that the level of protection of the data relating to appointments made in the context of the vaccination campaign was not manifestly inadequate considering the risk of infringement of the EU's General Data Protection Regulation, as further defined by the Court of Justice of the European Union in a Grand Chamber judgment of 16 July 2020 in *Data Protection Commissioner v Facebook Ireland and Maximilian Schrems (Schrems II)*.⁷⁸ In other words, the Council of State focused on applying the Court of Justice's *Schrems II* ruling to evaluate whether the processing of personal data for vaccination appointments entailed a risk of data transfer to the US in violation of EU law.

In Israel, the Supreme Court held that it was unconstitutional for the government to allow the Israel Security Agency (ISA) to track individuals who had tested positive to the virus, in a sweeping manner.⁷⁹ The Court found that such data access disproportionately and unreasonably violated the fundamental right to privacy, as tracing through ISA technology should only be regarded as a complementary mean to fight the pandemic. Nevertheless, the Court also ruled that surveillance could be warranted in limited cases where people do not cooperate with human epidemiological investigations, as opposed to technological surveillance. With regards to vaccines, it is worthwhile noting that the Court believed that the successful vaccination campaign, coupled with the expansion of the human epidemiological investigations, would change the government's use of the tracing tool.

While the focus of the French Council of State was to ensure that personal data would not be made available to US intelligence in the first place, the Israeli focus was to undo an ongoing surveillance scheme, applying the principle of proportionality to declare the sweeping surveillance tool used by intelligence services unconstitutional. The purpose and scope of personal data collection and processing was different in both cases, as the French authorities collected personal data (but not health data) for organizing the vaccination appointments, while the Israeli authorities were

⁷⁵ United States, U.S. District Court for the District of Idaho, 18 May 2021, *Byrd v. Little*, Case No. 1:21-cv-00001-DCN, 2021 WL 1990642.

⁷⁶ Alex Hern, 'Apple and Google block NHS Covid app update over privacy breaches' (*The Guardian*, 12 April 2021) <<https://www.theguardian.com/world/2021/apr/12/apple-and-google-block-nhs-covid-app-update-over-privacy-breaches>> accessed 5 October 2021.

⁷⁷ France, Council of State, 12 March 2021, No. 450163, ECLI:FR:CEORD:2021:450163.20210312.

⁷⁸ Court of Justice of the European Union, judgment of 16 July 2020, *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, C-311/18, ECLI:EU:C:2020:559.

⁷⁹ Israel, Supreme Court, 1 March 2021, *Association for Civil Rights in Israel v Knesset* (HCJ 6732/20).

tracking individuals who tested positive to COVID-19 (thus including health and location data).

Finally, the issue of data protection arose in the abovementioned case in which Members of the European Parliament challenged the imposition of a certificate to access the institution's premises.⁸⁰

The claimants argued that this system involved risks for their personal health data. However, the President of the EU's General Court rejected their claims because (i) to minimize data, only the validity of the certificate and the full name of the individuals would appear on the screens used by security agents when controlling access to the buildings; (ii) personal data would not be processed for any other means, and security agents are subject to strict obligations of professional secrecy; and (iii) the impact assessment for the protection of personal data made by the Parliament considered the risk of vulnerability of the application used by security agents to be low.

5. Level of Competence to Regulate Vaccination

Finally, litigation also arose related to the more institutional issue of which level of government is competent to regulate vaccination. The issue can become very relevant in jurisdictions where different levels of government have different views as to the conduct of health policies related to the pandemic in general, and vaccination campaigns in particular.

This issue is sometimes political, as the case of Brazil shows, especially considering the presidential skepticism around the virus in general and the vaccine to fight it, more specifically. The Brazilian case is interesting because the issue of vaccine regulation happens at two levels: (i) market regulation (to what extent are private entities allowed to import vaccines?); and (ii) institutional regulation (to what extent can municipalities administer the vaccination campaign or impose proof of vaccination to access public spaces?). At the first level of market regulation, both public (individual Brazilian municipalities)⁸¹ and private entities (companies and associations) are seeking to import vaccines directly, to bypass the federal

government. However, the ability for private entities to import COVID vaccines is limited by a federal law which conditions import authorizations to the donation of these vaccines to the public health system, to be used within the scope of the National Immunization Program.⁸²

Even so, a Federal court of Brasília held, in a case brought by a trade union, that this mandatory donation was unconstitutional and constituted an illegal infringement of private property by the State.⁸³

At the second, institutional level, it was the Democratic Labor Party (*Partido Democrático Trabalhista*) which filed the aforementioned case before the Supreme Court in which it claimed that the states and municipalities should determine if vaccination was compulsory or not, in opposition to Bolsonaro's health policies. The Supreme Court ultimately held that states and municipalities could each decide to impose both penalties and indirect measures aimed at encouraging vaccination, thereby circumventing the federal Health Ministry.

For instance, the Supreme Court held that the municipality of Rio de Janeiro could impose proof of vaccination for access to sports facilities, reversing a lower court's decision to suspend that measure.⁸⁴

Nevertheless, such possibility may had little practical effects in some localities given the vaccine shortages experienced in Brazil.

Similarly, private individuals in Taiwan brought a case before Taipei's High Administrative Court requesting the authorities to import WHO-certified vaccines, in a context of vaccine scarcity.⁸⁵ The claimants based their arguments on the principle of equal protection and the people's rights to health.

But the court rejected the claim because there was no legal basis for individuals to request the competent authorities to act.

In contrast, the Italian Constitutional Court suspended the regional law⁸⁶ of Valle d'Aosta –an autonomous region in northwest Italy– aimed at legislating to fight the pandemic.⁸⁷ The Court held that health policies directed at fighting the pandemic, including the vaccination campaign, should be let at national level. In particular, the Court explained that, in the event of highly

⁸⁰ See section 2.2.

⁸¹ Several cases are pending before federal lower and appellate courts.

⁸² Art. 2, Lei No. 14.125 de 10 de março de 2021, Dispõe sobre a responsabilidade civil relativa a eventos adversos pós-vacinação contra a Covid-19 e sobre a aquisição e distribuição de vacinas por pessoas jurídicas de direito privado, D.O.U 10 March 2021, p. 3.

⁸³ Brazil, Federal Civil Court of the Federal District (21st chamber), 5 May 2021, Case No. 1020384-49.2021.4.01.3400.

⁸⁴ Brazil, Federal Supreme Court, 30 September 2021, Medida Cautelar na Suspensão de Tutela Provisória 824 Rio de Janeiro, Min. Presidente L. F.

⁸⁵ Taiwan, Taipei High Administrative Court, 30 June 2021, Administrative Verdict 2021 No. 623.

⁸⁶ Legge della Regione autonoma Valle d'Aosta/Vallée d'Aoste 9 dicembre 2020, No. 11 (Misure di contenimento della diffusione del virus SARS-COV-2 nelle attività sociali ed economiche della Regione autonoma Valle d'Aosta in relazione allo stato d'emergenza).

⁸⁷ Italy, Constitutional Court, ordinance No. 4 of 14 January 2021 (ECLI:IT:COST:2021:4) and judgment No. 37 of 12 March 2021 (ECLI:IT:COST:2021:37).

contagious diseases capable of spreading globally, logical and legal reasons call for a national discipline, to preserve the equality of citizens in the exercise of the fundamental right to health and to protect the collective interest.

The Court highlighted the fact that the failure to contain the virus at regional level would have serious consequences at national and, potentially, international levels. This reasoning applied not only to quarantines and other restrictive measures applicable to daily activities, but also to contagion tracing, methods of collecting and processing health data and the supply of drugs and vaccines. The same holds true for vaccination campaigns, which should be carried out according to national criteria defined by the State legislature, the Court held.

In the same vein, the Spanish government challenged the constitutionality of a modification to the Health Law of the autonomous community of Galicia which intended to allow the Galician authorities to mandate vaccination on their territory.⁸⁸ The Spanish Constitutional Court unanimously maintained the suspension of the Galician law because compulsory vaccination was not a preventive measure expressly contemplated in the Spanish Organic Law 3/1986, on special measures in matters of public health.⁸⁹

In the United States, some states have also successfully obtained federal courts to suspend the application of federal vaccine mandates for healthcare workers and in companies of 100 workers or more.

The courts in these cases based their decisions in parts on the balance between federal and state powers,⁹⁰ and the separation of powers between the executive and legislative branches.⁹¹

The results in the Italian and Brazilian cases sharply diverge. While the Italian Constitutional Court stresses the importance of national cohesion in adopting public health policies to curb the spread of COVID-19, the Brazilian Supreme Court allows federated and local entities to adopt restrictions aimed at inciting individuals to vaccinate. Of course, the situation of both countries is also very different: national unity in Italy is required because of its limited size and denser population, compared to Brazil's vast territory, which warrants differentiated policies. Nevertheless, the outcomes

in all cases also highlight the political divergences that can arise in the context of an unprecedented pandemic.

6. Conclusion

This survey shows how vaccination worldwide has raised important fundamental rights issues in several aspects. Cases related to mandatory vaccination show that the fundamental right to health is not limited to an individual dimension but also includes a collective one. Courts appear to agree that vaccination is not only a matter of individual choice but also one of solidarity with the most vulnerable groups. Still, the implementation of health passes intended to reopen economies and restore freedom of movement have been highly controversial and intensely litigated, highlighting the key role of public trust in the deployment of vaccination campaigns globally.

Moreover, courts have usually upheld prioritization decisions made by the authorities. While this issue will progressively disappear nationally, in countries with high vaccination rates, it will continue to be a hot topic internationally, considering the vaccination gap between higher and lower income nations. In fact, the debate about lifting patent protection for COVID vaccines⁹² has been an expression of the concerns that some countries do not have sufficient access to the jabs or do not have sufficient resources for appropriate supplies, although it might also hide issues of vaccine nationalism.

If privacy and data protection concerns were already topical pre-COVID, the pandemic exacerbated them because it forced individuals and organizations to shift many aspects of their lives online, including with regards to vaccination. However, this survey shows that courts have been called upon to establish fundamental rights safeguards in this space too, as the important cases in France and Israel show.

Finally, differences over public policies in the field of vaccination resulted in litigation over the appropriate level of government to conduct vaccination campaigns. These cases showed how political the issue is, but also how the constitutional framework and the specific characteristics of each

⁸⁸ Ley 8/2021, de 25 de febrero, de modificación de la Ley 8/2008, de 10 de julio, de salud de Galicia, DOG No. 39, 26 de febrero de 2021, p. 11984.

⁸⁹ Spanish Constitutional Court, 20 July 2021, No. 74/2021, ECLI:ES:TC:2021:74A.

⁹⁰ U.S. Court of Appeals for the Fifth Circuit, 12 November 2021, *B. e.a. v Occupational Safety and Health Administration*, No. 21-60845; U.S. District Court, Eastern District of Missouri, Eastern Division, 29 November 2021, *State of Missouri et al. v Joseph R. Biden*, No. 4:21-cv-01329-MTS.

⁹¹ U.S. District Court, Western District of Louisiana, Monroe Division, 30 November 2021, *State of Louisiana et al. v Xavier Becerra et al.*, No. 3:21-cv-03970-TAD-KDM.

⁹² 'America wants to waive patent protection for vaccines' (*The Economist*, 8 May 2021) <<https://www.economist.com/business/2021/05/08/america-wants-to-waive-patent-protection-for-vaccines>> accessed 5 October 2021.

country are shaping the vaccination campaigns themselves.

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⁹³ Please note that citations have been harmonized for the sake of uniformity in this article, but do not reflect proper referencing in their respective jurisdictions.

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Case Law Survey on Data Protection – Covid-19 Litigation Project

Chiara Angiolini

Abstract. The article aims at analyzing the data protection case law collected within the COVID-19 Litigation project until November 2021. In particular, the survey focuses on litigation concerning cases where the processing of personal data is directly aimed at addressing the ongoing pandemic. The article firstly provides a very brief overview of the cases, focusing on the purposes of processing (Section 2). Then, the decisions are described in relation to the legal issues they address: the grounds for the processing of public interest and consent (Section 3), the different aspects of personal data processing that have been considered by the Court (Section 4), data transfers outside external borders (Section 5), and the remedies that courts have granted in individual cases, building a classification of those remedies (Section 6). In the course of the analysis, as well as in Section 7, case law trends are critically considered, also looking at future litigation and possible lines of research to be further developed.

Keywords: *Data Protection, Judicial Dialogue, COVID-19, Pandemic, Litigation, Personal Data, Proportionality, Case Law, Privacy*

1. Introduction

The Covid-19 pandemic has led to a twofold increase in the use of digital instruments: on the one hand, technologies are used as a means of coping with the pandemic (*e.g.*, for contact tracing purposes) and, on the other hand, to carry out various daily activities remotely (*e.g.*, education and work). The widespread use of digital technologies during the current crisis has brought with it massive processing of personal data and therefore is likely to generate litigation. The existing case law reflects, at least in part, the two directions outlined: on the one hand, cases concern data processing related to the use of digital tools for performing activities during the pandemic (*e.g.*, e-proctoring systems in the field of education¹). On the other hand, litigation relates to the processing of personal data which is directly aimed at addressing the ongoing pandemic (*e.g.*, the use of drones for ensuring law enforcement of emergency measures).

This article focuses on the second group of cases, highlighting that within data protection case law, as in other areas, crucial issues concern the balancing of different interests, often protected in the form of fundamental rights, and remedies. The table attached to this article, where each case taken into consideration is briefly described, shows that data protection litigation concerning data processing for facing the pandemic exists in several countries and across continents.² Indeed, institutional variety characterizes the jurisdictions considered with regard to substantive law and its enforcers³. All legal systems of the considered case law⁴ enacted legislation related to privacy and data protection; in some cases, the normative framework was recently reformed, as in the EU and in Brazil, while in other countries, like in India, its reform is under discussion. Legislation concerning DPAs is an example of the institutional variety in relation to the enforcers⁵. For instance, in the EU, under the

¹ See, as an example, the decision of the Amsterdam Court of first Instance C/13/684665 / KG ZA 20-481 (an unofficial translation in English is available here: <https://gdprhub.eu/index.php?title=Rb._Amsterdam_-_C/13/684665/_KG_ZA_20-481> accessed 26 June 2021. On this decision, see: Chiara Angiolini and others 'Remote Teaching During the Emergency and Beyond: Four Open Privacy and Data Protection Issues of 'Platformised' Education' (2020) *Opinio Juris in Comparatione*, 1, 46-72.

² The table annexed to this article briefly describes each case and includes the hyperlinks to the decisions when available.

³ More generally, according to the United Nations database, at the global level, 66% of countries have data

protection and privacy legislation, 19 % of States do not have that kind of laws, and 10% of countries have draft legislation. See <<https://unctad.org/page/data-protection-and-privacy-legislation-worldwide>> accessed 12 June 2021.

⁴ See the table annexed to this survey. The table sketches an overview of cases, considering the main issues at stake, the nature of data processed, and of parties in the proceedings.

⁵ In the EU legal system, the text GDPR is available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679>> accessed 11 June 2021. On the Indian legal framework, see, for a first overview M Deva

General Data Protection Regulation (GDPR), DPAs play an important role, as they have a significant set of advisory, investigative and corrective powers.⁶ In the Americas, various approaches exist (*e.g.*, in Brazil and Colombia a DPA was created, in Chile a DPA does not exist, in the U.S. the Federal Trade Commission as a consumer protection authority, acts as a privacy enforcement agency).⁷

The objective of the article is twofold. The first goal is to provide a qualitative analysis of data protection case law which has been collected and selected in the framework of the ongoing 'COVID-19 Litigation Project', conducted by the University of Trento.⁸ The article discusses cases collected through November 2021. It identifies recurrent legal issues and the data processing aspects that judges consider in their reasoning, and provides an overview of remedies granted by Courts. However, even if the main purpose of this survey is the analysis of judicial pronouncements, some examples of decisions taken by Data Protection Authorities (DPAs) are considered, as in the field of

data protection such authorities are often relevant actors. In accordance with the survey's objectives, only DPA decisions concerning a specific case were analyzed, excluding guidelines, opinions and other documents.

The second objective of the article is to build on the qualitative analysis of the case law in order to identify legal questions that may arise in future litigation and the legal issues that need further investigation by scholars.

The analysis begins in section 2, which provides some methodological and comparative remarks and a brief overview of the case law analyzed. Section 3 considers the legal grounds used for processing data. It focuses on the data subjects' consent and public interest as grounds for processing, examining the role played by the principles of necessity and proportionality in the case law. Section 4 identifies and analyses the aspects of data processing that Courts used in their reasoning and analyses Courts' arguments (*e.g.*, data retention period, means of processing).

Prasad, C Menon Suchithra, 'The Personal Data Protection Bill, 2018: India's regulatory journey towards a comprehensive data protection law' (2020) *International Journal of Law and Information Technology*, 28, 1. At the date of last revision of this survey, the 25th of October 2021, the proposed reform (Personal data protection bill) is pending (it is possible to accede to the legislative procedure here: <<http://loksabhaph.nic.in/Legislation/NewAdvsearch.aspx>> accessed 11 June 2021. For a first overview of the Israeli system: Soren Zimmermann, 'The legal Framework of Data Protection in Israel: A European Perspective' (2019) *European Data Protection Law Review* 2, 246, of the Brazilian legal framework, see: Arye Schreiber 'Right to Privacy and Personal Data Protection in Brazilian Law' in Dário Moura Vicente and Sofia de Vasconcelos Casimiro (eds.) *Data Protection in the Internet* (Springer, 2020) 45; of Colombia: Ana Isabel Gómez-Córdoba and others 'El derecho a la protección de datos personales, tecnologías digitales y pandemia por COVID-19 en Colombia' (2020) *Revista de bioética y Derecho*, 271 <<https://revistes.us.edu/index.php/RBD/article/view/31830/32129>> accessed 1 December 2021 and more generally with regard to Latin America: Inter-American Commission on Human Rights, *Pandemic and Human Rights in the Americas, Resolution 1/2020* <<https://www.oas.org/en/iachr/decisions/pdf/Resoluci-on-1-20-en.pdf>> accessed 1 December 2021; Luca Belli and Nicolo Zingales, 'Data protection and social emergency in Latin America: COVID-19, a stress test for democracy, innovation, and regulation' (2021) *International Data Privacy Law*, vol. 11, 1, 1-2 <<https://academic.oup.com/idpl/article/11/1/1/6129383>> accessed 1 December 2021; WIG Aponte 'Protección de Datos y Transparencia de la Información: Perspectivas para la Regulación Post-Pandemia en una Sociedad Digital desde Algunas Experiencias Latinoamericanas' (2020) *Direitos Fundamentais & Justiça - special issue - 69*; of the legal system in Montenegro: Nasir Muftic Tahir

Herenda, 'Sacrificing Privacy in the Fight Against Pandemics: How Far Is Too Far? Examples from Bosnia and Herzegovina and Montenegro', in *Balkan Yearbook of European and International Law* (Springer 2020).

⁶ See art. 58 GDPR.

⁷ On the topic: Daniel Alvarez-Valenzuela, 'La protección de datos personales en contextos de pandemia y la constitucionalización del derecho a la autodeterminación informativa' (2020) *Revista Chilena de Derecho y Tecnología*, 1, 1. See, for a comparative overview: Dário Moura Vicente and Sofia de Vasconcelos Casimiro 'Data protection in the Internet', in Katharina Boele-Woelki and others (eds.) *General Reports of the XXth General Congress of the International Academy of Comparative Law* (Springer, 2020) 611. For a comparison between different DPAs in Latin America see: Daniel Ospina-Celis and Juan Carlos Upegui Mejía 'EMNBD y Protección de Datos Personales en Brasil, Chile, Colombia y México: La Experiencia Común' in Vivian Newman Pont, Daniel Ospina-Celis, Juan Carlos Upegui (eds.) 'Festín de datos Empresas y datos personales en América Latina' (Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2020) 217; with regard to the EU system, see the Chapter, VI 'Independent supervisory authorities' of of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation - GDPR) [2016] OJ L 119, 4.5.2016.

⁸ On the structure and the project's aims and methodology, see the opening survey of this section Fabrizio Cafaggi and Paola Iamiceli, 'Global Pandemic and the role of courts'. When the author, mainly for language reasons, could not have direct access to the decisions, she relied only on the case summaries drafted by the project's collaborators. When direct access to the judgment was possible, such case summaries were a helpful tool for developing a comparative analysis.

Section 5 describes the case law concerning data transfers outside external borders, a critical aspect of data protection law. Section 6 gives an overview of remedies granted by Courts and, finally, section 7, building on the previous analysis, provides insights for identifying possible future litigation and related emerging legal issues. The last section provides some concluding remarks.

2. Data Processing to Face the COVID-19 Crisis: the Purposes of Processing and the Nature of Subjects who Process Data

As noted above, the article focuses on cases where the processing of personal data is directly aimed at addressing the ongoing pandemic. Thus, it will not deal with the litigation that has arisen due to the massive use of digital technologies for other purposes (*e.g.*, education). This choice allows for a focus on cases where the pandemic is a central element, as the purposes of processing are directly related to it. The following table summarizes the purposes of data processing related to COVID-19 in the case law analyzed.

PURPOSE	DECISION
Contact tracing purposes	India , Central Information Commission, <i>Saurav Das vs Deptt of Information Technology</i> , 26 November 2020
	India , The High Court of Orissa, <i>Cuttack, Ananga Kumar Otta v. Union of India & Ors</i> , WP (C) No. 12430/2020, decisions of 28 May 2020 and 16 July 2020
	India , High Court of Kerala, <i>Ramesh Chennithala vs State of Kerala</i> , 21 August 2020
	Austria , Constitutional Court, V 573/2020, 10 March 2021
	Belgium , Council of State, Decision no. 248.124, 5 August 2020
	Belgium , Council of State, no. 248.108, 3 August 2020
	France , French Constitutional Council decision no. 2020/800, 21 May 2020
	Spain , Asturias High Court of Justice, 10 June 2021
	Switzerland , Administrative Court of Zürich, AN.2020.00012, 3 December 2020
Contact tracing purposes and other purposes related to the spread of COVID-19	India , High court of Karnataka, <i>Anivar A Aravind v. Ministry of Home Affairs, GM PIL WP (C) 7483 of 2020</i> , 25 January 2021
	Israel , High Court of Justice, 2109/20 <i>Ben Meir v. Prime Minister</i> , 26 April 2020
	Israel , High Court of Justice, 6732/20 <i>Association for Civil Rights in Israel v. Knesset</i> 1 March 2021
Contact tracing and enforcement of COVID-19 measures	Norway , Data Protection Authority, decisions of 15 June and 17 August 2020
Enforcement of provisions taken for facing the COVID-19 crisis	India , High Court of Kerala, <i>Balu Gopalakrishnan & Anr. v. State of Kerala & Ors.</i> , W.P. (C). Temp No. 84, 24 April 2020
	France , Council of State, decision no. 441065, of 26 June 2020
	France , Council of State, dec. no. 440916 of 19 June 2020.
	Montenegro , Constitutional Court of Montenegro, decision U - II 22/20, 23 July 2020
Health and social emergency management, including legislation concerning the COVID-19 certificates	Poland , Data Protection Authority, no. DKN.5101.25.2020, 12 November 2020,
	France , Council of State, no. 453505, 6 July 2021
	Spain , Supreme Court, no. 1112, 14 September 2021
	Spain , Supreme Court, no. 1103, 18 August 2021
	Colombia , Constitutional Court, judgement C-150/20, 27 May 2020
Health emergency management and research purposes	Austria , Data protection authority, Decision of 15 February 2021
	France , Council of State, dec. decision nn. 440442, 440445; 18 May 20220; Council of State, decision n°446155, 22 December 2020
Information through media	India , Madras High Court, <i>Adv. M. Zainul Abideen vs The Chief Secretary</i> , W.P.No.7491 of 2020, 22 April 2020
Building official statistics	Brazil , Federal Supreme Court ADI 6387 MC-REF decisions of 24 April and 7 May 2020
Healthcare management and other purposes	France , Council of State, no. 450163, 12 March 2021
	France , Council of State, no. 44493, 13 October 2020

Not surprisingly, the table shows that case law mainly concerns data processing for purposes of collective and public interest, in particular for i) contact tracing; ii) the enforcement of provisions

taken for facing the COVID-19 crisis; and iii) health emergency management.

Moreover, the nature of subjects who process data is a relevant aspect, as the provisions

establishing the institutions that process data and setting its governance may have an impact on applicable data processing rules and on the level of transparency. Within the analysed case law the processing is often conducted by public authorities, but on various occasions private companies are involved in the processing⁹. Moreover, sometimes, data processing is carried out by private parties on the basis of an administrative or legislative decision (*e.g.*, restaurant owners process contact details of clients for contact tracing purposes¹⁰). As to the parties in the proceedings, often private parties (individuals or collective entities) sought the action and public bodies are the defendants (see also the table annexed to this article).¹¹

Adopting a bottom-up approach, the reading and the analysis of the cases lead to identifying four main issues which are addressed in the decisions: i) the legal grounds justifying the processing, also relating to its purpose; ii) the concrete aspects of the processing considered relevant by Courts in their reasoning (*e.g.*, means, retention period); iii) the transfer of personal data across national borders; and iv) the remedies provided by the Courts.

3. When Can Personal Data be Processed During the Pandemic? Data Subjects' Consent and Public Interests Grounds in Courts' Decisions

Defining when data processing may be carried out for the purpose of facing the pandemic is a crucial

issue within the analyzed case law, as the way in which lawful data processing's boundaries are set on the one hand identifies the limits to the possibility to use data for facing the pandemic, and, on the other hand, clearly influence the level of protection of data subjects.

Most of the decisions analyzed may be divided in two groups: i) cases where the data processing is justified by public health reasons; and ii) cases where data subject consent is required for processing. However, sometimes consent and public interest are both applied as grounds for the processing, with the aim of balancing the various interests at stake (*e.g.*, the Israeli case law). It should be noted here that there are few cases which have not been included in this paragraph because the decisions do not provide elements concerning the grounds for processing¹², or data processing is based on grounds other than public interests related to the pandemic and consent.¹³

3.1. Data Processing Based on Public Health Reasons: the Role of Necessity and Proportionality Principle

On several occasions, Courts assessed cases where data processing was based on public health reasons. The processing of personal data has often been very useful in dealing with the pandemic, notably for monitoring purposes.¹⁴ At the same time, defining the scope of the processing operations necessary for facing the COVID-19 crisis is crucial to prevent

⁹ For example, in the case High Court of Kerala, *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors.*, W.P. (C) Temp No. 84, 24 April 2020, the Court assessed the lawfulness of a contract between the Government of Kerala and a USA-based software company, aimed at creating an online data platform for data analysis of medical/ health data in relation to COVID-19. In Europe, a case concerned the lawfulness of an administrative act imposing a duty of private health centers to share negative results of PCR tests with public administration (Austrian data protection authority, Decision of 15 February 2021). Moreover, two cases concern the lawfulness of data transfers to a third country, outside the European Economic Area (French Council of State, 12 March 2021, no. 450163, and 13 October 2020, no. 44493). Another French case concerns the lawfulness of data processing, within a platform of health data for facilitating the use of health data for improving the health emergency management and fostering knowledge about covid-19 (French Council of State, dec. no. 440916 of 19 June 2020). Furthermore, in South America, the Brazilian Federal Supreme Court ADI 6387 MC-REF decisions of 24 April and 7 May 2020 reviewed the constitutionality of provisions that obliged telecommunication Companies to share the list of names, telephone numbers, and addresses of their consumers with Brazilian Institute of Geography and Statistics Foundation, for supporting

official statistic during the public health emergency resulting from the COVID-19 pandemic.

¹⁰ As to case law concerning restaurant's owners see: Austrian Constitutional Court, 10 March 2021, V 573/2020 ; Belgian Council of State, Decision n°248.124 of 5 August 2020; with regard to media: Madras High Court, *Adv. M. Zainul Abideen vs The Chief Secretary*, W.P.No.7491 of 2020, 22 April 2020.

¹¹ For a brief description of each case see the table attached to this article.

¹² *E.g.*, Central Information Commission, *Saurav Das vs Deptt of Information Technology*, 26 November 2020; High Court of Kerala, *Ramesh Chennithala vs State of Kerala*, 21 August 2020; Data Protection Authority, decisions of 15 June and 17 August 2020; on data transfers outside external borders: French Council of State, no. 450163, 12 March 2021 and no. 44493, 13 October 2020; on a data breach: Data Protection Authority, no. DKN.5101.25.2020, 12 November 2020.

¹³ *E.g.*, on the freedom of press: Madras High Court, *Adv. M. Zainul Abideen vs The Chief Secretary*, W.P.No.7491 of 2020, 22 April 2020.

¹⁴ On this aspect see, for instance, the OECD 'Policy Responses to Coronavirus (COVID-19) Tracking and tracing COVID: Protecting privacy and data while using apps and biometrics', 23 April 2020

the pandemic from becoming an opportunity to justify personal data processing in a way that is detrimental to data subjects' rights and interests. For instance, the risks of widespread surveillance are at stake, for example, as shown in the literature, with regard to the future use of collected data beyond the purpose of facing the actual pandemic¹⁵. However, the rules for organizing these different interests and their interpretation by Courts vary across continents and countries.

In Europe, EU law provides various legal basis for processing. According to one of them, personal data may be processed if such processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the data controller, and it is authorized by law.¹⁶ Moreover, even sensitive data (including health data) may be processed where it is necessary for reasons of substantial public interest, for the provision of health or social care, or treatment or the management of health or social care systems, provided that certain guarantees (*e.g.*, the processing must be authorized by law) are respected.¹⁷ Accordingly, case law within EU countries often focuses on the necessity of processing for the protection of public health and on the existence of a law authorizing it.¹⁸ Three groups of cases may be identified by reason of the nature of the subjects who process data: i) public: personal data processed by public authorities; ii) public-private: personal data disclosed by public authorities to the public or shared by private parties to public bodies; and iii) private: personal data processed by private parties.

As to data processed by public bodies, in two decisions the French Council of State assessed the lawfulness of data processing conducted by public authorities through drones for ensuring the

enforcement of provisions restricting the freedom of movement for facing the COVID-19 pandemic. In both cases, the Council considered that the processing was legitimate in the light of the COVID-19 crisis, as it is necessary for public safety.¹⁹ Nevertheless, in one of these decisions, the French Council of State affirmed that surveillance conducted through drones that process personal data must stop and may restart only if, after the opinion of the French DPA (*CNIL*), it is approved through a regulatory text authorizing the creation of a personal data processing system in compliance with applicable law.²⁰ In its reasoning, the Council of State mentioned the principle of proportionality, affirming that the measures taken by public authorities in order to fight the pandemic which may limit the exercise of fundamental rights and freedoms must be necessary, appropriate and proportionate to the objective of safeguarding public health which they pursue.²¹

In another case, the French Council of State, in the light of the current health risks, upheld the necessity and proportionality of health data processing within the French Health Data Hub for purposes of fighting the COVID-19, where the Minister of Health authorized this processing.²² Moreover, in its decision 2020/800 of 21 May 2020 concerning the processing of health data by public bodies for combatting COVID-19, the French Constitutional Council's reasoning focused on the necessity assessment.²³ In particular, the Council decided on the necessity of data processing for fighting the pandemic, stating that it is justified that a number of public bodies in charge of health

<<https://www.oecd.org/coronavirus/policyresponses/tracking-and-tracing-covid-protecting-privacy-and-data-while-using-apps-and-biometrics-8f394636/>> accessed 22 October 2021. An example of processing of personal data for monitoring purposes at the national level is the processing of personal data carried by the Italian Institute of Health (*Istituto Superiore di Sanità*) for the purposes of Epidemiological and microbiological surveillance in the context of the SARSCoV-2 epidemic (Covid-19). Further information is available at: <https://www.epicentro.iss.it/en/coronavirus/sars-cov-2-integrated-surveillance-data> (accessed 22 October 2021).

¹⁵ On this aspect see Ignacio Cofone, 'Immunity Passports and Contact Tracing Surveillance' (2021) *Stanford Technology Law Review* 24, 176, 225 ss.; WIG Aponte (n. 5) 83.

¹⁶ See art. 6 of the Reg. (EU) 2016/679 (GDPR).

¹⁷ See art. 9 GDPR.

¹⁸ A detailed analysis is provided in this paragraph; two examples of such decisions are the following:

Administrative Court of Zürich, AN.2020.00012, 3 December 2020; French Council of State, decision nn. 440442, 440445, 18 May 2020.

¹⁹ See the decisions nn. 440442, 440445, of 18 May 2020 and no. 446155, 22 December 2020.

²⁰ French Council of State, decision nn. 440442, 440445, 18 May 2020.

²¹ See point 4 of the decision.

²² French Council of State, decision no. 440916 of 19 June 2020.

²³ The purposes were: i) the identification of persons infected with Covid-19 by ordering, performing and collecting the results of relevant medical examinations and providing evidence of clinical diagnosis; ii) the identification of persons who, having been in contact with them, are at risk of infection; iii) guidance of both to prophylactic medical isolation prescriptions and support during and after the end of these isolation measures; iv) national and local epidemiological surveillance as well as research on the virus and on ways to control its spread.

services can access the data.²⁴ However, the Council also concluded that social services are not allowed to process such data because their purposes are not directly connected to the pandemic, showing the need to establish both necessity and proportionality of the measures in relation to the pandemic.²⁵ Moreover, in another case, the French Council of State, assessing the lawfulness of data processing related to the use of thermal cameras in schools by municipal staff based on public interest reasons related to the pandemic, stated that there was a lack of a legal provision authorizing the processing.²⁶

Some cases concerned the disclosure of data by public authorities to the general public or the duty of private parties to share personal data with public bodies. As to the former, the Constitutional Court of Montenegro decided a case concerning the constitutionality of a measure, taken by the national coordinating body for contagious diseases, to publish names and addresses of persons in self-isolation in relation to COVID-19 on the Government website to ensure the enforcement of rules on self-isolation.²⁷ This decision shows that Courts may separate the assessment on the legitimacy of the aim pursued through processing and the judgement concerning proportionality and necessity of the concrete measures adopted.²⁸ The Court, relying on European Court of Human Rights' case law, took into account the existence of a legitimate aim and its lawfulness, concluding that there was a legal basis for processing and that the aim of protecting public health is legitimate, considering the COVID-19 pandemic.²⁹ However, in assessing the necessity of the measure in a democratic society, the Constitutional Court of Montenegro found that such a measure did not strike a fair balance between the public health protection interests and the right to privacy.³⁰

With regard to cases of data sharing from private parties to public authorities, in a decision on 15 February 2021, the Austrian DPA stated that the

duty of private health centers to share negative results of PCR tests with public administration was justified because the processing was needed for developing the best strategy to combat the pandemic.³¹ The DPA affirmed that the public interest reasons which justified the processing of health data may be specified by law or through an administrative act.³²

As to cases where private parties process data, a decision of the Belgian Council of State concerns the obligation of restaurant clients to give the contact information of at least one person of their table. In this case, the Council considered the purposes of processing (*i.e.*, the building of an effective contact tracing system) as relevant for denying the existence of a danger to the fundamental right, which may have justified an urgency procedure.³³ In a similar case, the Austrian Constitutional Court stated that a municipal ordinance requiring restaurant owners to collect and share data for contact tracing purposes was not sufficiently justified with regard to the necessity and proportionality assessment, the latter being required by national law.³⁴

Moreover, the processing of personal data within systems based on the so-called 'COVID certificates' is at stake in several decisions, where the legislative measures introducing such certificates are challenged.³⁵ As to Europe, in the EU, the Regulation 2021/953 of the European Parliament and of the Council, approved on 14 June 2021, establishes a framework for the issuance, verification, and acceptance of interoperable COVID-19 vaccination, test, and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic.³⁶ As to the case law, the French Council of State in an urgency procedure assessed the national legislation which allowed the French Prime Minister to require the presentation of the results of a negative test, of proof of vaccination status or recovery related to COVID-19, in order to allow some travels and the access to

²⁴ French Constitutional Council, decision 2020/800 of 21 May 2020.

²⁵ French Constitutional Council, decision 2020/800 of 21 May 2020.

²⁶ French Council of State, decision no. 441065, of 26 June 2020.

²⁷ Constitutional Court of Montenegro, decision no. U - II 22/20, of 23 July 2020.

²⁸ Constitutional Court of Montenegro, decision no. U - II 22/20, of 23 July 2020.

²⁹ Constitutional Court of Montenegro, decision no. U - II 22/20, of 23 July 2020.

³⁰ Constitutional Court of Montenegro, decision no. U - II 22/20, of 23 July 2020.

³¹ Austrian DPA, Decision of 15 February 2021.

³² Austrian DPA Decision of 15 February 2021.

³³ Decision no. 248.124 of 5 August 2020.

³⁴ See the decision of 10 March 2021, V 573/2020.

³⁵ On this issue, see: Alberto Alemanno and Luiza Bialasiewicz 'Certifying Health: The Unequal Legal Geographies of COVID-19 Certificates' (2021) *European Journal of Risk Regulation* 1.

³⁶ The text approved is available at: <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=celex%3A32021R0953> (accessed 26 June 2021). A comment to the regulation, published when it was still a proposal is provided for by Chiara Angiolini, 'Le proposte di Regolamento UE sul Certificato COVID digitale UE tra tutela della salute, libertà di circolazione e protezione dei dati personali', (2021) *Biolaw Journal* 2, 151.

certain places, establishments or events involving large gatherings of people for leisure activities or trade fairs.³⁷ In its decision, the Council of State affirmed the existence of a legal basis for processing under the GDPR³⁸, *i.e.*, the necessity of the processing for reasons of public interest in the area of public health. The Council of State took into account that i) the 'health pass' is likely to reduce the circulation of the Covid-19 virus in France by limiting the flow of people, ii) its use has been restricted to travel to foreign countries, Corsica and overseas, and to access to places of leisure, without affecting daily activities or the exercise of freedom of worship, assembly or demonstration.³⁹ The Spanish Supreme Court decided another case concerning national legislation regulating the use of COVID-19 certificates, within a procedure for the ratification of health measures restrictive of fundamental rights. The Court stated that limiting the access to certain inside entertainment establishments, where there is a large flow of people, to those persons who can prove that they are in possession of a valid 'COVID passport' must be ratified.⁴⁰ The Court considered that even if health data are processed, the pandemic situation, the massive vaccination, and the solidarity principle involved in protecting and helping each other prevails over privacy. As to the right to data protection, the Court stated that this right is not limited by the measure at stake, because the data are not collected as the data subject must only show the data for entry in the establishment.⁴¹ Framing this decision in the light of the EU legislation, it should be recalled that under the GDPR the notion of "data processing" is broadly⁴², and that also the access to the data for checking that the individual is

in possession of the 'COVID passport' is a data processing under EU law.⁴³

In Asia, the decisions vary. For instance, in India, the High Court of Orissa decided a case where the public disclosure of the identities of confirmed COVID-19 patients and persons in quarantine was implicated.⁴⁴ The Court concluded that the State Government approved measures to prevent unauthorized disclosure, and affirmed that the disclosure of the identity of such persons in exceptional circumstances of public health and safety concerns to the discretion of the State.⁴⁵ The Court in this case stated that disclosure is subject to scrutiny of a triple test developed in the case *K.S. Puttaswamy and another v. Union of India and others* (2017), where the Nine Judge Constitution Bench of the Apex Court stated that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Indian Constitution and as a part of the freedom guaranteed by Part-III of that Constitution.⁴⁶ The High Court of Orissa recalled that, according to *Puttaswamy*, the right to privacy is not absolute, as it can be subject to reasonable restrictions and the interference in such right can only be justified if "(i) the action is sanctioned by law; (ii) the action is aimed at achieving a legitimate aim; and (iii) the action is necessary and proportionate for the achievement of that aim".⁴⁷

Furthermore, the exceptionality of the COVID-19 crisis was an element considered by the High Court of Kerala in its decision *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors., W.P. (C). Temp No. 84, 24 April 2020*.⁴⁸ Here, the Government of Kerala affirmed that it could not continue the fight against COVID-19 without the assistance of software

³⁷ French Council of State, decision no. 453505, of 6 July 2021.

³⁸ Art. 9, para 2, lett. i) GDPR.

³⁹ French Council of State, decision no. 453505, of 6 July 2021, § 13.

⁴⁰ Spanish Supreme Court, no. 1112, 14 September 2021.

⁴¹ Spanish Supreme Court, no. 1112, 14 September 2021.

⁴² Art. 4, para 1, no. 2 GDPR defines processing as "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

⁴³ This interpretation is confirmed by EU legislation on the COVID certificate, which expressly regulates the cases where the data can be accessed for the purposes of the Regulation. In this respect, Art. 10 § 3 of the EU Regulation 2021/953 states that the personal data

included in the certificates shall be processed by the competent authorities of the Member State of destination or transit, or by the cross-border passenger transport services operators required by national law to implement certain public health measures during the COVID-19 pandemic, only to verify and confirm the holder's vaccination, test result or recovery".

⁴⁴ High Court of Orissa, Cuttack, Ananga Kumar Otta v. Union of India & Ors., WP (C) No. 12430/2020, decision of 16 July 2020.

⁴⁵ High Court of Orissa, Cuttack, Ananga Kumar Otta v. Union of India & Ors., WP (C) No. 12430/2020, decision of 16 July 2020.

⁴⁶ High Court of Orissa, Cuttack, Ananga Kumar Otta v. Union of India & Ors., WP (C) No. 12430/2020, decision of 16 July 2020.

⁴⁷ High Court of Orissa, Cuttack, Ananga Kumar Otta v. Union of India & Ors., WP (C) No. 12430/2020, decision of 16 July 2020.

⁴⁸ High Court of Kerala, decision *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors., W.P. (C). Temp No. 84, 24 April 2020*.

provided by a U.S. based company, and the the judges stated that they “do not think it will be prudent on our part, when our country and the whole world is fighting the pandemic, to issue any orders that would create a perception of impeding such effort”.⁴⁹

In South America, Brazil’s Federal Supreme Court decided a case concerning the obligation, imposed by a provisional presidential decree, of telecommunication companies to share the list of names, telephone numbers, and addresses of their consumers with the Brazilian Institute of Geography and Statistics Foundation.⁵⁰ The Court stated that such a duty violates the right to intimacy and private life because the public entities had not proven the existence of a legitimate public interest to share personal data, considering the necessity, adequacy, and proportionality of the measure.⁵¹ Moreover, the Federal Supreme Court took into account the fact that the guarantees of adequate and safe treatment of the shared data were absent.⁵² In Colombia, the Constitutional Court undertook constitutional review of the Legislative Decree 458 of 2020, through which the National Administrative Department of Statistics was to provide, when requested, information collected in censuses, surveys, and administrative records to the State entities responsible for adopting measures to control and mitigate COVID-19.⁵³ The legislation provides that the data may only be used for these specific purposes.⁵⁴ The Court’s reasoning relied on laws no. 1266/2008 and no. 1581/2012, which established the principles of purpose, freedom, and confidentiality in data processing and on the related case law.⁵⁵ Applying such principles to the case, the Court stated that data sharing between public bodies was legitimate because it aimed to ensure the minimum vital needs of the country’s most vulnerable population, through

their rapid identification.⁵⁶ Furthermore, the Court considered that data can be shared and further processed only to implement measures to control and mitigate the COVID-19, and even then only while the health emergency is in force.⁵⁷ In the facts of the case, data confidentiality was guaranteed and, accordingly, the Court stated that there was not a violation of the Constitution.⁵⁸

In sum, where the legal grounds for processing consist in public interests related to the pandemic, the respect of data subjects’ interests has been ensured through different means. First, in various cases concerning data processing by public authorities, Courts stated that the processing must be authorized by law⁵⁹ or at least by an administrative act.⁶⁰ Second, across continents, Courts applied the principles of necessity and proportionality balancing the fundamental rights and interests at stake.⁶¹ Further research may compare the way Courts, across countries and continents, apply the principles of proportionality and necessity, separately or jointly. Such an analysis could be of particular interest for understanding whether and how the application of the principles differs across jurisdictions, and the consequences in terms of protection of fundamental rights of the various interpretations of such principles. Furthermore, from a comparative law perspective, this analysis could show the influences and relationships between legal systems and the existence of judicial dialogue between courts.

3.2. Data Subject’s Consent

In an international landscape where the role of the data subject’s consent in granting self-determination and fundamental rights is under discussion⁶², a cluster of cases concern the role of

⁴⁹ High Court of Kerala, decision *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors.*, W.P. (C). Temp No. 84, 24 April 2020.

⁵⁰ Decisions ADI 6387 MC-REF of 24 April and 7 May 2020.

⁵¹ Decisions ADI 6387 MC-REF of 24 April and 7 May 2020.

⁵² Decisions of 24 April and 7 May 2020, ADI 6387 MC-REF.

⁵³ Constitutional Court, judgement C-150/20, 27 May 2020.

⁵⁴ Constitutional Court, judgement C-150/20, 27 May 2020.

⁵⁵ Par. 7.4 of the decision.

⁵⁶ Par. 8.3.4 of the decision.

⁵⁷ Constitutional Court, judgement C-150/20, 27 May 2020.

⁵⁸ Constitutional Court, judgement C-150/20, 27 May 2020

⁵⁹ *E.g.*, French Council of State, 18 May 2020, nn. 440442, 440445; French Council of State, decision no. 441065, of 26 June 2020; Israeli decision 2109/20, *Ben Meir v. Prime Minister*, of 26 April 2020.

⁶⁰ *E.g.*, Austrian DPA Decision of 15 February 2021.

⁶¹ *E.g.*, French Council of State, 18 May 2020, nn. 440442, 440445; French Council of State, decision no. 440916 of 19 June 2020; French Constitutional Council, ; decision 2020/800 of 21 May 2020; Constitutional Court of Montenegro, decision no. U - II 22/20, of 23 July 2020; Austrian Constitutional Court, 10 March 2021, V 573/2020; High Court of Orissa, Cuttack, *Ananga Kumar Otta v. Union of India & Ors.*, WP (C) No. 12430/2020, decision of 16 July 2020; Brazil Federal Supreme Court, Decisions ADI 6387 MC-REF of 24 April and 7 May 2020.

⁶² See, for example: Laura Brandimarte, Alessandro Acquisti and George Loewenstein, *Misplaced Confidences: Privacy and the Control Paradox* (2012) Soc. Psych. Per. Sc. 4, 340; Bart Willem Schermer, Bart Custers Simone van

consent with respect to the processing of health data during the pandemic. Obviously, Courts' trends in this field also vary depending on existing legislation. However, the case law shows that the data subject's consent is considered a legal tool for avoiding or limiting intrusive data processing.⁶³

In Europe, data subjects' consent is a lawful ground for processing personal data, among others legal bases, such as, under certain conditions, the legitimate interest of the data controller or the public interest.⁶⁴ Moreover, consent must be freely given, specific, informed, and must consist of an unambiguous indication of the data subject's wishes, provided through a statement or by a clear affirmative action.⁶⁵ Furthermore, as health data is considered a special category of personal data, it is subject to specific rules for processing.⁶⁶ In particular, according to Art. 9 Reg. UE 2016/679, the processing of such data is prohibited, with some exceptions including the data subject's explicit consent.⁶⁷ In the case law, the French Council of State applied the health data regime in deciding the lawfulness of health data processing through a thermal camera in schools, recalling that one of the exceptions provided for by art. 9 of GDPR is data subject's explicit consent.⁶⁸

Outside the EU, the Constitutional Court of Montenegro considered the role of data subjects' consent, assessing the constitutionality of the decision, taken by the National Coordinating Body for Contagious Diseases, to publish names and addresses of persons in COVID-19 self-isolation on the Government's website.⁶⁹ The Court relied on

existing legislation, according to which health data may be processed only with the express consent of the person and when their processing is necessary for the purpose of detecting, preventing or diagnosing of data subject's illness or carrying out their medical treatment, as well as for the improvement of health services, in so far as the processing is done by a health worker or other person subject to the duties of keeping professional secret.⁷⁰ Relying on this legislation, the Court held that the health data was not processed according to the law, *i.e.* without the explicit consent of the person.⁷¹

As to Asia, in India, the High court of Karnataka stated that the use of a contact-tracing app (*Aarogya Setu*) must be voluntary and that personal data, and specifically health data, can be collected and further processed (*i.e.*, use and sharing) through this app only after the data subject has given her informed consent. The Court affirmed also that the benefits of any services that are provided by the Governments, its agencies, and instrumentalities must not be denied to an individual on the ground that she has not downloaded and installed the abovementioned app.⁷² Furthermore, in a case concerning the use of a USA based software company for data processing by Government of Kerala, the High Court of Kerala, in a concise argument, stated that data may be accessed by the private company, or by other third-party service providers, only on the basis of citizens' specific consent.⁷³

der Hof 'The crisis of consent: how stronger legal protection may lead to weaker consent in data protection' (2014) *Eth. Inf. tech.*, 2; Marcin Betkier, *Privacy online, Law and the Effective regulation of online services* (Intersentia, 2019) 9.

⁶³ For some references to the critical debate on the effectiveness of consent for ensuring data subject's self-determination see footnote no. 66.

⁶⁴ See art. 6, Reg. (EU) 2016/679 (GDPR).

⁶⁵ See art. 6, art.7, art. 4 (11) Reg. (EU) 2016/679 (GDPR).

⁶⁶ See art. 9 Reg. (EU) 2016/679 (GDPR). In the European context, as to the special regime of health data, see the Council of Europe, *Recommendation CM/Rec(2019)2, Protection of Health-Related Data*.

⁶⁷ It should be recalled that to process lawfully special categories of data, both an exception to the prohibition in Art. 9 and a legal basis for processing among those provided for in Art. 6 EU Reg. 2016/679 must be applied. In other words, the processing of special categories of personal data falling under art. 9 GDPR should be made only if i) an exception to the prohibition of processing provided for by art. 9 GDPR is applicable and ii) a legal basis provided for by art. 6 GDPR applies. See in that regard: EDPB, 'Opinion 3/2019 concerning the Questions

and Answers on the interplay between the Clinical Trials Regulation (CTR) and the General Data Protection regulation (GDPR) (art. 70.1.b)'], of 23 January 2019, § 28, p. 8; EDPB, 'Document on response to the request from the European Commission for clarifications on the consistent application of the GDPR, focusing on health research', 2 February 2021, § 13; European Data Protection Supervisor, '*Preliminary Opinion 8/2020 on the European Health Data Space*', 17 November 2020, §§ 15-16).

⁶⁸ Decision no. 441065, of 26 June 2020.

⁶⁹ Constitutional Court of Montenegro, decision no. U - II 22/20, of 23 July 2020.

⁷⁰ On the Montenegro legal framework see: N Muftić, T Herenda, (n. 5).

⁷¹ Constitutional Court, decision U - II 22/20, 23 July 2020. On that issue, although not mentioning the decision of the Constitutional Court, see N Muftić, T Herenda (n. 5).

⁷² High court of Karnataka *Anivar A Aravind v. Ministry of Home Affairs, GM PIL WP (C) 7483 of 2020*, 25 January 2021

⁷³ *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors., W.P. (C). Temp No. 84*, of 24 April 2020. On the relevance of consent in the Indian legal system, see: R Walters, L Trakman, B Zeller, *Data Protection Law. A Comparative*

3.3. The Intersections Between Public Interest and Consent as Legal Grounds for Processing

In two cases both the existence of a public interest ground and the data subjects' consent are addressed by Courts.

In Israel, the High Court of Justice decided the case 2109/20, *Ben Meir v. Prime Minister*, of 26 April 2020, where with regard to certain processing the ground is the public interest, while other processing operations are based on consent.⁷⁴ The case concerned the legitimacy of a government decision providing the Israel Security Agency (ISA) authorization to process, for purposes of contact tracing, "technological information" regarding persons who tested positive to COVID-19, as well as persons who came into close contact with them.⁷⁵ With regard to processing based on public interests, the Court, taking into account the exceptional circumstances of the COVID-19 crisis, stated that if, in the future, the State seeks to continue to employ the means at the ISA's disposal, it must authorize such processing in primary legislation.⁷⁶ In this respect, in a subsequent judgment on the same issue, the Israeli High Court of Justice stated that the Government could not continue to authorize the ISA to assist in conducting epidemiological investigations in a sweeping manner. Furthermore, the Court affirmed that the Government must set criteria for situations in which ISA technology can be used.⁷⁷ Moreover, the Court stated that, from the time of its ruling, the government's ability to authorize to use of the ISA would be limited to cases where a person who tested positive for the virus does not cooperate in the human epidemiological investigation.⁷⁸

However, in case no. 2109/20, *Ben Meir v. Prime Minister*, of 26 April 2020, the Court also provided specific rules concerning journalists, where consent plays a strong role. In particular, the High Court of Justice held, in the light of the fundamental importance of freedom of the press, that the contact tracing conducted by the State's preventive security service with especially intrusive means, particularly concerning journalists who tested positive for the virus, would require the consent of

the data subject.⁷⁹ The Court stated that, in the absence of consent, a journalist would be required to undergo an individual epidemiological investigation, and would be asked to inform any sources with whom he was in contact over the 14 days before his diagnosis.⁸⁰

In Europe, the High Court of Justice of Asturias decided a case concerning the obligation for hotels and restaurants to draw up and retain for 30 days an attendance list of attendees and for nightlife establishments a list of clients. The Court stated that the measure imposes a restriction of the right to data protection for fighting the pandemic and that such measure is justified from an epidemiological point of view.⁸¹ However, the Court stated that the measure is not proportional as it did not distinguish between situations where the risk of contagion is different. Accordingly, the Court affirmed that the administration must justify the necessity of the restrictions, being insufficient the generic statement on the need of ensuring social distance. The Court also mentioned some criteria (*e.g.*, the capacity of the premises, times of greater or lesser clients' flow, music installations that encourage shouting, the advantages and risks of terraces) the Administration should consider in justifying the restrictions.⁸² In its proportionality test, the Court considered how the fundamental right to data protection is affected.⁸³ As a positive element for assessing the proportionality of the measure, the Court considered the consent of the data subject. In particular, the judges took into account that the measure did not impose a general obligation for data subjects to provide personal data, considering that data subjects must not provide personal data if they decide to not enter hotels, restaurants, or nightlife establishments.⁸⁴ The ruling is of particular interest in the light of EU law concerning consent as a legal basis for processing. In this regard, art. 7, § 4 of the GDPR states that in assessing whether consent is freely given, utmost account shall be taken of whether, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract. Moreover, recital 42 of the GDPR states that "consent should not be

Analysis of Asia-Pacific and European Approaches, (Springer, 2019), 157.

⁷⁴ High Court of Justice, decision 2109/20, *Ben Meir v. Prime Minister*, of 26 April 2020.

⁷⁵ High Court of Justice, decision 2109/20, *Ben Meir v. Prime Minister*, of 26 April 2020.

⁷⁶ High Court of Justice, decision 2109/20, *Ben Meir v. Prime Minister*, of 26 April 2020.

⁷⁷ High Court of Justice, 6732/20 *Association for Civil Rights in Israel v. Knesset* 1 March 2021.

⁷⁸ High Court of Justice, 6732/20 *Association for Civil Rights in Israel v. Knesset* 1 March 2021.

⁷⁹ Decision 2109/20 *Ben Meir v. Prime Minister*, April 26, 2020.

⁸⁰ Decision 2109/20 *Ben Meir v. Prime Minister*, April 26, 2020.

⁸¹ Asturias High Court of Justice, 10 June 2021, 15.

⁸² Asturias High Court of Justice, 10 June 2021, 19.

⁸³ Asturias High Court of Justice, 10 June 2021, 15.

⁸⁴ Asturias High Court of Justice, 10 June 2021, 15.

regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment”.⁸⁵ In the light of these rules, if the data subject must provide personal data to enter in an establishment, her choice to enter in such establishment could not be qualified as a valid consent to the processing under EU law, because she is not able to refuse that consent without detriment. As an example, the detriment may consist in the prohibition of entry to restaurants. However, in assessing the proportionality of a measure, judges may consider whether the data subject may decide to not provide data as well as the consequences of such a decision (e.g., deny of entry).

The qualitative analysis suggests that future research may concern the relationship between consent and other legal grounds for processing in different countries. For instance, future research could develop a comparison between cases where consent is considered the only legal ground for processing, and cases where other legal grounds exist (e.g. public interest). Such a study could also address the arguments used by the courts to justify a difference in the regime for processing personal data (e.g., the need to obtain consent to the processing, not using public interests grounds depends on a greater risk of violation of fundamental rights at stake through processing, or to scientific uncertainty relating to the need of the processing for protecting public and collective health).

4. The Aspects of Data Processing Taken into Account in Courts' Reasoning

When deciding on the lawfulness of data processing or on the measures authorizing it, Courts consider not only the grounds or the purpose for processing, but also the concrete characteristics of the processing operations. This paragraph illustrates the different aspects that the Courts took into account in their reasoning. Adopting a bottom-up approach, the following aspects may be identified: i) data categories; ii) data retention period; iii) subjects who can access data; iv) means of processing; and v) consequences of processing with respect to the data subject.

⁸⁵On the interpretation of these rules the debate is open. See Court of Justice of the EU, *Orange Romania*, C-61/19, 11 November 2020; EDPB Guidelines 5/2020 on consent under regulation 2016/679, 4 May 2020; Lee A. Bygrave, 'Art. 4(11) Consent' in Christopher Kuner and others (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press, 2020); E. Kosta 'Art. 7 Conditions for consent', *ibidem*.

⁸⁶ Austrian DPA, decision of 15 February 2021.

⁸⁷ Decision of 12 November 2020, no. DKN.5101.25.2020.

4.1. Data Categories

Health data plays a major role in processing personal data for facing the pandemic. As to the definition of this category of data in the context of the current health crisis, in Europe the Austrian DPA, in the light of the EU Court of Justice's caselaw (*Lindqvist*, C-101/01), affirmed that the notion of health data should be interpreted broadly.⁸⁶ In Poland, the DPA stated that the notion of health data encompasses information about the quarantine of a person who was exposed to a disease or who has been in contact with a source of a biological pathogen.⁸⁷ The Polish DPA also concluded that whether or not the person exhibits disease symptoms is irrelevant for this qualification.⁸⁸ In the same vein, the Constitutional Court of Montenegro, applying national law, found that personal data of persons in self-isolation, where their health condition was monitored by the competent authority, have to be qualified as health data because they concern the risk of becoming ill or of having been exposed to COVID-19 virus.⁸⁹ In the same decision, the Constitutional Court of Montenegro stated that medical data requires special protection.⁹⁰ A similar argument was used by the French Constitutional Council in the abovementioned decision no. 2020/800 of 21 May 2020, where the Council stated that when personal data of a medical nature is processed, particular attention must be paid in the processing and in the definition of its boundaries.⁹¹

Furthermore, in a decision concerning a measure concerning the obligation for hotels, restaurants, and other establishments to collect personal data of attendees or clients, the High Court of Justice of Asturias took into account the nature of data collected in assessing the proportionality of the measure. In particular, the Court relying on a decision of the Spanish Constitutional Tribunal⁹², stated that the categories of data collected are "peripheral and innocuous data" in relation to the data subjects' privacy, at least in the light of the interests at stake, in this case, the health and life of data subjects.⁹³ In this vein, the Administrative Court of Zürich adopted similar reasoning in an analogous case: the Court stated that there was only

⁸⁸ Decision of 12 November 2020, no. DKN.5101.25.2020.

⁸⁹ Decision no. U - II 22/20, of 23 July 2020.

⁹⁰ Decision no. U - II 22/20, of 23 July 2020.

⁹¹ French Constitutional Council, decision no. 2020/800 of 21 May 2020.

⁹² Spanish Constitutional Tribunal, no. 97, 17 July 2019.

⁹³ Asturias High Court of Justice, 10 June 2021.

minimal interference with the right to informational self-determination because of the nature of the data processed (surname, first name, postcode, mobile phone number, e-mail address, time of entry and exit to the catering establishment).⁹⁴

Moreover, the relation of strict necessity between the purposes and the definition of data category to be processed is evaluated as a positive element within the assessment of the constitutionality of measures challenged. For example, the French Council of State, in a case concerning the processing of personal data within the COVID-19 Certificates System, affirmed that the processing of identification data is necessary to check that the pass presented is that of the person presenting it.⁹⁵ Furthermore, this issue emerged in contact tracing cases across continents. For example, in Europe, in its decision of 15 June 2020 the Norwegian DPA relied on the *Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak*, adopted on 21 April 2020 by the European Data Protection Board, stating that the use of location data in contact tracing is unnecessary and recommending the use of Bluetooth data only. Accordingly, the Norwegian DPA stated that the Norwegian authority had not sufficiently justified the need to use location data for contact tracing. In India, the High Court of Orissa, assessed the necessity of public disclosure of patient's names by public authorities, considering whether the processing of information concerning a COVID-19 patient's identity led to better and more comprehensive contact tracing, taking into account the right to privacy and the social stigma and discrimination suffered by persons infected or suspected of being infected by COVID-19.⁹⁶ A similar argument, concerning the risk of stigmatization derived from the publication of a list of persons in quarantine was adopted by the Constitutional Court of Montenegro.⁹⁷ Lastly, Courts considered the categories of data processed assessing the risks concerning data transfers outside external borders, showing the relevance that the kind of data processed may acquire in Courts' reasoning concerning the protection of fundamental rights and data subject's interests.⁹⁸

In sum, in relation to the categories of data, three legal issues arise: the notion of health data, the relationship of necessity between the purposes of processing and the definition of the data processed, and the relevance of the nature of data in assessing the impact of the processing on the right to privacy and data protection.

With regard to the first aspect, within the case law concerning the processing of data for facing the pandemic, the issue of the boundaries of the notion of health data is at stake, and Courts – at least European courts – seem to adopt a broad interpretation of this concept. From the perspective of future research, a comparison between the notion of health data adopted by the courts before and during the pandemic may be developed for understanding if the notion is evolving within the case law.

Secondly, the relationship of necessity between the purposes of processing and the definition of the data processed is an important aspect of decisions of European and Indian Courts. In this respect, further research may consider how the necessity test is conducted across countries. In that regard, the Indian case shows that the necessity assessment could encompass not only the need for processing in relation to the purposes but also the risks for data subjects' fundamental rights involved in such processing.

Lastly, in relation to the relevance of the nature of data in the Courts' assessment concerning the impact of the processing on the right to privacy and data protection, further research may concern the criteria with which the consequences of the processing of different categories of data are compared and assessed.

4.2. Data Retention Period

The data retention period is another element considered by Courts, across all continents analyzed, in the assessment of the balancing choices made within data processing or with respect to provisions regulating such processing. This period is often mentioned by Court, but the way it is relevant is often not explicit in judges' reasoning.⁹⁹ In cases concerning data processing for contact tracing purposes, in India the High Court of Kerala

⁹⁴ Administrative Court of Zürich, AN.2020.00012, 3 December 2020, § 4.5.2.

⁹⁵ French Council of State, decision no. 453505, of 6 July 2021, § 8.

⁹⁶ High Court of Orissa, *Ananga Kumar Otta v. Union of India & Ors*, WP (C), No. 12430/2020, of 16 July 2020.

⁹⁷ Decision no. U - II 22/20, of 23 July 2020.

⁹⁸ French Council of State, decision of 12 March 2021, no. 450163. In that case the data processed included personal identification data and data relating to appointments, but no health data on the possible medical grounds for eligibility for vaccination.

⁹⁹ *E.g.*, High Court of Kerala, decision of *Ramesh Chennithala vs State of Kerala* of 21 August 2020.

found that data are destroyed after 14 days.¹⁰⁰ In Europe, the Belgian Council of State, in its decision 248.124 of 5 August 2020, considered the data retention period (14 days) as an element for evaluating the conditions of gravity necessary for deciding the case in an urgency procedure.¹⁰¹ In Switzerland, the same retention period was considered by the Administrative Court in assessing the proportionality of a measure that established the obligation for accommodation and catering services to collect data of their guests for contact tracing purposes.¹⁰² In France, the Council of State considered the retention period in order to evaluate the risks related to data transfers.¹⁰³ In Spain, the High Court of Justice of Asturias considered the retention period in assessing the proportionality of a measure concerning the obligation for hotels, restaurants, and other establishments to collect personal data of attendees or clients.¹⁰⁴

In one case, the necessity of the data retention period in relation to the purposes of processing is considered: in Brazil, the Supreme Court held that the conservation of personal data collected by the public entity was manifestly in excess of the strictly necessity to fulfill its stated purpose.¹⁰⁵

In sum, Courts considered the data retention period as a relevant element but often they do not specify the arguments of such relevance; this is a critical aspect of the analysed decisions, as the reasons for the assessment of the data retention period could be explained in the decisions (e.g. a long retention period raises the risk of infringement of the data subject's rights; the retention period is necessary – or not – for the purposes of the processing).

4.3. Subjects Who Can Access Data

Courts took into account the number and the kind of subjects who can access data and the relationship between who processes data and the data subject. As to the level of disclosure and confidentiality of data, the Constitutional Court of Montenegro took into account the fact that personal medical data were made publicly accessible to an indefinite number of persons on the internet when

assessing the respect of the necessity in a democratic society of the Government's decision of publishing names and addresses of persons in self-isolation in relation to COVID-19.¹⁰⁶ In Spain, the provision of only one public body – the Directorate General for Public Health – who can process personal data for contact tracing purposes is an element considered by the High Court of Justice of Asturias in assessing the proportionality of a measure concerning the obligation for hotels, restaurants, and other establishments to collect personal data of attendees or clients.¹⁰⁷ In India, the confidentiality of personal data related to COVID-19 (*i.e.*, the absence of public disclosure and the limitation of subjects who can access data) is a key element in the decision *Balu Gopalakrishnan & Anr. V. State of Kerala & Ors.*, W.P. (C) of the High Court of Kerala. In this case, the Court ordered a company providing software that processes and analyse patients data and data concerning persons vulnerable to the COVID to the Government not to commit any act which would be, directly or indirectly, in breach of confidentiality of the data entrusted to it for processing by the Government of Kerala and to not disclose such data to any third party.¹⁰⁸ Moreover, confidentiality is a relevant aspect in the reasoning of another decision from the same court, *Ramesh Chennithala vs State of Kerala*, of 21 August 2020. The case concerned the collection of Call Detail Records (CDR) by the police to track where patients were 14 days before they were confirmed to be positive and the Court dismissed the action, taking into account the strict confidentiality of CDR.¹⁰⁹ Furthermore, the public disclosure of the identity of confirmed COVID-19 patients was at stake in the case decided by the High Court of Orissa, where, although the Court rejected the claim, it acknowledged that the level of disclosure of personal data had an impact on the protection of the right to privacy.¹¹⁰

Regarding the kind of subjects who can access data, in Israel the High Court of Justice concluded that the violation of privacy was particularly severe because of the institution that processes data, the Israel Security Agency (ISA), which was in charge of tracking the State's citizens and residents. The Court found that this entity normally act for fighting

¹⁰⁰ High Court of Kerala, decision of *Ramesh Chennithala vs State of Kerala* of 21 August 2020.

¹⁰¹ Belgian Council of State, decision 248.124 of 5 August 2020.

¹⁰² Administrative Court of Zürich, AN.2020.00012, 3 December 2020, § 4.5.2.

¹⁰³ Decision of 12 March 2021, no. 450163. The maximum retention period provided for data concerning the vaccination appointment was three months.

¹⁰⁴ Asturias High Court of Justice, 10 June 2021, 17.

¹⁰⁵ Decisions ADI 6387 MC-REF of 24 April and 7 May 2020.

¹⁰⁶ Decision U - II 22/20, of 23 July 2020.

¹⁰⁷ Asturias High Court of Justice, 10 June 2021, 17.

¹⁰⁸ High Court of Kerala, *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors.*, W.P. (C), Temp No. 84, 24 April 2020.

¹⁰⁹ High Court of Kerala, *Ramesh Chennithala vs State of Kerala*, of 21 August 2020.

¹¹⁰ High Court of Orissa, *Ananga Kumar Otta v. Union of India & Ors.*, WP (C), No. 12430/2020, 16 July 2020.

against hostile elements, while in the present case its means were used in relation to “citizens and residents who do intend it no harm”.¹¹¹ The Court took into account also that data processing by this kind of subject is exceptional in the international landscape.¹¹²

In India the specific relation between doctor and patient and the regulation of the information received by the doctor during this relationship was considered as a relevant element by the High Court of Orissa, which assessed the compatibility of the disclosure of the identity of the confirmed COVID-19 patients with the right to privacy.¹¹³ In particular, the Court relied on national and international legislation and on previous case law in affirming that confidentiality in the relationship between a doctor and her patients is a key rule, with few exceptions which should be provided by law. One of these exceptions is based on the public interest of the information.¹¹⁴

4.4. The Means of Processing

The means of processing operations are of particular importance in some Courts’ reasonings. In France, the Council of State, in its decision concerning the processing of personal data within the Covid-19 certificates system, analysed in detail how the processing is carried out (the use of a QR code and of a decentralised system) for affirming the respect of the principle of data minimization.¹¹⁵

In the Israeli case decided by the High Court of Justice, 2109/20 *Ben Meir v. Prime Minister*, of 26 April 2020, the Court found that the violation of privacy is particularly severe because of the chosen means of processing.¹¹⁶ Such means are under secrecy by reason of the “desire to preserve secrecy in regard to the ISA’s abilities”. The Court stated that the use of the same tools used by the security agency against hostile elements with respect to the State’s citizens and residents who do not intend to harm is a threat to democracy.¹¹⁷ Moreover, the Court took into account: i) the importance of transparency of the means of processing, lacking in the present case; ii) the lack of consent; and iii) the need to make an effort to find “alternatives like those adopted elsewhere in the world, among them, use an application developed by the Ministry of Health, which are all based upon obtaining the consent of the person being tracked”.¹¹⁸ As to the existence of other ways to obtain the same objectives, a similar argument was used by the French Council of State, in its decision no. 440916 of 19 June 2020.¹¹⁹ In this decision, the Council stated that the processing of health data within a national data hub to conduct projects of public interest in relation to the pandemic can be justified, *inter alia*, where alternative solutions are lacking.¹²⁰

Furthermore, the tracking means evaluation used by the State’s preventive security service at the core of the Israeli decision no. 6732/20 *Association for Civil Rights in Israel v. Knesset*, decided by the High Court of Justice on 1 March 2021.¹²¹ In this decision, the majority

¹¹¹ Decision 2109/20 *Ben Meir v. Prime Minister*, of April 26, 2020. The Court stated that “The violation of privacy in the present case is particularly severe for two primary reasons: The first concerns the identity of the entity that is exercising the means under discussion, that is, the fact that it is the ISA – the State’s preventive security service – that is tracking the State’s citizens and residents, and the second concerns the nature of the means chosen, viz., the fact that we are speaking of a coercive mechanism that is not entirely transparent. “As for the identity of the entity employing the said means – employing tools that were developed for the purpose of fighting against hostile elements, and aiming them at the State’s citizens and residents who do intend it no harm is a step that might cause any lover of democracy to lose sleep”, par. 38.

¹¹² Decision 2109/20 *Ben Meir v. Prime Minister*, of April 26, 2020. The Court stated that “To this we may add that according to documents published by the Israel Democracy Institute (hereinafter: the Institute), the apparatus employed in Israel that will be used to locate contacts with validated patients is carried out with the aid of the preventive security organ, is exceptional on the international landscape”, par. 38.

¹¹³ Decision *Ananga Kumar Otta v. Union of India & Ors.*, WP (C), No. 12430/2020, 16 July 2020.

¹¹⁴ Decision *Ananga Kumar Otta v. Union of India & Ors.*, WP (C), No. 12430/2020, 16 July 2020, par. 11-12.

¹¹⁵ French Council of State, decision no. 453505, of 6 July 2021, § 9.

¹¹⁶ High Court of Justice, 2109/20 *Ben Meir v. Prime Minister*, of 26 April 2020.

¹¹⁷ High Court of Justice, 2109/20 *Ben Meir v. Prime Minister*, of 26 April 2020.

¹¹⁸ Para. 40 of the decision of the Israeli High Court of Justice, 2109/20 *Ben Meir v. Prime Minister*, of 26 April 2020.

¹¹⁹ French Council of State, decision no. 440916 of 19 June 2020.

¹²⁰ French Council of State, decision no. 440916 of 19 June 2020.

¹²¹ On both decisions see: 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’, (updated April 2021) (available at: <https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e13#law-occ19-e13-note-270>); (accessed 11 June 2021); on the decision of 1st March 2021, see Tamar Hostovsky Brandes ‘Tracking Citizens. Military Surveillance Tools in Israel and Privacy in a Pandemic’ (22 March 2021) [Verfassungsblog <https://verfassungsblog.de/tracking-citizens/>](https://verfassungsblog.de/tracking-citizens/) accessed 11 June 2021.

opinion held that it is disproportionate and unreasonable to use the ISA tool that collects sensitive information in a sweeping manner.¹²² The Court took into account the fact that the government had not established measurable criteria for implementing the measure, even if the concrete situation evolved (*e.g.*, the vaccination campaign, the claim of the ISA that the use of the tool should be reduced).¹²³ The Court stated the tracking tool should be interpreted by the Government as its last resort, and, where necessary, it could be used as a complementary tool only for individual cases.¹²⁴ Accordingly, the Court stated that the surveillance can be carried out only after the governmental definition of measurable criteria for determining the scope of the complementary use of the ISA tool, and that such surveillance must be limited only to those who won't cooperate with epidemiological investigations.¹²⁵

4.5. Consequences of Processing with Respect to the Data Subject

In some cases Courts considered the consequences of processing with respect to the data subject. For instance, the Constitutional Court of Montenegro, in its decision U - II 22/20, of 23 July 2020, evaluated the necessity in a democratic society of the Government's decision consisting of the publication of names and addresses of persons in self-isolation due to COVID-19 on the Government's website¹²⁶. The Court considered the consequences of processing with respect to the data subject, namely that a consequence of data disclosure could be that those in need of medical assistance might have been deterred from seeking appropriate treatment, thereby endangering their own health and eventually public health.¹²⁷

Moreover, the French Council of State, in its decision concerning the processing of personal data within the Covid-19 certificates system, assessed the risk to the rights and freedoms of natural

persons that the processing may create in the light of the EU legislation concerning the data protection impact assessment.¹²⁸ In this regard, art. 36 GDPR provides that the data controller shall consult the supervisory authority prior to processing where the data protection impact assessment indicates that the processing would result in a high risk, in the absence of measures taken by the controller to mitigate the risk. The French Council of State affirmed that the violation of the prior consultation of the national DPA is likely to constitute a serious and manifestly unlawful breach of the right to privacy and personal data protection.¹²⁹ However, the Council stated that in the present case there was not a violation of such prior consultation rule, taking into account that the risks related to illegitimate access to and unwanted modification of data were mitigated by the following elements: i) the processing was based on local control of the data ("off-line mode"); ii) the government did not exchange data with the central server of the service provider company when verifying the receipts presented on the mobile phone of the person intending to use the COVID certificate.¹³⁰

In Poland, the DPA found that the ways in which the controller's failure to comply with legal obligations concerning data security may have an impact on data subjects' rights and freedoms.¹³¹ In particular, the DPA stated that the nature, scope, context, and purposes of the processing and the risk of violation of the rights or freedoms are factors that the data controller must take into account in building the data protection system¹³². In this case, the DPA found that within the processing risk analysis, the data controller must take into account the existence of the COVID-19 pandemic, the sense of fear associated with the epidemiological situation, and the potential harms stemming from the unlawful disclosure of personal data related to COVID-19, such as discrimination, stigmatization, social ostracism, stress, and potential material

¹²² Israeli High Court of Justice, no. 6732/20 *Association for Civil Rights in Israel v. Knesset*, 1 March 2021.

¹²³ The analysis of this case is based on a case summary drafted by prof. Dr. Ittai Bar-Siman-Tov & Yehonatan Dayan & Shaiel Tcherkansky in the framework of the Covid-19 Litigation project.

¹²⁴ Israeli High Court of Justice, no. 6732/20 *Association for Civil Rights in Israel v. Knesset*, 1 March 2021.

¹²⁵ Israeli High Court of Justice, no. 6732/20 *Association for Civil Rights in Israel v. Knesset*, 1 March 2021.

¹²⁶ Constitutional Court of Montenegro, decision U - II 22/20, of 23 July 2020.

¹²⁷ Constitutional Court of Montenegro, decision U - II 22/20, of 23 July 2020.

¹²⁸ French Council of State, decision no. 453505, of 6 July 2021, § 10.

¹²⁹ French Council of State, decision no. 453505, of 6 July 2021, § 10.

¹³⁰ French Council of State, decision no. 453505, of 6 July 2021, § 10.

¹³¹ Decision of 12 November 2020, no. DKN.5101.25.2020.

¹³² Decision of 12 November 2020, no. DKN.5101.25.2020.

losses derived from the negative reaction of the community where the data subject lives¹³³.

4.6. Summing up: the Relevance of Concrete Characteristics of the Processing Operations in Courts' Reasoning

A transversal issue to the different aspects considered by the Courts is that of the organization of interests around personal data: mainly those of data subjects and those of the public linked to the fight against the pandemic. The need to coordinate several interests emerges in the analysis of different aspects of concrete data processing operations. In certain cases, the Courts' reasoning is specific to one aspect of data processing: i) in relation to the category of data Courts and DPAs affirmed that medical data need specific protection¹³⁴; ii) the gravity of the violation of privacy was assessed relying on the kind of subject who process data¹³⁵; and iii) the Court examined the possibility to put in place alternative and less intrusive means of processing¹³⁶. However, coordination between different interests sometimes occurs through the principles of necessity and proportionality. Necessity is applied in assessing the relationship between the purposes of processing and i) the definition of the category of data to be processed¹³⁷; ii) the data retention period¹³⁸; iii) the level of disclosure and of confidentiality of data¹³⁹; and iv) the consequences of processing with respect to the data subject¹⁴⁰.

In some cases, Courts applied the principle of proportionality, for example with regard to the means of processing¹⁴¹. Moreover, in at least one case, necessity, proportionality, and the data minimization principle are considered jointly in the assessment concerning the category of data processed¹⁴². The analysis shows that further research may be conducted in order to analyse how, across countries, the various aspects of processing are part of the necessity or proportionality tests, and which are the

consequences of the possible differences in the outcomes of the decisions, particularly in relation to the level of data subjects' protection.

5. Data Transfers to Third Countries

Another issue that emerged in the case law concerning the processing of personal data relates to the data transfers outside external borders. Generally speaking, this topic is a crucial one in data protection law; however, the analysis of the few cases where such data transfers were part of data processing operations aimed at combatting the pandemic is a starting point for building a comparison of case law prior to and contemporaneous with the pandemic.

In India, in the decision *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors., W.P. (C)*. Temp No. 84, of 24 April 2020, the High Court of Kerala took into account the possibility of data transfers, stating that a USA-based software company who concluded with the Kerala Government a contract concerning data processing "shall not disclose (...) such data to any third party/person/entity - of whatever nature or composition - anywhere in the world".

In Europe, although not related to the processing of data for purposes related to COVID-19, the judgment *Schrems Facebook Ireland, C- 311/20*, of 16 July 2020 issued by the Court of Justice of the European Union (CJEU), is relevant to frame national decisions related to data transfers in the context of the pandemic.¹⁴³ For the purposes of this article, it should be recalled that in *Schrems Facebook Ireland, (C-311/20)* the CJEU, relying on its previous case law (*Schrems, C-362/14*), on the principle of proportionality, and on art. 52 of the Charter of Fundamental Rights of the EU concerning the limits of fundamental rights, stated that the Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 on the adequacy of the protection provided by the *EU-US Privacy Shield*, was invalid.¹⁴⁴ Furthermore, in its judgement, the Court concluded that data subjects whose personal data are transferred to a

¹³³ Decision of 12 November 2020, no. DKN.5101.25.2020.

¹³⁴ See: Constitutional Court of Montenegro, in its decision no. U - II 22/20, of 23 July 2020; Austrian data protection authority, decision of 15 February 2021.

¹³⁵ Israeli High Court, 2109/20 *Ben Meir v. Prime Minister*, of April 26, 2020.

¹³⁶ Israeli High Court of Justice, 2109/20 *Ben Meir v. Prime Minister*, of April 26 2020; French Council of State, in its decision no. 440916 of 19 June 2020.

¹³⁷ For example, see French Constitutional Council, decision no. 2020/800 of 21 May 2020; High Court of Kerala, *Ramesh Chennithala vs State of Kerala*, of 21 August 2020; Norwegian DPA, decision of 15 June 2020.

¹³⁸ See: Brazilian Supreme Court, decisions ADI 6387 MC-REF of 24 April and 7 May 2020.

¹³⁹ For example, see Constitutional Court of Montenegro, decision no. U - II 22/20, of 23 July 2020;

High Court of Kerala, *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors., W.P. (C)*. Temp No. 84, 24 April 2020; French Constitutional Council, dec. no. 2020/800 of 21 May 2020.

¹⁴⁰ Constitutional Court of Montenegro, decision U - II 22/20, of 23 July 2020.

¹⁴¹ Israeli High Court of Justice, 6732/20 *Association for Civil Rights in Israel v. Knesset*, 1 March 2021.

¹⁴² French Council of State, no. 440916, 19 June 2020.

¹⁴³ CJEU, judgment *Schrems Facebook Ireland, C-311/20*, of 16 July 2020.

¹⁴⁴ CJEU, judgment *Schrems Facebook Ireland, C-311/20*, of 16 July 2020. That EU Commission Decision allowed, under certain conditions, the free transfer of data to companies certified in the US.

third country must be afforded a level of protection essentially equivalent to that guaranteed within the European Union by the GDPR, read in the light of fundamental rights.¹⁴⁵ To that end, the Court stated that the assessment of the level of protection afforded in the context of such a transfer must consider: i) the contractual clauses between the controller or processor established in the European Union and the recipient of the transfer established in the third country concerned; and ii) the relevant aspects of the legal system of that third country with regard to any access by the public authorities of that third country to the personal data transferred.¹⁴⁶

The *Facebook Schrems* case (C-311/18) had an impact in national litigation related to COVID-19, as shown by the the French case law concerning the hosting subcontracting for the “Health data hub” made by French authorities. In a first decision, no. 440916, of 19 June 2020, prior to *Facebook Schrems* case (C-311/18), the Council of State, *inter alia*, stated that data transfers to the USA for maintenance needs complied with the GDPR, as they were authorized by a decision of the European commission in 2016, which the GDPR allows¹⁴⁷. In its second decision on the same topic the Council of State, given the possibility of data being transferred to the United States, deeply analyzed (i) the risk of data transfers due to the application of the contract with Microsoft; and (ii) the risk of other types of data transfers (extraterritoriality of US law).¹⁴⁸

An interesting case was decided by the French Council of State in decision no. n°450163, of 12 March 2021, where associations and trade unions asked the interim relief judge of the Council of State to suspend the partnership between the Ministry of Health and Doctolib, arguing that the hosting of vaccination appointment data by the subsidiary of a US company (Amazon Web Services) entailed risks with regard to access requests by the US authorities.¹⁴⁹ The Council of State, applying the criteria laid out by the CJUE in its judgment *Schrems Facebook Ireland* (C-311/18) of 16 July 2020 to the relationship between controller and processor, decided that the level of protection provided during the data processing should be verified by taking into account not only the contractual stipulations

between the controller and the processor, but also, in the event of the processor being subject to the law of a third country, the relevant elements of the legal system of that country.¹⁵⁰ Taking into account existing safeguards and the data categories concerned, the Council of State found that the level of protection of data relating to appointments made in the context of the COVID-19 vaccination campaign is not manifestly inadequate in the light of the risk of infringement of the GDPR invoked by the applicants.¹⁵¹ Therefore, the Council of State held that the decision of the Minister of Solidarity and Health to entrust the company Doctolib, among other possible ways of booking appointments, with the management of covid-19 vaccination appointments does not seriously and manifestly illegally infringes the right to respect for private life and the right to protection of personal data.¹⁵²

In the analyzed case law the Court’s approaches vary. In an Indian case, the Court affirmed that the obligation of confidentiality applies globally to every subject, while the European approach focuses on the level of protection in the third country. However, the analysed case law does not attach particular importance to the pandemic context for deciding the questions related to the pandemic. Future litigation on this topic may concern possible cases where data transfers may pursue the public interest concerning the fight of the pandemic (e.g., scientific research or the coordination of vaccination campaign based on health data), and there are significant risks for data subjects’ rights (e.g., the risk of surveillance by the foreign country).¹⁵³

6. Remedies

An important aspect of case law analysis is the one concerning the remedies provided by Courts. In the following table, the remedies granted by the courts are described and grouped in categories. Such categories have been defined through a bottom-up approach: from the reading of the decisions and their comparison a grouping of the case law has been made, for providing a first overview of the remedies adopted, including through the drafting of the following table.

¹⁴⁵ CJEU, judgment *Schrems Facebook Ireland*, C-311/20, of 16 July 2020.

¹⁴⁶ CJEU, judgment *Schrems Facebook Ireland*, C-311/20, of 16 July 2020.

¹⁴⁷ Council of State, decision no. 440916, of 19 June 2020.

¹⁴⁸ French Council of State, n°444937, of 13 October 2020.

¹⁴⁹ French Council of State, decision no. n°450163, of 12 March 2021.

¹⁵⁰ French Council of State, Council of State in decision no. n°450163, of 12 March 2021.

¹⁵¹ French Council of State, decision no. n°450163, of 12 March 2021.

¹⁵² French Council of State, decision no. n°450163, of 12 March 2021.

¹⁵³ On this issue, see Heidi Beate Bentzen and others ‘Remove obstacles to sharing health data with researchers outside of the European Union’ (2021) *Nat. Med.* 27, 1329.

DECISION	REMEDY APPLIED	CATEGORY OF REMEDY
Austria , Constitutional Court, V 573/2020 10 March 2021,	The Court stated that there was a lack of formal requirements with respect to the challenged measures.	Declaration of unconstitutionality
France , French Constitutional Council decision no. 2020/800 21 May 2020	Partial declaration of unconstitutionality. The Court declared the following provisions against the Constitution: - the sharing of data with social service, for the lack of a direct link with the fight against the pandemic; - the subordination of the regulatory power of the prime minister to the one of another authority (national DPA).	
Montenegro , Constitutional Court of Montenegro, decision U - II 22/20, 23 July 2020	The Decision, adopted by National coordinating body for contagious diseases, to publish names and addresses of persons in self-isolation due to COVID-19 on the Government's website, without their consent, violated their right to respect their private life.	
Brazil , Federal Supreme Court ADI 6387 MC-REF, 7 May 2020	The Court declared the unconstitutionality of the provision enabling data sharing from telecommunication companies to the Brazilian Institute of Geography and Statistics, due to the violation of the right to intimacy and private life.	
Spain , Supreme Court, no. 1103, 18 August 2021	The Court rejected the claim against the reject of ratification of a measure that limited the access to inside entertainment and hospitality establishments with music to those persons who can prove that they have a valid EU Covid digital certificate or accreditation of antigen test or negative PCR. The Court stated that the measure is not proportional as it is neither necessary nor adequate. The Court took into account the limitation of the right to personal privacy provided for by the measure in its proportionality assessment.	Rejection of the ratification imposing limitations to fundamental rights. (or rejection of the claim against the rejection of ratification)
Spain , Asturias High Court of Justice, 10 June 2021	The Court rejected ratification of measures which imposed the obligation to draw up and retain for 30 days an attendance list for hotels and restaurants and a list of clients for nightlife establishments. The Court considered that the measure was not proportional as it not distinguished between situations where the risk of contagion is different. Accordingly, the Court considered that the Administration must specify the necessity of the restrictions.	
Brazil , Federal Supreme Court ADI 6387 MC-REF, 24 April 2020	The Court, in an urgency procedure, on the basis of the necessity to prevent irreparable damage to the intimacy and privacy of more than a hundred million users of fixed and mobile telephone services, suspended the provision enabling processing, determining that the Brazilian Institute of Geography and Statistics must refrain from requesting to the telephone companies the access to list of names, telephone numbers and addresses of the consumers.	Suspension in an urgency procedure of the effectiveness of the measure enabling processing, with the effect of prohibiting such processing
India , The High Court of Orissa, Cuttack, Ananga Kumar Otta v. Union Of India & Ors, WP (C) No. 12430/2020, 28 May 2020	The court stated that the State authorities must ensure that the identity of any person, who is admitted to COVID centers, any Government Hospital/private Hospital or any Quarantine center in the State, found infected with Coronavirus (COVID-19) is not disclosed/publicized either in any intra-departmental communication or in any media platform including social media.	Temporary prohibition of processing
Norway , Data Protection Authority, decisions of 15 June and 17 August 2020	Temporary ban on the processing of personal data within a contact tracing app.	
France , Council of State, dec. decision nn. 440442, 440445; 18 May 20220; Council of State, decision no. 446155, 22 December 2020,	The Council of State, in its decision of 18 May 20220, nn. 440442, 440445, ordered the State to immediately cease drone surveillance concerning compliance with the health regulations in force during the COVID-19 emergency. This decision was confirmed in the decision of 22 December 2020, n°446155.	Prohibition of processing

France , Council of State, decision no. 441065, 26 June 2020	The Council of State ordered the municipality of Lisses to cease the use of portable thermal imaging cameras deployed in schools.	
Poland , Data protection authority, decision no. DKN.5101.25.2020, 12 November 2020,	The DPA stated that, as there was a breach of data confidentiality which implies a high risk of a violation of rights or freedoms of natural persons, the data controller is obliged to notify the data subjects of the breach of protection of their personal data without undue delay.	Ascertainment of the existence of a data breach and related obligations
India , High Court of Kerala, <i>Balu Gopalakrishnan & Anr. v. State of Kerala & Ors.</i> , W.P. (C). Temp No. 84, 24 April 2020	<p>The Court issued some order related to the measures for ensuring the confidentiality of data. The Court:</p> <ul style="list-style-type: none"> - ordered to the Government of Kerala: i) to anonymize all the citizens' data related to the COVID-19 pandemic collected or to be collected; ii) to allow the USA-based software company to have further access only to such anonymized data; iii) to inform every citizen concerned that such data is likely to be accessed by third party service providers and iv) to ask for their specific consent for the latter processing. - The Court ordered the USA-based company: i) to not commit any act which would breach the confidentiality of data shared with them for processing by the Government of Kerala under the challenged contract; ii) to not communicate such data to any third party anywhere in the world; iii) to give back all such data to the Government of Kerala as soon as the contractual obligation, as regards its processing, is performed; iv) to give back to the Kerala Government any residual or secondary data available; and v) to not use or exploit any such data, or the name and the official logo of the Government of Kerala, directly or indirectly, for any commercial benefit. 	The Court partially upheld the claim and gave some prescriptions on data processing operations
India , High court of Karnataka, <i>Anivar A Aravind v. Ministry of Home Affairs</i> , GM PIL WP (C) 7483 of 2020, 25 January 2021	<p>The Court partially upheld the claim:</p> <ul style="list-style-type: none"> - accepting the assurance given by the Government of India that the benefits of any services that are provided by the Governments, its agencies and instrumentalities is not denied to an individual on the ground that she has not downloaded and installed the contact tracing app. <p>Moreover, the Court:</p> <ul style="list-style-type: none"> - stating that the use and retention of information and data shall remain confined to what is provided in the privacy policy which is available on the contact-tracing app; - restraining the Government of India and the National Informatics Centre, respectively from sharing the response data by applying the provisions of the contact Data Access and Knowledge Sharing Protocol (2020), unless the informed consent of the app users is taken. 	
France , Council of State, no. 44493, 13 October 2020,	The Council of State concluded that, even if it cannot be totally excluded, the risk that the US intelligence services will request access to the Health Data Hub, it does not justify, in the very short term, the suspension of the processing within the platform, but it does require special precautions to be taken, under the supervision of the French DPA.	
Israel , High Court of Justice, 2109/20 <i>Ben Meir v. Prime Minister</i> , 26 April 2020	<ul style="list-style-type: none"> - as the provision violates the basic right to privacy and considering the exceptionality of the COVID-19 crisis, the Court decided that as of April 30, 2020, it will not be possible to authorize the ISA to the data processing it was currently authorized. - A specific regime is designed by the Court for journalists (<i>the Ministry would ask a journalist who tests positive for the virus to consent to providing his details to the ISA. If</i> 	Some prescriptions are directed to the defendant for the future.

	<i>such consent is given, the mechanism would operate in the usual way. If the journalist refused, he will be granted 24 hours to petition the court for an order preventing the transfer of his data to the ISA. At the same time, he will undergo an individual epidemiological investigation, and will be asked to sign a declaration that he undertakes to inform any journalistic sources with whom he was in contact over the 14 days prior to his diagnosis.</i>	
Israel , High Court of Justice, 6732/20 <i>Association for Civil Rights in Israel v. Knesset</i> , 1 March 2021	The Supreme Court ruled that the government could not continue to authorize the ISA as a sweeping manner to assist in conducting epidemiological investigations.	
Spain , Supreme Court, no. 1112, 14 September 2021	The Supreme Court stated that the proposed measure must be authorised or ratified. The Court stated that the measure is proportional as the benefit provided by the measure (i.e., a significant reduction in contagions) is much greater than the sacrifice entailed by the requirement to present documentation for access to the premises. The Court took into account that there is no measure that would be more appropriate to safeguard the life and health of the public in such premises.	Ratification of a measure imposing limitations to fundamental rights.
France , Council of State, no. 440916, 19 June 2020	Lawfulness of the processing under the conditions that the Health Data Platform i) provide the French DPA with all information for enabling it to verify that the measures taken ensure sufficient protection and ii) will complete the information on its website relating to the project concerning the use of data on emergency room visits for the analysis of the use of care and the monitoring of the covid-19 health crisis in accordance.	Claim rejected under certain conditions for processing the defendant should ensure
India , Central Information Commission, <i>Saurav Das vs Deptt of Information Technology</i> , 26 November 2020	The complaint is rejected. The <i>Aarogya Setu</i> website needs to keep the information about the app up to date to be able to satisfy the citizens queries.	
India , The High Court of Orissa, Cuttack, <i>Ananga Kumar Otta v. Union Of India & Ors, WP (C) No. 12430/2020</i> , 16 July 2020	The Court rejected the claim, affirming that it hopes and trusts that: - the State shall take further steps if not already taken to keep the personal information masked by applying appropriate method, and keep utmost confidentiality of such information in intradepartmental communication. - that the Press shall behave in a more responsible manner with regard to disclosure of identity and should not disclose the identity of such persons unauthorizedly. Furthermore, <i>inter alia</i> , the Court stated that the State must have to vigil over spreading unauthorized information in the social media platforms and whenever it comes to their knowledge regarding such disclosure of names without authorization in the social platform, to legally proceed against such persons.	Claim rejected. Some prescriptions are directed to certain subjects
India , Madras High Court, <i>Adv. M.Zainul Abideen vs The Chief Secretary, W.P.No.7491 of 2020</i> , 22 April 2020	The Court dismissed the petition, affirming that it is not in the position to provide the guidelines to regulate the visual platform.	
India , High Court of Kerala, <i>Ramesh Chennithala vs State of Kerala</i> , 21 August 2020	Action dismissed	
Austria , Data protection authority, decision of 15 February 2021	The DPA stated that the transfer of results of a negative PCR test from a private medical center to public administration was lawful.	Claim rejected
Belgium , Council of State, Decision no. 248.124, 5 August 2020	Considering the guarantees for data processing, its regime and purpose, the Council of State held that the requirement of urgency required to suspend the contested act are not met, and accordingly rejected the claim.	
Belgium , Council of State, no. 248.108, 3 August 2020	The Council of State stated that the applicants' claims are based on provisions that do no longer have any effect in	

	the legal order or do not arise directly from the contested measure. Therefore, the Council held that the requirements of urgency required to suspend the contested act are not met, and accordingly rejected the claim.	
France , Council of State, no. 453505, 6 July 2021	The Council of State rejected the claims, considering that the implementation of the 'health pass' was not manifestly illegal at the date of its decision.	
France , Council of State, no. 450163 12 March 2021	The Council of State dismissed the request, noting that the data collected in the context of vaccination appointments did not include health data on the medical grounds for eligibility for vaccination and that guarantees had been put in place to deal with a possible request for access by the US authorities.	
Switzerland , Administrative Court of Zürich, AN.2020.00012, 3 December 2020	The Administrative Court rejected the claim, affirming that the measure establishing the obligation for accommodation and catering services to collect data of their guest for contact tracing purposes is proportional. The Court held that contact tracing is crucial for facing the COVID-19 crisis, according to scientific knowledge. The judges took into account several characteristics of the processing, such as the strict retention period and the fact that data can be processed only for contact tracing purposes.	
Colombia , Constitutional Court, judgement C-150/20, 27 May 2020	The provision under examination complies with the principles of freedom, purpose, necessity, confidentiality and restricted circulation. Therefore, that provision respects the standard of protection defined by constitutional jurisprudence for the effective guarantee of the fundamental right to <i>habeas data</i> .	Constitutionality of the measure

As shown by the table above, Courts or DPAs sometimes simply rejected the claim. In other cases, Courts and DPAs upheld, at least partially, the claim, providing the following remedies, obviously partially depending on the plaintiff's claims and on the type of procedure:

i) Declaration of unconstitutionality of the provision challenged

Constitutional Courts declared that the challenged measures contrasted with the Constitution for the lack of formal requirements or due to the violation of the right to private life, as the measure did not strike a fair balance between this right and the public health protection interests. In one case, the French Council declared the measure only partially in contrast with the Constitution.¹⁵⁴

ii) Ratification/rejection of ratification

In Spain, some decisions concern the ratification of measures that limits fundamental rights. In one

case, the Court affirmed the need to ratify the measure; in two cases judges rejected the ratification of the measures, as they were considered not proportional.

iii) Prohibition of processing (temporary or not)

In four cases the remedy was the prohibition of processing, sometimes temporary. The Brazilian case is quite different from the others, as the prohibition of processing is the consequence of the suspension of a provision enabling a specific processing, within a proceeding of constitutionality review of the measure.

iv) Courts' prescriptions about data processing

Sometimes Courts gave prescriptions regarding data processing, for example concerning data subjects' information¹⁵⁵ or data anonymization.¹⁵⁶ The decisions vary: in some cases, Courts upheld the claim¹⁵⁷, while in a case the claim was rejected

¹⁵⁴ French Constitutional Council decision no. 2020/800 of 21 May 2020.¹⁵⁴

¹⁵⁵ French Council of State, dec. no. 440916 of 19 June 2020.

¹⁵⁶ High Court of Kerala, *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors.*, W.P. (C). Temp No. 84, 24 April 2020.

¹⁵⁷ See French Council of State, 13 October 2020, n°, 44493; High Court of Kerala, *Balu Gopalakrishnan & Anr. v. State of Kerala & Ors.*, W.P. (C). Temp No. 84, 24 April 2020.

on condition that the defendant ensures certain information duties, *vis-à-vis* the national data protection authority and the data subjects.¹⁵⁸ Moreover, in two cases some prescriptions are directed to the defendant for the future.¹⁵⁹ Lastly, the case decided by the Polish data protection authority is quite different: the DPA ascertained the existence of a data breach and affirmed that the data controller is obliged to notify the data subjects of the breach without undue delay.¹⁶⁰

In sum, when deciding on cases related to data protection rights during the current pandemic, Courts and DPAs applied a variety of existing data protection remedies. Courts' conclusions vary with regard to remedies and their impact on data processing operations, due to several factors, including the ones related to the type of action sought and to differences among legal systems.¹⁶¹ However, the analyzed case law suggests that sometimes remedies are not only the outcome of the balancing between different interests (often protected as fundamental rights) but also a part of such balancing, at least where they encompass prescriptions adapted to the concrete case (e.g., the court's decision to give some prescriptions about the way data processing must be carried out and to not prohibit the processing may be interpreted as a balancing technique).

7. Insights from the Case Law Analysis

The case law analysis shows the importance of litigation in cases where personal data processing is directly aimed at addressing the ongoing pandemic. With regard to the legal issues addressed by Courts and DPAs, within data protection case law, as in other areas, crucial issues concern the balancing of

different interests – often protected in the form of fundamental rights – and the remedies. Processing of personal data may be useful or necessary to face the current pandemic crisis (e.g., contact tracing to limit contagions; management of vaccine appointments), while at the same time it shows the need of protecting data subjects' interests, not only related to privacy. For instance, there is the need to avoid discrimination against virus-positive individuals and, at least in respect to contact tracing, the risks of widespread surveillance.

Moreover, other interests and fundamental rights, such as freedom of expression, may be relevant.

The issue of defining the boundaries of lawful processing of data, ensuring both the protection of personal data and privacy and other fundamental rights or public and collective interests may be subject to further litigation, also challenging the notion of personal data itself.

In this respect, looking at the case law, the use and the public disclosure of aggregated data was at stake in an Indian decision, not subject of direct analysis in this article as Courts' arguments are not strictly related to data protection issues.¹⁶² In this respect, the question of whether aggregated data are to be considered personal data may arise.¹⁶³ Moreover, the academic debate and case law may also concern the ways of balancing the right to data protection with the right to be informed.

Furthermore, the correct use of data for the purposes of scientific research, to ensure the reliability of the results is at stake in a decision of the Brazilian Federal Court of Accounts, not analysed in this paper because not strictly related to data protection aspects¹⁶⁴. In this regard, the necessity to ensure both the reliability of scientific

¹⁵⁸ French Council of State dec. no. 440916 of 19 June 2020158.

¹⁵⁹ Israeli High Court of Justice, dec. 2109/20 *Ben Meir v. Prime Minister*, April 26, 2020; dec. 6732/20 *Association for Civil Rights in Israel v. Knesset*, March 1st, 2021.

¹⁶⁰ Decision of 12 November 2020, no. DKN.5101.25.2020.

¹⁶¹ In this respect, see the opening article of this section Fabrizio Cafaggi, Paola Iamiceli, 'Global Pandemic and the role of courts'.

¹⁶² High Court of Delhi, *Vinay Jaidka v. Chief Secretary W.P.(C) 5026/2021 & CM APPL. 15401/2021*, April 28th, 2021.

¹⁶³ For example, in Europe according to art. 4 para. 1 no. 1 of the GDPR 'personal data' means any information relating to an identified or identifiable natural person, and an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or

social identity of that natural person. The case law of the Court of Justice of the EU addressed the notion of personal data on several occasions. In relation to the identifiability concept it is of particular interest *Breyer*, C-582/14, 19 October 2016; on this case see Frederik Zuiderveen Borgesius, 'The Breyer Case of the Court of Justice of the European Union: IP Addresses and the Personal Data Definition' (2017) *Eur. Data Protection L. rev.*, 3, 130; Paul de Hert, 'Data Protection's Future without Democratic Bright Line rules. Co-Existing with technologies in Europe after Breyer' (2017) *Eur. Data Protection L. rev.* 1, 20. On the notion of personal data in the EU see also Nadezhda Purtova, 'The law of everything. Broad concept of personal data and future of EU data protection law' (2018) *L. Inn. tech.* 1, 40; Chiara Angiolini 'Lo statuto dei dati personali. Uno studio a partire dalla nozione di bene' (Giappichelli, 2020) 26.

¹⁶⁴ An English summary of the decisions is available at: <https://edpb.europa.eu/news/national-news/2020/temporary-suspension-norwegian-covid-19-contact-tracing-app_en> last accessed: 30 April 2021.

research and the respect of data protection and privacy rights could raise some legal questions related to possible conflicts (*e.g.*, the publication of personal data is useful for allowing a control on the research outputs but could be detrimental for data subjects) or complementarities (*e.g.*, the control of data correctness and their periodic update) between the two interests at stake, which may be the subject of future litigation and research.

The analysis shows that often the necessity and the proportionality of processing for facing the COVID-19 crisis (*e.g.*, through an effective contact tracing) are considered important criteria in the courts' and DPA's assessments. This analysis suggests that further litigation may concern the evaluation of necessity and proportionality in case of changes within the pandemic context. For instance, in case of improving health situation, may a judge consider data processing operations - that were lawful in a scenario worse than the current one - no longer necessary or proportionate, and, accordingly, consider that the balance struck between protection of public health and data subjects' rights is no longer correct? Which will be the role of scientific evidence in that regard? For instance, if the scientific knowledge concerning the Covid-19 will significantly evolve, may a judge rely on these scientific developments in conducting the proportionality and the necessity tests? If yes, how? Furthermore, in deciding concrete cases, Courts took into account the way data is processed, considering several factors (*e.g.*, the means, the data retention period, the category of data processed, the level of confidentiality). As an example, the possibility to adopt alternative solutions, less intrusive to the one in place is considered in certain cases as an important element. In this vein, in assessing the lawfulness of processing and in granting remedies, could Courts consider the effort (from an economic and technological point of view) made by people who conduct the processing (*e.g.*, public authorities) in developing and building less intrusive means for processing? Moreover, considering the possible use of AI tools for remote diagnosis within pandemic¹⁶⁵, may the elements considered in Section 4 be useful in order to assess the balancing between different interests (*e.g.*, infection risk of medical staff, data subjects' rights, patients' rights) with regard to these means of processing?

Moreover, looking forward, in relation to the use of "COVID certificates" or "COVID passports"

several data protection issues may be subject of case law in the field of data protection. As showed by the existing case law, the principle of necessity in that regard could play quite a strong role: which are the categories of data, the retention period, the subject who can process such data, necessary for processing? The evaluation of scientific knowledge may also play a strong role in assessing the necessity and the proportionality of such measures, for example with regard to the assessment concerning the usefulness and necessity of such data for demonstrating a lower level of public health risk (*e.g.*, immunity).

Moreover, the analysis shows the variety of remedies Courts adopted; such remedies have a different impact on data processing, from its ban to prescriptions concerning certain specific aspects of processing operations. The criteria Courts adopt (and should adopt) in selecting the remedy among the ones available, could be the subject of future litigation (*e.g.*, Courts may choice between temporary or permanent ban or the prohibition of certain means of processing).

8. Conclusion

This article has analyzed the case law collected within the COVID-19 Litigation project on personal data protection until November 2021. In particular, this survey focused on litigation concerning cases where the processing of personal data is directly aimed at addressing the ongoing pandemic.

The article firstly provides a very brief overview of the cases, focusing on the purposes of processing (Section 2). Then, the decisions are described in relation to the legal issues they address: the grounds for the processing of public interest and consent (Section 3), the different aspects of personal data processing that have been considered by the Court (Section 4), data transfers outside external borders (Section 5), and the remedies that courts have granted in individual cases, building a classification of those remedies (Section 6). A bottom-up approach was adopted for identifying the most important aspect of data processing considered by Courts in their reasoning and in classifying the remedies Courts granted. In the course of the analysis, as well as in Section 7, case law trends are critically considered, also looking at future litigation and possible lines of research to be further developed.

¹⁶⁵ See, for example, Marco Almada, Juliano Maranhão 'Voice-based diagnosis of COVID-19: ethical and

legal challenges' (2021) *International Data Privacy Law* 11, 1. 63.

APPENDIX

TABLE OF CASES

DECISION	MAIN LEGAL ISSUES AT STAKE
Asia	
India , High Court of Kerala, <i>Balu Gopalakrishnan & Anr. v. State of Kerala & Ors.</i> , W.P. (C). Temp No. 84, 24 April 2020 ¹⁶⁶	Lawfulness of a contract between the Government of Kerala and a USA-based software company, aimed at creating an online data platform for data analysis of medical/ health data in relation to COVID-19 <u>Data concerned</u> : data concerning patients or persons susceptible to COVID-19 <u>Nature of the parties</u> : private and public (including the State of Kerala and the USA-based company).
India , Central Information Commission, <i>Saurav Das vs Deptt of Information Technology</i> , 26 November 2020 ¹⁶⁷	Lack of transparency of the procedure of creation of a contact tracing app (<i>Aarogya Setu</i>), and on the related measures concerning the risk assessment of data processing and the security of the app. <u>Data concerned</u> : data processed through an app <u>Nature of the parties</u> : private (plaintiff); public body (defendants).
India , High Court of Kerala, <i>Ramesh Chennithala vs State of Kerala</i> , 21 August 2020 ¹⁶⁸	Alleged violation of right to privacy (Art. 21 Constitutional law of India) through the collection of Call Detail Records by the police to track where the patients were prior 14 days before they were confirmed to be positive. <u>Data concerned</u> : Call Detail Records (CDRs) <u>Nature of the parties</u> : an individual who is member of the Legislative Assembly (plaintiff), public body (defendant).
India , Madras High Court, <i>Adv. M. Zainul Abideen vs The Chief Secretary</i> , W.P.No.7491 of 2020, 22 April 2020 ¹⁶⁹	Request for guidelines concerning the media broadcasting visual news of confirmed Covid-19 patients with specific religion <u>Data concerned</u> : identity of Covid-19 patient with specific religion <u>Nature of the parties</u> : private (plaintiff); public body (defendants).
India , The High Court of Orissa, Cuttack, <i>Ananga Kumar Otta v. Union of India & Ors.</i> , WP (C) No. 12430/2020, decisions of 28 May 2020 and of 16 July 2020	Compatibility of the disclosure of the identity of the confirmed Covid patients with the right to privacy <u>Data concerned</u> : identity of Covid patients <u>Nature of the parties</u> : private party (plaintiff); public body (defendant)
India , High court of Karnataka, <i>Anivar A Aravind v. Ministry of Home Affairs</i> , GM PIL WP (C) 7483 of 2020, 25 January 2021	Assessment of the some aspects aspects of a contact-tracing app, including its mandatory character for accessing certain services and the existence of the data subjects' consent to data processing. <u>Data concerned</u> : health data, location data, contact details, sex, profession <u>Nature of the parties</u> : private party (plaintiff); public body (defendant)
Israel , High Court of Justice, 2109/20 <i>Ben Meir v. Prime Minister</i> , 26 April 2020 ¹⁷⁰	Legitimacy of a Government decision providing the Israel Security Agency (ISA), to process, for purposes of contact tracing and control over the respect of COVID-19 measures, "technological information" regarding persons who tested positive to COVID-19, as well as persons who came into close contact with them. The provision applied to journalists as well. <u>Data concerned</u> : "technological information" for identifying the route of the movement of anyone who tested positive for the virus during the 14 days prior to the diagnosis, and location data concerning all the people who were in that person's close proximity for more than a quarter of an hour. <u>Nature of the parties</u> : Associations, individual (plaintiffs); public bodies (defendants)
Israel , High Court of Justice, 6732/20 <i>Association for Civil Rights in Israel v. Knesset</i> , 1 March 2021	Lawfulness of a Government decision enabling the Israel Security Agency to use tracking technological means for epidemiological purposes regarding persons who had tested positive to the COVID-19, as well as contact persons.

¹⁶⁶ The decision is available at: <<https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/05/Balu-gopalakrishnan-v-State-of-kerala.pdf>> accessed 5 May 2020.

¹⁶⁷ The decision is available within the database: <<https://indiankanon.org/>> accessed 5 May 2021.

¹⁶⁸ The decision is available within the database: <<https://indiankanon.org/>> accessed 5 May 2021.

¹⁶⁹ The decision is available within the database: <<https://indiankanon.org/>> accessed 5 May 2021.

¹⁷⁰ The decision is available, in English, at: <<https://versa.cardozo.yu.edu/opinions/ben-meir-v-prime-minister-0>> accessed 5 May 2021.

	<u>Data concerned</u> : information concerning people who had tested positive for the novel coronavirus, as well as persons who came into close contact with them. <u>Nature of the parties</u> : Associations (plaintiffs); public bodies (defendants)
Europe	
Austria , Constitutional Court, V 573/2020, 10 March 2021	Constitutionality review of a provision establishing, for contact tracing purposes, that restaurant owners must collect personal data of customers and to transmit such data to the competent authorities if asked. <u>Data concerned</u> : data concerning restaurants' clients <u>Nature of the parties</u> : private party (plaintiff)
Austria , Data protection authority, Decision of 15 February 2021 ¹⁷¹	The lawfulness of an administrative act imposing a duty of private health centers to share negative results of PCR tests with public administration. <u>Data concerned</u> : data on the results of a PCR test for SARS CoV-2 from a primary care center <u>Nature of the parties</u> : private (plaintiff)
Belgium , Council of State, no. 248.124, 5 August 2020 ¹⁷²	Urgency procedure for suspension against a ministerial order imposing, <i>inter alia</i> , the communication of personal data in catering establishments <u>Data concerned</u> : telephone number and e-mail address (limited to one for each group of clients sharing the same restaurant table). <u>Nature of the parties</u> : private parties (plaintiffs) and public body (defendant).
Belgium , Council of State, no. 248.108, 3 August 2020 ¹⁷³	Urgency procedure for suspension against a ministerial order imposing, <i>inter alia</i> , the communication of personal data in catering establishments <u>Data concerned</u> : telephone number and e-mail address (limited to one for each group of clients sharing the same restaurant table). <u>Nature of the parties</u> : private parties (plaintiffs) and public body (defendant).
France , Council of State, no. 453505, 6 July 2021 ¹⁷⁴	Procedure for the suspension of the use of the 'health pass' (QR Code requiring the processing of data relating to civil status and of health data) <u>Nature of the parties</u> : Data protection association (plaintiff); public body (defendant)
France , Council of State, no. 450163, 12 March 2021 ¹⁷⁵	Lawfulness of data transfers to a third country, outside the European Economic Area (EEA) <u>Data concerned</u> : personal identification data and data relating to appointments (not health data) <u>Nature of the parties</u> : Associations and trade unions (plaintiff); public body and private company (defendant)
France , Council of State, no. 44493, 13 October 2020, ¹⁷⁶	Lawfulness of data transfers to a third country, outside the European Economic Area (EEA) <u>Data concerned</u> : health data <u>Nature of the parties</u> : associations and trade unions (plaintiff); public body (defendant)
France , Council of State, decision nn. 440442, 440445, 18 May 2020; Council of State, decision no. 446155, 22 December 2020 ¹⁷⁷	Lawfulness of the processing of data through drones by the police, for purposes of surveillance of the compliance of health regulation in force during the COVID-19 emergency. <u>Data concerned</u> : personal data registered by drones <u>Nature of the parties</u> : Data protection association (plaintiff), public body (defendant)

¹⁷¹ The author/s thanks M. Grochowski and O. Ceran for the help they provide for the understanding of the case.

¹⁷² The decision is available, in French, at: <<http://www.raadvst-consetat.be/arr.php?nr=248124>> accessed 5 May 2021.

¹⁷³ The decision is available, in French at: <<http://www.raadvst-consetat.be/arr.php?nr=248.108>> accessed 9 December 2021.

¹⁷⁴ The decision is available, in French at: <<https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-06/453505>> accessed 5 May 2021. The Press release in English is available at: <<https://www.conseil-etat.fr/en/news/the-conseil-d-etat-decides-not-to-suspend-france-s-health-pass>> accessed 9 December 2021.

¹⁷⁵ The decision is available, in French, at: <<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000043261200>> accessed 5 May 2021.

¹⁷⁶ The decision is available, in French, at: <<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042444915>> accessed 5 May 2021.

¹⁷⁷ The decisions are available in French at: i) <<https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-18-mai-2020-surveillance-par-drones>> ; ii) <<https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-12-22/446155>> accessed 30 April 2021.

<p>France, Council of State, no. 440916, 19 June 2020¹⁷⁸</p>	<p>Lawfulness of data processing, within a platform of health data for facilitating the use of health data for improving the health emergency management and fostering knowledge about covid-19. <u>Data concerned</u>: health data <u>Nature of the parties</u>: Associations, professional associations, trade unions (plaintiffs); public body; representative of the ‘Health Data Hub’, a body constituted by public and private bodies (defendants)</p>
<p>France, Council of State, decision no. 441065, 26 June 2020¹⁷⁹</p>	<p>Lawfulness of the processing of data through portable thermal imaging cameras used by municipal staff in schools to measure the body temperature of students, teachers and municipal staff working on school premises (data processing provided for by a municipal order). <u>Data concerned</u>: health data (temperature) <u>Nature of the parties</u>: fundamental rights’ association (plaintiff); public body (defendant)</p>
<p>France, Constitutional Council no. 2020/800 21 May 2020¹⁸⁰</p>	<p>Constitutional review of the compatibility of privacy right with a provision setting conditions under which the medical data of people infected with COVID-19 and those who have been in contact with them may be shared between certain professionals responsible for dealing with infection chains. <u>Data concerned</u>: health data <u>Nature of the parties</u>: President of the Republic; President of Senate, individuals (plaintiffs)</p>
<p>Montenegro, Constitutional Court, U - II 22/20, 23 July 2020</p>	<p>Constitutionality review of the decision, taken by the National Coordinating Body for Contagious Diseases, to publish names and addresses of persons in self-isolation in relation to COVID-19 on the Government website <u>Data concerned</u>: names and addresses of persons in self-isolation in relation to COVID-19 <u>Nature of the parties</u>: private (NGO, plaintiff)</p>
<p>Norway, Data Protection Authority, decisions of 15 June and 17 August 2020¹⁸¹</p>	<p>Compatibility with the data protection legal framework of the contact tracing app developed by the Norwegian Institute of Public Health (NIPH), used for contact tracing purposes and for monitoring the pandemic. <u>Data concerned</u>: personal data about app users, including continuous location data (GPS) and information about app users’ contact with others <u>Nature of the parties</u>: public body – sanctioning procedure</p>
<p>Poland, Data Protection Authority, no. DKN.5101.25.2020, 12 November 2020,¹⁸²</p>	<p>Existence of confidentiality breach of data concerning addresses of persons subject to quarantine and related obligations of the data controller. <u>Data concerned</u>: list with addresses of persons quarantined based on the decision of the State Sanitary Inspector, persons quarantined following a return from abroad, and persons with active COVID-19 infection in obligatory domestic isolation <u>Nature of the parties</u>: public body (plaintiff)</p>

¹⁷⁸ The decision is available in French at: <<https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-19/440916>> accessed 30 April 2021.

¹⁷⁹The decision is available in French at: <<https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-26-juin-2020-cameras-thermiques-a-lisses>> accessed 5 May 2021.

¹⁸⁰ The decision is available in French at: <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2020800dc/2020800dc.pdf> accessed 30 April 2021 (English and Spanish translations are provided).

¹⁸¹ An English summary of the decisions is available at: <https://edpb.europa.eu/news/national-news/2020/temporary-suspension-norwegian-covid-19-contact-tracing-app_en> accessed 30 April 2021.

¹⁸² The author/s thanks M. Grochowski and O. Ceran for the help they provide for the understanding of the case.

<p>Spain, Supreme Court, no. 1112, 14 September 2021¹⁸³</p>	<p>The decision concerns a procedure for ratification of health measures restrictive of fundamental rights. The measure at stake limited the access to certain inside entertainment establishments to those persons who can prove that they have a valid 'COVID passport' <u>Data concerned</u>: data included in the 'COVID passport' <u>Nature of the parties</u>: public body (plaintiff)</p>
<p>Spain, Supreme Court, no. 1103, 18 August 2021¹⁸⁴</p>	<p>The decision concerns a procedure for ratification of health measures restrictive of fundamental rights. The measure at stake limited the access to inside entertainment and hospitality establishments with music to those persons who can prove that they have a valid EU Covid digital certificate or accreditation of antigen test or negative PCR in the last 72 hours carried out in health centres, services or establishments. Data concerned: data included in the EU Covid digital certificate or in the document concerning the antigen test or negative PCR. <u>Nature of the parties</u>: public body (plaintiff)</p>
<p>Spain, Asturias High Court of Justice, 10 June 2021¹⁸⁵</p>	<p>The decision concerns a procedure for the ratification of health measures restrictive of fundamental rights. The measure at stake imposed the obligation for hotels and restaurants to draw up and retain for 30 days an attendance list and for nightlife establishments to draw up and retain for 30 days a list of clients. <u>Data concerned</u>: date and time of entry and exit of attendees or clients, their name and/or surname and their contact telephone number. <u>Nature of the parties</u>: public body (plaintiff)</p>
<p>Switzerland, Administrative Court of Zürich, AN.2020.00012, 3 December 2020¹⁸⁶</p>	<p>The decision addresses the claim for the revocation of a regulation introducing the obligation for accommodation and catering services to collect data of their guests for contact tracing purposes. <u>Data concerned</u>: surname, first name, postcode, mobile phone number, e-mail address, time of entry and exit to the catering establishment <u>Nature of the parties</u>: private individual (plaintiff), public body (defendant)</p>
South America	
<p>Brazil, Federal Supreme Court ADI 6387 MC-REF decisions of 24 April and 7 May 2020¹⁸⁷</p>	<p>Constitutionality review of provisions of the Provisional Presidential Decree 954/2020, which obliged telecommunication Companies to share the list of names, telephone numbers and addresses of their consumers with Brazilian Institute of Geography and Statistics Foundation, for supporting official statistic during the public health emergency resulting from the COVID-19 pandemic. <u>Data concerned</u>: list of names, telephone numbers and addresses of clients of telecommunication companies <u>Nature of the parties</u>: Brazilian Bar Association (plaintiff)</p>
<p>Colombia, Constitutional Court, judgement C-150/20, 27 May 2020</p>	<p>Constitutionality review of the Legislative Decree 458 of 2020, providing measures against poverty in the framework of the State of Economic, Social and Ecological Emergency. According to that measure, the National Administrative Department of Statistics shall provide the information collected in censuses, surveys, and administrative records to the State entities responsible for adopting measures for the control and mitigation</p>

¹⁸³ The decision is available in Spanish at <<https://www.poderjudicial.es/search/AN/openDocument/308a9176fc4b9502/20210920>> accessed 10 December 2021.

¹⁸⁴ The decision is available in Spanish at : <<https://www.poderjudicial.es/search/AN/openDocument/5774c96862c0f7ef/20210827>> accessed 9 December 2021.

¹⁸⁵ The decision is available in Spanish at <<https://www.poderjudicial.es/cgpp/es/Poder-Judicial/Tribunales-Superiores-de-Justicia/TSJ-Asturias/Noticias-Judiciales-TSJ-Asturias/El-TSJ-de-Asturias-no-ratifica-medidas-del-Gobierno-del-Principado-relativas-a-establecimientos-de-hosteleria-y-oocio-nocturno->>> accessed 9 December 2021.

¹⁸⁶ The decision is available in German at: <https://vgrzh.djiktzh.ch/cgi-bin/nph-omniscgi.exe?OmnisPlatform=WINDOWS&WebServerUrl=https://vgrzh.djiktzh.ch&WebServerScript=/cgi-bin/nph-omniscgi.exe&OmnisLibrary=JURISWEB&OmnisClass=rtFindinfoWebHtmlService&OmnisServer=JURISWEB,127.0.0.1:7000&Parametername=WWW&Schema=ZH_VG_WEB&Source=&Aufruf=getMarkupDocument&cSprache=GER&nF30_KEY=220831&W10_KEY=5555488&nTrefferzeile=4&Template=standard/results/document.fiw> accessed 9 December 2021.

¹⁸⁷ The decision is available in Portuguese at <<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6387MC.pdf>> accessed 30 April 2021.

	<p>of the COVID-19 coronavirus, when requested by them for the implementation of measures for the control and mitigation of the COVID-19 coronavirus. These data may only be used for that purpose.</p> <p><u>Data concerned:</u> databases of the National Administrative Department of Statistics</p> <p><u>Nature of the parties:</u> public bodies (constitutional review procedure), intervention by universities and private citizens</p>
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SECTION II – LITIGATION

COVID-19 and Freedom to Conduct a Business

Gianmatteo Sabatino

Abstract. The present survey is meant to offer a general overview concerning the different approach that courts in several jurisdictions on a global scale adopted to deal with the potential and actual conflicts between Covid-19 related emergency measures (justified by public health interests) and the freedom to conduct a business. Such conflicts encompass either situations where business activities were closed down or limited due to the pandemic or situations in which closed businesses requested compensation or questioned the appropriateness of the relief schemes designed by public authorities.

The relation between public health and economic freedoms in times of pandemic is a complex one, which is also deeply affected by how the interactions between the principles of the economic constitutions are shaped and function in different legal systems. The issue, therefore, necessarily requires the assessment of the critical connection between law and economic policy.

The analysis carried out in the survey mainly revolves around case law and places great emphasis on the use of general legal principles such as proportionality, reasonableness, precaution, and non-discrimination to carry out a balancing of conflicting rights and interests.

At the same time, given the factual complexity of the concrete situations triggering such conflicts, the analysis also highlights how the specific features of the “legal emergency”, such as the declaration of a state of emergency or the reliance on scientific evidence concerning the evolution of the pandemic, may affect the courts’ reasoning.

The goal of the survey is to provide a general comparative landscape of the different approaches chosen by courts to deal with some of the economic consequences of the pandemic.

Keywords: *COVID-19, Economic Freedoms, Right to do Business, Balancing of Rights, Emergency*

1. Introduction and Structure of the Survey

This survey provides a general overview of some of the most relevant judicial decisions issued by courts from several different countries concerning the impact of Covid-19-related emergency measures on the regular functioning of business and trade activities.

All over the world, lockdown measures as well as relief measures have deeply affected economies, raising potential conflicts between economic freedoms – either explicitly protected or enshrined in the legal texture of modern countries – and other rights and interests, namely the interest in public health, and inherently connected with the right to health as the object of positive state actions.

In a relatively brief time-period, the courts have been called upon to solve some of these conflicts. In doing so, they have carried out a balancing of interests, applied general legal principles, and employed different remedies in order to tackle not only the legal issues of the conflict between interests, but also the economic issues associated with the losses suffered by business operators hit by the lockdowns.

Furthermore, the emergency measures, though often similar in their general content, are framed within legal systems, or even legal traditions, different from each other¹. Such differences may imply a variety in the approaches chosen by courts in multiple

¹ It is therefore for the comparative analysis, and the comparative lawyers, to trace both convergent and divergent patterns in the management of the emergency, also with regard to the relation between law, politics and science. On the issue see Arianna Vidaschi and Lorenzo Cuocolo, ‘L'emergenza sanitaria nel diritto comparato: il caso del Covid-19’ (2020) DPCE Online 43(2) 1449; Kim

Barker and Enrique Uribe-Jongbloed, Tobias Scholz, ‘COVID-19 and the “Myriad”’: A Comparative Assessment of Emergency Responses from Europe and South America’ (2021) *Legalities* 1(1), 116; Peter Yeoh, ‘COVID-19 Legal-Economic Implications of a Pandemic’ (2020) *Business Law Review* 41(3), 74.

countries in assessing, applying and interpreting the measures. The following survey sketches the courts' trends, within a conceptual framework based on the legal principles deployed. The work is mainly based on the analysis of case law and is carried out within the context of a Project coordinated by the University of Trento and relying on a wide network of judges and legal scholars. The contact points of the network, together with the project staff, collected the decisions analyzed. The specific focus of the project – namely, the (potentially conflictual) connections between health and other fundamental rights and interests – inspires the logic of this work, which strongly emphasizes the perspective of interests' balancing in the assessment of Covid-19-related emergency economic measures.

The survey is structured in eight sections. Section 2 will sketch a general overview of the conflicts addressed in the selected cases, properly framed within the correspondent legal systems and traditions, while section 3 will carry out an analysis of the different models of adjudication with a special focus on balancing. Section 4 will address the different principles used by courts and section 5 will review the determination of remedies, while section 6, also with a particular emphasis on remedies, will address some decisions from India that are deemed particularly relevant. Section 7 will assess how the courts considered the issue of economic losses suffered by business operators in their reasoning and, finally, section 8 will draw some general conclusions.

2. General overview. The significance of economic freedoms in different legal traditions

The notion of economic freedom is a complex one. Its significance, for the present analysis, stems from its role in the judicial review of emergency measures, in particular as a concept against which to balance public health interests used to justify lockdown provisions.²

As such, the “economic freedom” we are interested in is that integrated in the “economic constitutions” of the legal systems considered.³ It is this notion that the comparative analysis must use as a criterion to measure to what extent judges adhered to or distanced themselves from the general features of the system in order to assess the legitimacy of the challenged emergency measures.

The pandemic led to lockdowns and limitations of business activities in vastly divergent economic contexts, embracing different philosophies of business development, shifting from liberal, to social-democratic to socialist systems. In each of these models, business freedom is enshrined in different legal sources and implies varying roles played by public policies.

In U.S. law, as confirmed by the selected cases, economic freedoms are mainly channeled through the general due process clause (14th Amendment of the U.S. Constitution) with specific regard to the protection of property rights.⁴ One foundation of economic freedom, the freedom of trade, is further protected by the commerce clause, enshrined in Art. 1 Sec. 8 of the Constitution.

² On the restrictions upon economic freedoms brought by the pandemic see, among others, Judith Bueno de Mesquita, Anuj Kapilashrami and Benjamin Mason Meier, ‘Human Rights Dimensions of the COVID-19 Pandemic’ (2021) Independent Panel for Pandemic Preparedness and Response, Background Paper no. 11 <<https://theindependentpanel.org/wp-content/uploads/2021/05/Background-paper-11-Human-rights.pdf>> accessed 21 October 2021; Billie Bell, ‘Fundamental rights and freedoms during the COVID-19 crisis’ (2020) EAP CSF Covid-19 Briefing Paper <<https://eap-csf.eu/wp-content/uploads/COVID19-Briefing-Paper-Fundamental-rights-and-freedoms-during-covid19-crisis.pdf>> accessed 21 October 2021; Fabrizio Cafaggi and Paola Iamiceli, ‘Uncertainty, Administrative Decision-Making and Judicial Review: The Courts’ Perspectives’ (2021) European Journal of Risk Regulation 0(0) 1.

³ On the general notion of economic constitution see Tony Prosser, *The Economic Constitution* (OUP 2014);

Ngoc Son Bui, ‘Economic Constitutions in the Developing World’ (2019) *Law and Development Review* 12(3) 669; Paola Bilancia, ‘L’effettività della Costituzione economica nel contesto dell’integrazione sovranazionale e della globalizzazione’ (2019) 5 *federalismi.it* <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=40500>> accessed 21 October 2021; Eugenio De Marco, ‘“Costituzione economica” e integrazione sovranazionale’, (2019) 5 *federalismi.it* <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=40505>> accessed 21 October 2021.

⁴ Ryan C. Williams, ‘The One and Only Substantive Due Process Clause’ (2010) *The Yale Law Journal* 120 408; Kurt T. Lash, ‘Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act’ (2018) *The Georgetown Law Journal* 106, 1389.

A more complex landscape is that sketched by European law. Such complexity is essentially due to the (sometimes difficult) interaction between the constitutional traditions of the Member States – often emphasizing the social function of both property rights and private economic initiative⁵ – the fundamental economic freedoms which the common market relies on and the effective protection of fundamental rights, already part of the *acquis communautaire* and today integrated within the treaties and the Charter of Fundamental Rights of the European Union.⁶ It is in order to manage the interaction among these elements and to set a standard of legitimacy for public powers' action that the Court of Justice of the European Union referred to the general principle of effectiveness and proportionality, while avoiding at the same time the definition of a general hierarchy between economic freedoms and other fundamental rights.⁷

Furthermore, public health interests, which have indeed long been recognized as justifiable causes for limitations to economic freedoms⁸, are also interpreted in light of the principle of precaution, thus designing a particularly "strategic" role for the scientific assessment of risks connected to certain business activities in times of pandemic.

As we move outside the Euro-American sphere, and its typically neoliberal economic law model, we observe a greater variety and even

fragmentation in the constitutional status of economic freedoms. Although recognized as fundamental, they are necessarily balanced against tendencies conferring law a particularly strong role in the composition of social conflicts.⁹ Such a view effectively empowers the courts, in absence of clear interventions by public authorities, to not only question the legitimacy of emergency measures but also to design specific remedies targeted for particular situations of socio-economic distress.¹⁰ From this perspective, moreover, the very notion of economic freedom is put in relation with other fundamental rights, such as the right to work.¹¹

Lastly, a peculiar approach to the protection and regulation of economic freedom is embraced by those systems, such as the Chinese system, founded on the doctrine of market socialism. In such cases, the widespread recognition of property rights and economic freedoms is inherently functional to the pursuit of socio-economic development goals set by the state.¹² As such, regardless of the "weight" of private economy, the issue of hierarchies among economic freedoms and public interests is not only resolved *ex ante* in favor of the latter, but is also directly dependent on the interpretation of public interests given by authorities and official policy acts. The scope of the judge's review is therefore vastly limited and relies solely on the principle of legality, narrowly interpreted as a check over the respect of formal procedures. It

⁵ The social function of property, as derived from the constitutional traditions of the Member States, was already recognized and embraced by the Court of Justice in Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 03727. On the issue, see Valbona Alikaj, 'The Right Of Ownership In The European Law' (2016) *European Scientific Journal* 12(22) 26.

⁶ Sybe A. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) *Utrecht Law Review* 9(1) 169.

⁷ *Ibidem*. On the role of the principles of effectiveness and proportionality in EU Law, albeit from the specific perspective of consumer law, see Fabrizio Cafaggi and Paola Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) *Eur. Rev. Priv. L.* 3 575.

⁸ See Court of Justice of the European Economic Community, Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649.

⁹ This is, for instance, the case concerning India. This is also the case in the Latin American legal systems, whose notion of economic law (*derecho económico*), even if deeply affected by neoliberal views, maintained

interventionist tendencies justified on the basis of developmental aims of the state. See, on the issue, Jorge Witker, *Introducción al Derecho Económico* (McGraw-Hill 1999). See also Luis F. Sabogal Bernal, 'Nociones generales de la libertad de empresa en Colombia' (2005) *Revist@ e – Mercatoria* 4(1) 1.

¹⁰ Such active role of the courts is connected, in some cases, to specific traits of the different legal traditions. In Latin America, for instance, the 'humanist' tendency of courts, not only with regard to the composition of economic conflicts but, in general to the adjudication of disputes, has been regarded as a peculiar feature of a 'Latin American' legal system. On the issue see Ignazio Castellucci, 'Sistema jurídico latinoamericano' (Giappichelli 2011).

¹¹ Tribunal of first instance for administrative and tributary disputes no. 2 of the city of Buenos Aires, secretaria no. 4, *S.M.I. Y otros contra Gcba sobre otros procesos incidentales – Amparo*, 29 May 2020.

¹² For general references on the issue see Angelo Rinella and Iolanda Piccinini (eds), 'La costituzione economica cinese' (il Mulino 2010); Gianmatteo Sabatino, 'Legal Features of Chinese Economic Planning', in Ignazio Castellucci (ed), 'Saggi di diritto economico e commerciale cinese' (Editoriale Scientifica 2019) 33.

should also be considered that the ability to apply constitutional review principles is limited as well, since in these systems the constitution itself cannot be invoked in judicial disputes nor directly applied by judges, but rather serves instead as reference for the action of public powers.¹³

2.1 The Different Levels of Complexity of Analysis

The values underlying the notion of economic freedom in the different legal systems, as noted, deal with potential conflicts between such freedoms and other rights and interests, arising from multiple perspectives and involving different socio-economic actors. The analysis we have carried out displays, therefore, several levels of complexity which inevitably affect the way courts have interpreted emergency measures and applied general principles when balancing rights and freedoms.

In the first place, the elaboration of emergency measures implies a connection between their legal and scientific foundations. In other words, the administrative power at the basis of such measures is both justified and limited by scientific evidence concerning the risks of certain activities and the effects that lockdown measures may produce on the evolution of the pandemic. In the legal systems where there is no predetermined hierarchy between economic freedoms and public interests, the reference to scientific evidence affects the application of the general principles of reasonableness, proportionality and, with special regard to European countries, precaution.¹⁴

Indeed, even in countries – such as China – where public interests, as expressed by the political leadership, are inherently superior to private economic freedoms, the legal doctrine embraces the use of necessity (*biyao xing*), appropriateness (*shidang xing*) and

proportionality (*bili xing*) to ensure that the limitations of rights are founded in concrete protection of citizens' health.¹⁵ The difference is in the extent of the judicial review, which in the Chinese case law never scrutinizes the reasonableness or the proportionality of the public policy choices, nor the technical and factual basis on which the policy and the corresponding prioritization of public health over private rights and interests rely.¹⁶

Second, measures affecting business activities have an impact not only on the rights and interests of business owners but also on those of workers and customers/consumers. It could be expected that courts in legal systems which emphasize the social dimension of private economic initiative take into greater account the variety of social actors affected by emergency measures, whereas courts focusing on the relation between challenged measure and individual property rights of business owners could be less interested in a comprehensive analysis of the measures' social impact. The assessment of the case law, in comparative perspective, could either confirm or overturn such view.

Third, the specific issues triggering potential conflicts between economic freedoms and other rights and interests represent a further level of complexity, due to their variety. In particular, while the majority of the challenged measures concerned lockdown provisions ordering closure of business activities, in other cases courts have addressed more circumscribed or targeted interventions, such as limitation of business hours, imposition of safety requirements to resume activities, and suspension of certain fees or terms of a business activity¹⁷. The following analysis will assess how such differences in concrete situations affected the courts' reasoning not only in evaluating the measures' legitimacy but also in addressing the issue of economic losses sustained by business operators.

¹³ Jianfu Chen, 'Chinese Law: Context and Transformation', (Martinus Nijhoff 2008) 135 ff.

¹⁴ Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review' (n. 2).

¹⁵ Liu Changqiu (刘长秋), Zhao Zhiyi (赵之奕), 论紧急状态下公民健康权的克减及其限度 (On the derogation and limitation of citizens' right to health during the state of emergency) (2020) *fa xue lun tan* 9 2020 30.

¹⁶ The standard of the judicial review in times of emergency is, by the way, an issue acknowledged by legal scholars. See, for instance, Yin Qin (殷勤), 应急行政合法

性审查理念的转变 (The change in the concept of administrative legality review in emergency) (2020) *ren min si fa* 16 52.

¹⁷ See, for instance, the decision of the Administrative Court of Karlsruhe (Germany), 3 K 4418/20, 30 October 2020; the decision of the High Court of Zimbabwe, 'The Zimbabwe Chamber for Informal Workers & 2 Others v Minister of Health and Child Care & 6 Others'; the decision of the Haryana High Court (India), *Independent Schools Association ... vs State Of Punjab And Ors*, 30th June 2020, Writ Petition no. 7409/2020.

2.2 Decisions Upholding the Challenged Measures

The following table presents a set of decisions which rejected the plaintiffs' claims, therefore upholding the legitimacy of the challenged measures.

The decisions are classified according to their factual backgrounds, the types of measure and remedies involved and the reasoning embraced by the judge in rejecting the claims.¹⁸

Decision	Economic sector	Measure challenged	Remedy sought	Outcome
<i>Argentina: Appeal Chamber in Administrative Disputes, Córdoba, Unión de Trabajadores del Turismo, Hoteleros y Gastronómicos de la República Argentina UTHGRA c/ Gobierno de la Provincia de Córdoba, 14 August 2020</i>	Tourism, hotel and gastronomic sector	Closure of business	Unconstitutionality of the challenged measure (via Amparo); reopening of business	Claim rejected: The challenged measure does not appear arbitrary or clearly unconstitutional and is also viewed in light of the complex technical assessment concerning the elaboration of restrictive measures. However, the court encourages the parties to implement concertation mechanisms to address the issues arising from the lockdown measures.
<i>Belgium: Council of State, 24 February 2021, no. 249.904</i>	Betting shops	Closure of business	Annulment of the measure	Claim rejected: The challenged measure pursues a legitimate objective. The Interior Minister has wide discretionary power to strike a balance between conflicting interests.
<i>Belgium: Council of State, 28 October 2020, no. 248.781</i>	Restaurants	Closure of business	Annulment of the measure	Claim rejected: The challenged measure pursues a legitimate objective. The Interior Minister has wide discretionary power to strike a balance between conflicting interests. The challenged measure provides for reasonable distinctions between activities and relies on scientific evidence and opinions.

¹⁸ Not all the decisions addressed in this survey are included in this table (or in the one in § 2.3): indeed, the main purpose of the table is to offer a general overview taking into account as many jurisdictions as possible and highlighting relevant differences and analogies both in the factual background of the cases and in their outcome.

Therefore, some decisions whose content is quite similar have not been included in the table. They will be, however, referred to in the footnotes when relevant for the paper. For a complete list of the cases addressed see the Appendix.

Belgium: <i>Council of State, 29 October 2020, no. 248.798</i>	Restaurants and bars	Closure of business	Collective action for interim relief, asking for suspension of the challenged measure	Claim rejected: The plaintiffs did not demonstrate in concrete terms the damage suffered by each establishment, in relation to their economic capacity. The general reference to the hardships endured by the economic sector does not suffice to justify interim relief.
Belgium: <i>Council of State, 13 November 2020, no. 248.918</i>	Hotels, bars, restaurants	Closure of business	Interim relief: request for suspension of the challenged measure	Claim rejected: The challenged measure is appropriate and proportionate with relation to its purpose (i.e. reduction of infections). The freedom of business is not absolute.
Canada: <i>Superior Court of Quebec, 19 March 2021 Entrepreneurs en action du Québec c. Procureur général du Québec</i>	Various businesses	Closure of business	Declaration of nullity of restrictive measures	Claim rejected: The challenged decrees are meant to tackle an emergency. There is still scientific uncertainty regarding transmission of the virus and therefore the measures cannot be considered unjustified.
Croatia: <i>Croatian Constitutional Court, decision no. U-I-2162/2020 of 14 September 2020</i>	Hospitality and catering activities	Closure of business	Unconstitutionality of the challenged measures	Claim rejected: When exceptional circumstances occur, public authorities are authorized to issue provisions regarding closure of businesses.
France: <i>Council of State, 27 January 2021, no. 448732</i>	Fairs	Closure of business	Urgency request for suspension of the challenged order (interim relief); as a subsidiary measure, enjoin the prime minister to adopt relief measures for business operators	Claim rejected: The infringement upon business freedom is outweighed by the necessity to protect public health. In addition, business operators may accede to different kinds of assistance under the regulatory framework.
France: <i>Council of State, decision no. 445102 of 16 October 2020</i>	Sporting activities	Prohibition of sporting activities	Urgency request for suspension of challenged measures (interim relief)	Claim rejected: Sporting activities are particularly dangerous in terms of the risk of spreading the virus. Business freedom must be balanced with public health.
France: <i>Council of State, decision no. 440439 of 11 June 2020</i>	Amateur football championships	Prohibition of activity	Request for suspension of the measure (interim relief)	Claim rejected: The decision is justified in light of the health crisis and the fact that most of the matches had already been played.

France: <i>Council of State, decision no. 447208 of 11 December 2020</i>	Ski lifts	Closure of business	Urgency request for suspension of the challenged measure (interim relief)	Claim rejected: There is a need to implement all possible measures to avoid higher numbers of infections. Such necessity outweighs the impacts of limitations on business freedom. Moreover, the government has announced stronger support measures for the sector.
France: <i>Council of State, decision no. 451085 of 14 April 2021</i>	Art galleries	Closure of business	Suspension of the challenged measure	Claim rejected: The state of emergency justifies wider discretionary powers of authorities in determining restrictions.
Germany: <i>Administrative Court of Karlsruhe, 3 K 4418/20, 30 October 2020</i>	Restaurants and bars	Limitation of business hours	Request for interim relief – suspension of the challenged measure	Claim rejected: The measures are necessary to reduce the impact of the virus, also given the impossibility to identify specific breeding grounds for the virus and the risk of gatherings in bars and restaurants. The limitation is an appropriate and proportional means to achieve the objective.
Germany: <i>Federal Constitutional Court 1 BvQ 47/20, 29 April 2020</i>	Shops with shopping areas exceeding 800 square meters	Closure of business	Unconstitutionality claim, request for interim relief (suspension of the measures)	Claim rejected: The rights to life, health and bodily integrity outweigh business freedom. Claim also rejected in light of the fact that the challenged measure is temporary and that shops are allowed to be open provided they install physical barriers.
Germany: <i>Federal Constitutional Court 1 BvR 2530/20, 11 November 2020</i>	Cinemas and restaurants	Closure of business	Preliminary injunction suspending measures	Claim rejected: In light of the dangers that unrestrained infections could pose to human life, business freedom is outweighed by public health necessity.
Germany: <i>High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021</i>	Gyms	Closure of business	Annulment of the measure; suspension of its efficacy (as interim relief)	Claim rejected: The challenged measure is based on a proper scientific risk assessment and is necessary to reach the legitimate aim of reduction of infections. In gyms there is also a higher risk of infections.

				Furthermore, the challenged measure lays out support schemes for economic operators hit by the pandemic.
Italy: <i>Advisory Opinion of the Council of State, no. 00850/2021, 28 April 2021</i>	Restaurants	Closure of business	Annulment of the challenged measure	Claim rejected: The measure is reasonable and based on a set of scientific opinions; it does not unjustifiably discriminate among economic activities. The legal form of the measure (Decree of the President of the Council of Ministers) complies with the constitution and is appropriate to tackle the rapidly changing circumstances of the pandemic.
Italy: <i>Decree of the Council of State, no. 884, 22 February 2021</i>	Betting halls, amusement arcades, bingo halls	Closure of business	Annulment and interim suspension of the challenged measure	Claim rejected: The measure is based on a scientific risk assessment. Protection of public health outweighs the prevention of economic damage.
Italy: <i>Administrative Regional Tribunal of Trentino Alto-Adige, decision of 23 December 2020</i>	Tender procedures	Withdrawal of tender procedure in light of changing necessities for public authorities due to the pandemic	Annulment of the impugned decision	Claim rejected: The administration can, on grounds of opportunity, revert its decisions concerning the tender. The appearance of the pandemic raises new necessities and requires performances not foreseen in the original tender procedure.
Italy: <i>Administrative Regional Tribunal of Campania, decision of 18 November 2020</i>	Tender procedures	Exclusion of an offer from a tender procedure	Request for annulment of the Decision to exclude an offer from a tender procedure for sanitary masks, claiming that timing of the request for clarifications made it impossible to respond	Claim rejected: The timing was not unreasonable given the urgency of ensuring the continued supply of masks.
Scotland: <i>[2020] CSOH 98 P1043/20</i>	Various businesses (decision placing an area in Level 3 of restrictions, therefore leading to stricter restrictions to business activities)	Stricter restrictions to business	Request for interim suspension of the measure	Claim rejected: The decision was based on the assessment of the trend of the pandemic and is rational. Moreover, the restrictions are temporary and periodically reviewed.
Spain: <i>Superior Court of Justice of the Valencian Community,</i>	Recreational and gambling establishments	Closure of business	Reopening of business facilities (interim relief)	Claim rejected: The challenged measure is taken pursuant to the precautionary principle

<i>Administrative Chamber, 94/2021 of 17 March 2021</i>				in light of the potential health risks related to the opening of gambling and recreational activities.
Spain: <i>Superior Court of Justice of the Valencian Community, Administrative chamber 59/2021, 25 February 2021</i>	Bars and restaurants	Closure of business	Reopening of business (interim relief)	Claim rejected: The activities limited by the challenged measure are particularly dangerous and there is not enough evidence concerning risk reduction connected to the use of safety measures.
South Africa: <i>High Court of South Africa (Gauteng Division), Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP)</i>	Tobacco products	Prohibition of sale	Annulment of the challenged measures	Claim rejected: There is a reasonable connection between the ban on tobacco products and the necessity to reduce Covid-19 infections, the ban was enacted in light of public health necessities.
United States: <i>United States District Court for the Northern District of California, Altman v. County of Santa Clara, 464 F.Supp.3d 1106 (N.D. Cal. 2020) 227 A.3d 872 (Pa. 2020)</i>	Firearms retailers	Closure of business	Request for preliminary injunction suspending the measure	Claim rejected: The county had legitimate public health goals in preventing the spread of Covid-19 and protecting public health resources, plaintiffs' Second Amendment rights were not plainly, palpably invaded by the closure order because it is not the equivalent of a firearms ban, is temporary, and is facially neutral, and that closing businesses was reasonable to prevent transmission of Covid-19.
United States: <i>United States District Court, Western District of Michigan, Southern Restaurant and Lodging Association v. Gordon, 1:20-cv-1104, 20 November 2020</i>	Restaurants	Closure of business	Request for injunction reopening business facilities	Claim rejected: The public authority had valid reasons to target restaurants and to lay out specific restrictive measures for them. The impact on interstate commerce (Art. 1 Sec. 8 U.S. Const.) is outweighed by the benefits of the lockdown.
United States: <i>Supreme Court of Pennsylvania, Friends of Danny</i>	Various businesses ("non-essential businesses")	Closure of business	Request for extraordinary relief (i.e. suspension of closure)	Claim rejected: The court stated that the Governor of Pennsylvania has

<p><i>DeVito v. Wolf</i>, 227 A.3d 872 (Pa. 2020)</p>				<p>expansive emergency management powers upon declaration of a disaster emergency under the state's Emergency Code. The protection of the lives and health of Pennsylvania citizens by closing non-life-sustaining businesses was the proper exercise of police power and was not unduly oppressive.</p>
<p>United States: <i>Texas, U.S. District Court for the Western District of Texas, 6th Street Business Partners LLC v. Abbott</i></p>	<p>Bars obtaining more than 51% of revenues from liquors</p>	<p>Closure of business</p>	<p>Unconstitutionality, injunction (reopening of business); monetary damages</p>	<p>Claim rejected: The challenged measure is not traceable to the defendant (Governor of Texas). The Governor has the power to issue executive orders but not the power to enforce them. In any case, the claim for monetary damages would be quashed because of the sovereign immunity.</p>
<p>Zimbabwe: <i>High Court of Zimbabwe, The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others</i></p>	<p>Transport sector; informal sector</p>	<p>Restrictions to business activities (transport sector); closure of business (informal sector)</p>	<p>Interim relief: removal of restrictions and reopening of businesses</p>	<p>Claim rejected: Limitations imposed on business freedom are proportionate to the aim pursued. They serve to protect the rights of every citizen to life, dignity and a safe environment. If the transport sector and the informal sector were to reopen, such activities could not be properly traced, and the risk of infections would rise.</p>

The table proves a certain degree of uniformity among the decisions, especially with regard to the type of measure challenged and the remedies sought. In total, 21 of the 29 selected decisions deal solely with measures closing down business premises; 4 other decisions deal also with limitations to business activities, concerning business hours, the sale of specific products or working conditions; 2 decisions concern measures prohibiting certain activities, with subsequent impacts on businesses involving those activities (e.g. sports); and 2 decisions concern tender procedures and, specifically, termination or amendments to the procedure due to emergency circumstances.

Regarding the claims, they concern either a request for annulment of the challenged measures or a request (in form of interim relief) for suspension of their efficacy. The concrete aim pursued is, obviously, the reopening of business premises and the removal of limitations. In cases directly brought before constitutional courts, the removal of the challenged measure derives from a claim of unconstitutionality. A similar degree of uniformity is found in the specific rights and interests claimed by plaintiffs and evaluated by judges against public health interests; all of the selected decisions refer to a general notion of business freedom. However, in American case law the plaintiffs mentioned other rights and interests found in the

United States constitution, such as the right to bear arms – with regard to the closure of firearms retailers¹⁹ – and the freedom of interstate commerce, albeit in connection with business freedom.²⁰

It should be mentioned that a group of Chinese cases, though involving business activities, do not take into account freedom of business; in order to determine the legitimacy of the restrictions, they instead solely focus on the duty of all citizens to respect the emergency measures²¹. At the same time, they emphasize that emergency regulations in economic matters are issued also to ensure consumer protection and market order, albeit from a public economic management perspective.²²

The specific connotations of these decisions are also related to the social function of the judge in the legal order of the People’s Republic of China, which strongly emphasized the pedagogic dimension of the judicial decision, meant as an instrument to direct the conduct of private citizens in light of common interests and public needs, especially in times of emergency such those caused by the pandemic.²³

It is worth noting that courts, depending on the specific arguments put forward by parties, emphasized in some cases public health interests

and in other cases individual fundamental rights (e.g. to life, to health, to bodily integrity) as counterparts to economic freedoms in the balancing equation. Whereas, as also displayed in the table, references to public health were greater in number, references to individual fundamental rights were also quite “scattered” among different legal systems, not allowing to draw sufficiently grounded comparative remarks.

However, an interesting point is raised by a decision from Zimbabwe, where the judge specified that the limitations imposed on business freedom ensure the protection of the individual fundamental rights to life, dignity and to a safe environment²⁴. In this case, the reasonableness of the challenged measure is entirely justified on the basis of civil rights, prevailing over economic rights, instead of public interests.

2.3 Decisions Quashing the Challenged Measures

The following table points out both the main reasoning followed by the court and the remedy issued in some relevant decisions quashing emergency provisions.

Decision	Economic sector	Measure challenged	Reasoning	Finding/Remedy
Austria: <i>Constitutional Court, decision no. V392/2020 of 1 October 2020; decisions no. V405/2020 and V429/2020 of 1 October 2020</i>	Restaurants and similar establishments	Prohibition to enter business premises/Closure of business	The legal basis of the restrictive measure does not provide for sufficient information concerning the distinction between activities to be closed down and activities to be kept open.	Unconstitutionality of the challenged measure
Brazil: <i>Federal Court - 1st Region, 1013225-</i>	Purchase and	Measures introducing	Introducing restrictive criteria for private	Unconstitutionality of the

¹⁹ United States, District Court for the Northern District of California, *Altman v. County of Santa Clara*, 464 F.Supp.3d 1106 (N.D. Cal. 2020); District Court for the District of Connecticut, *Connecticut Citizens Defense League v. Lamont*, 465 F.Supp.3d 56 (D. Conn. 2020); District Court for the Central District of California, *McDougall v. County of Ventura*, no. 2:20-cv-02927-CBM-AS, 2020 WL 6532871 (C.D. Cal. Oct. 21, 2020).

²⁰ United States, District Court, Western District of Michigan, Southern Division, *Mich. Rest. & Lodging Ass’n v. Gordon*, 504 F. Supp. 3d 717 (W.D. Mich. 2020).

²¹ Intermediate People’s Court of Tianjin, Final Decision n. 166, 12 May 2020; Wugang Primary People’s Court (Hunan Province), 18 September 2020.

²² Primary People’s Court of Kenli District, Dongying City, 2 June 2020, Administrative decision no. 57.; Xishui Primary People’s Court, 16 September 2020; Intermediate People’s Court of Chengde City, 30 November 2020 – Appeal Decision no. 207; Wugang Primary People’s Court (Hunan Province), 18 September 2020; Intermediate People’s Court of Tianjin, Final Decision n. 166, 12 May 2020.

²³ On the pedagogic role of the courts in the People’s Republic of China see Ignazio Castellucci, ‘Rule of Law and Legal Complexity in the People’s Republic of China’ (Università di Trento 2012).

²⁴ Zimbabwe, High Court of Zimbabwe, ‘The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others’.

<i>55.2021.4.01.3400 Federal Court, 21^a Vara Federal Cível, decision reached on the 25/03/2021</i>	distribution of vaccines by private establishments	restrictive criteria for the purchase of vaccines	establishments to purchase, distribute and administer vaccines conflicts with both the freedom of business and the right to health.	challenged measure
China: <i>Wugang Primary People's Court (Hunan Province), 18th September 2020, First Instance Decision (Administrative) no. 127</i>	Private education	Order to cease business	Public authorities, in times of emergency, may close down facilities or prohibiting activities in absence of the safety requirements prescribed. However, they may not impose sanctions not provided by law. The specific sanction imposed in the case is not laid out in the applicable laws and does therefore violate the principle of legality.	Annulment of the challenged measure (on grounds of legality)
France: <i>Council of State, 30 December 2020, no. 448201</i>	Various businesses	Local measures introducing stricter lockdown provisions than what is provided for at the national level	The challenged measure does not have proper justification to introduce different lockdown provisions than at the national level.	Quashing of the first instance decision, order to the mayor to rectify lockdown requirements
France: <i>Council of State, 9 June 2020, no. 440809</i>	Football Leagues	Suspension of <i>Ligue 1</i> , with relegation of two teams at the bottom (at the moment of the suspension) in <i>Ligue 2</i> .	The decision is likely to have a serious and immediate impact on the interests of the clubs concerned. Therefore, a further review on the conditions necessary to resume the games should be carried out.	Suspension of the implementation of the challenged measure, the football league must carry out a review on the condition to resume the games
Germany: <i>Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020</i>	Social integration activities for mentally disabled people	Prohibition to perform activities	The prohibition is disproportionate since it does not achieve its objective (i.e. reduction of infections) and introduces an unreasonable distinction between disabled adults and children/teenagers, who are not subjected to the ban.	Suspension of the challenged measure (interim relief)
India: <i>Haryana High Court, Independent</i>	Private education	Prohibition to charge fees	The decision to prevent private schools from	Private schools may charge fees,

<i>Schools Association ... vs State Of Punjab And Ors, 30th June 2020, Writ Petition no. 7409/2020</i>		during the pandemic	collecting fees must be assessed in light of the different interests (of schools and families) affected by the pandemic	provided that they are meant to cover only actual expenditure incurred in during the lockdowns.
Israel: <i>Supreme Court of Israel, HCJ 6939/20 Idan Mercaz Dimona Ltd.v. Government of Israel, decision of 2 February 2021</i>	Sale of toys	Closure of business	The challenged measure is unlawful since it allows essential stores to sell non-essential products while prohibiting other sellers of those non-essential products from opening.	The court instructed the respondent public authority to amend the challenged measure within a prescribed time limit (a week).
Italy: <i>Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933</i>	Various businesses	Prohibition for private establishments to conduct Covid-19 tests	The prohibition is unjustified as well as conflicting with the necessity to maximize tests.	Annulment of the challenged measure
Italy: <i>Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862</i>	Beauty centres	Closure of business	The legal basis of the restrictive measure does not rely on a proper factual inquiry and a proper explanation to justify the closure of beauty centres in “red zones” while hair salons could remain open.	Annulment of the challenged measure
Italy: <i>Administrative Regional Tribunal of Campania, 4 February 2021, no. 789</i>	Wholesale retailers of electric components	Closure of business	The activity is “essential” pursuant to national emergency measures and the local government’s decision to close it down is unlawful. The impugned measure had already expired, but the plaintiff was entitled to monetary compensation given the causal link between the challenged measure and the economic damage sustained.	Monetary compensation
Spain: <i>Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020</i>	Sport activities	Closure of business	The decision to close down all sports facilities is not proportional since other viable alternatives exist to achieve the same objective (i.e. reduction of infections).	Grant of the precautionary measures requested (reopening of facilities)

<p>Spain: <i>Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14th September 2020</i></p>	<p>Gatherings – parties and ceremonies</p>	<p>Prohibition of gatherings</p>	<p>Gatherings for occasions such as parties or ceremonies have been restricted while other types of gatherings and meetings as well as the transport sector have not, without any justifiable basis for distinctions.</p>	<p>Grant of the precautionary measures requested by a confederation of entrepreneurs in the hotel and tourism sector (suspension of ordinance prohibiting gatherings)</p>
<p>United States: <i>Court of Common Pleas of Lake County, Ohio, Rock House Fitness, Inc. v. Acton, Case no. 20CV000631, 20 May 2020</i></p>	<p>Gyms</p>	<p>Closure of business</p>	<p>The state cannot impose penalties on gyms for being open during the lockdown, as long as they adhere to safety requirements. The state's department of health has no legal grounds to close down all businesses for several months. To do so is unreasonable and unjustified and violates the fundamental right to property.</p>	<p>Grant of the injunction requested (i.e. no bond or 0 \$ bond for businesses which stay open during the lockdown)</p>
<p>United States: <i>Court of Common Pleas of Erie Country, Ohio, LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et al., 2020-CV -020 1, 12 June 2020</i></p>	<p>Holidays-related activities (resort)</p>	<p>Closure of business</p>	<p>The state's department of health has no legal grounds to close down all businesses. The decision is also discriminatory since it focuses on the identity of the business (i.e. non-essential activity) rather than on its capability of providing a safe environment.</p>	<p>Grant of the injunction requested (reopening of business facilities)</p>
<p>United States: <i>Michigan Supreme Court, Department of Health and Human Services v. Karl Manke, 161394 & (27)(37)(38)</i></p>	<p>Barbershops</p>	<p>Closure of business</p>	<p>The appellate court failed to hold a full briefing or an oral argument; furthermore, it issued a preliminary injunction without the prescribed unanimity.</p>	<p>The case is remanded to the Court of Appeals for additional considerations. Decision quashed on grounds of legality</p>

Among these decisions, we may observe less uniform features in terms of both measures challenged and legal reasoning followed by courts. There were 9 out of 16 selected decisions which dealt with the closure of business premises or, in one case, an order to cease the activity. In 3 cases, the concrete issue was the prohibition of certain activities, causing impact on specific business sectors. In 2 specific cases, courts addressed prohibitions for private establishments to manage Covid-19-related health services (i.e. swabs and vaccines). One case concerned a general measure imposing a stricter lockdown at the local level, while another case concerned a suspension of fees for students at private schools, which is not strictly a measure aimed at limiting the spread of the pandemic, but rather a measure to address its economic consequences.

With regard to remedies, in the majority of cases courts either annulled the challenged measures (4), declared them unconstitutional (2) or suspended their efficacy as a means of interim or injunctive relief, thus reopening facilities and authorizing activities (5). In one case, the judge did not address the efficacy of the emergency measure (i.e. suspension of football leagues) but of its practical consequence (i.e. relegation of two teams in *Ligue 2*), ordering, at the same time, a further review on the conditions to resume games. In another case, the judge considered the possible negative outcomes of an outright quashing or suspension of the measure challenged and instead ordered the public authority to amend it within a prescribed time limit.

Finally, the Indian decision concerning school fees quashed the challenged measure, thus allowing collection of fees, but at the same time imposed specific limitations on such activity in light of the interest of both the private schools and the students (and their families). This type of complex balancing, deeply affected by considerations on the social impact of the Courts' decision, is a recurring trait of Indian jurisprudence and will be further assessed below.²⁵

2.4 Other General Criteria

Apart from the distinctions outlined, the selected decisions also employ some specific criteria to assess the legitimacy of the challenged measures, often directly connecting them with general principles used as balancing techniques, such as proportionality and reasonableness. While referring to the following paragraphs for a more thorough analysis on the use of such techniques, it is useful to immediately point out some of the factual criteria used by courts.

2.4.1 Distinction Among Economic Activities

Courts take into account the distinctions among economic activities with regard to the socio-economic interests they satisfy. Such distinction is indeed laid out by the legislature in the emergency measures, in order to set up different lockdown regimes for economic activities having a different impact on the daily necessities of people, as it happens with the distinctions between "essential" and "non-essential" activities. What courts do is assess whether the legislature had solid grounds to introduce distinctions and to classify, for instance, certain activities or goods as "essential" or not.

As such, the character of the economic activity scrutinized is relevant since it concerns the reasonableness and proportionality of the challenged measure, meaning that distinctions not properly justified could be deemed unlawful.²⁶ A decision from the Campania Regional Administrative Tribunal, from this perspective, held that a wholesale retailer of electric components which engages in trade with businesses providing essential goods (such as electricity) is part of an essential supply chain and is therefore to be regarded as an essential business, whose closure is unreasonable.²⁷

On the other hand, similar activities could in concrete form serve varying interests, thus justifying differentiated treatments. The advice of the Italian Council of State held, for example, that while from a broad point of view restaurant services may be grouped under one category, in concrete some distinctions may be

²⁵ See § 6.

²⁶ Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

²⁷ Italy, Administrative Regional Tribunal of Campania, 4 February 2021, no. 789.

reasonably laid out by authorities.²⁸ In particular, restaurant services provided in hospitals, hotels or along highways are aimed at offering necessary services in specific contexts which are different from the activity of restaurants operating as a mainly “leisure” activity.

Again, a set of decisions from the Italian administrative courts instead focused on the non-essential nature of bingo halls, betting halls, amusement arcades and casinos to uphold the legitimacy of the challenged measures which suspended such activities²⁹. Another decision, on the other hand, pointed out that hair salons and beauty centers mostly satisfy the same needs. To distinguish between these two activities (allowing the first and prohibiting the second) without a proper inquiry and a thorough explanation from the authority, is unlawful.³⁰

In several instances, courts focused on whether the distinctions introduced were unjustifiably discriminatory against some economic activities, therefore referring to a general principle of non-discrimination or equal treatment.³¹ We therefore refer to the correspondent paragraph (4.2) for a further analysis.

2.4.2 The State of Emergency

The state of emergency is a concept which, as might be expected, is often found in the courts’ reasoning. It is therefore important to discern its concrete impact on the assessment of restrictive measures.

²⁸ Italy, Advisory Opinion of the Council of State, 28 April 2021, no. 00850/2021.

²⁹ Ordinance of the Regional Administrative Tribunal of Lazio, 12 February 2021, no. 827; Decree of the Council of State, 22 February 2021, no. 884.

³⁰ Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

³¹ Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ); High Court of Zimbabwe, ‘The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others’; Belgian Council of State, 24 February 2021, no. 249.904; Constitutional Court of the Republic of Latvia, decision of 11 December 2020, no. 2020-26-0106; for Spain see Superior Court of Justice of the Valencian Community, Administrative Chamber, no. 94/2021 of 17 March 2021; United States Court of Appeal of the Sixth Circuit, *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, no. 20-Civ-1581, (6th Cir. 2020); United States, United States Court of Appeal for the Fifth Circuit, *Big Tyme Investments, LLC v. Edwards*, No. 20-30526 (5th Cir.

In principle, the emergency, and the subsequent need for constantly evolving measures, rapidly adapting to the changing reality of the pandemic, raises issues from two different perspectives. From a formal point of view, emergency affects the “allocation of regulatory powers” among different institutions and among local and central authorities.³² From the substantive perspective, it affects the way the balancing between conflicting instances is developed, altering the standards of reasonableness and legitimacy of public interventions.³³

Some countries have formally declared the state of emergency, while in others the courts have made circumstantial references to it although their states have not made such a declaration. The emergency requires making decisions in a state of urgency and limited knowledge³⁴. Uncertainty may modify the balancing between health protection and economic activities. From a formalistic and constitutional point of view, the emergency affects the choice of the legal instruments designed to fight the pandemic.

In American case law, the judge’s evaluation takes into great account the presence of a formal declaration of the state of emergency.³⁵ These cases link the expanded powers of public authorities in limiting businesses to the official declaration of a state of emergency, pursuant to the relevant legislation.³⁶ In such cases, the state of emergency is not only a principle justifying wider margins of discretion in balancing rights, but also an official and formal circumstance legitimizing public interventions and reducing the scope of the judicial review.³⁷

Jan. 13, 2021); Austrian Constitutional Court, decision no. V392/2020 of 1 October 2020.

³² See, in this issue of the journal, Fabrizio Cafaggi and Paola Iamiceli, ‘Global Pandemic and the role of courts’.

³³ *Ibidem*.

³⁴ Fabrizio Cafaggi and Paola Iamiceli, Uncertainty, Administrative Decision-Making and Judicial Review (n. 2).

³⁵ United States, Supreme Court of Pennsylvania, *Friends of Danny Devito v. Wolf*, 227 A.3d 872 (Pa. 2020); United States District Court – Eastern District of Washington, *Slidewaters v. Washington State Department of Labor and Industries*, no. 2:20-CV-0210-TOR; Court of Appeals of the State of Minnesota, *Free Minnesota Small Business Coalition v. Walz*, no. A20-0641.

³⁶ *Ibidem*.; see also Ramsey County District Court, *Free Minnesota Small Business Coalition v. Walz*, 1 September 2020.

³⁷ *Ibidem*.

In a Belgian decision, the Council of State held that the emergency and the urgency surrounding the proceeding prevented the Council itself from seeking the opinion of its legislative section before delivering the judgment.³⁸

The Italian Council of State, instead, referred to the changing circumstances during a health emergency to assess the appropriateness of the legal instrument used to regulate the lockdown (i.e. a Decree of the President of the Council of Ministers), the proportionality, the scientific evolution of knowledge about the pandemic and its consequences.³⁹ The court pointed out that, while complying with the principle of legality, the use of such Decree is also an appropriate means to tackle issues whose features rapidly change due to the evolution of the pandemic. Italian courts also recognized that emergency, implying urgency of interventions, justifies the withdrawal of the public administration from a tendering procedure as well as particularly stringent timelines in tender procedures⁴⁰. In other words, the unilateral intervention on tender procedures which would have been, under ordinary circumstances, arbitrary and unlawful, is instead upheld due to the necessity to adjust even public procurement procedures to the new priorities and demands of public offices (such as more stringent health requirements when performing activities).

From a more substantive perspective, the state of emergency – declared or not – is essentially viewed by the courts as a circumstance which widens discretionary powers of authorities in issuing measures which are constantly amended⁴¹ and introduce distinctions among economic activities.⁴²

In justifying the imposition of limitations on business activities – and especially the closure of business premises – courts often

emphasized the peculiar circumstances surrounding the adoption of the challenged measures.⁴³ A Scottish decision, for example, points out that the emergency justifies a wide margin of discretion for authorities in order to issue the most effective measure against the pandemic.⁴⁴ The effectiveness of the protection is, according to the court, the criterion that, when balancing public interests and economic freedoms, orients the assessment of the measures' reasonableness.

Another decision, from Zimbabwe, connected the consideration of the state of emergency and the principle of non-discrimination, evaluating the different risks which could arise from the business of the informal sector compared with the formal one, where activities may be tracked and registered.⁴⁵

Even from this perspective, some decisions seem to emphasize the formal declaration of the state of emergency. The French Council of State, for instance, on the basis of the declared state of emergency, justified the imposition of differentiated measures which are constantly adjusted on the basis of the pandemic's evolution.⁴⁶ An Argentinian court indicated that the fact that emergency measures were taken pursuant to a declaration of emergency and to the subsequent laws and decrees empowering authorities to issue measures upheld the non-arbitrariness of the measures themselves.⁴⁷

These three decisions prove how the state of emergency affects, in concrete, the interpretation and application of general principles governing balancing of rights and interests, such as non-discrimination and reasonableness. This general relation is, however, viewed differently by courts. On the one hand, a French decision identified the emergency as an element directly orienting the

³⁸ Council of State, 24 February 2021, no. 249.904.

³⁹ Italy, Advisory Opinion of the Council of State, 28 April 2021, no. 00850/2021.

⁴⁰ Italy, Administrative Regional Tribunal of Trentino Alto-Adige, decision of 23 December 2020; Administrative Regional Tribunal of Campania, decision of 18 November 2020.

⁴¹ France, Council of State, decision of 14 April 2021, no. 451085.

⁴² High Court of Zimbabwe, 'The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others'.

⁴³ Scotland, *KLR & RCR International Ltd. E al. v The Scottish Ministers* [2020] CSOH 98 P1043/20 of 11 December 2020; High Court of Zimbabwe, 'The Zimbabwe Chamber for informal Workers & 2 Others v

Minister of Health and Child Care & 6 Others'; Canada, Superior Court of Quebec, *Entrepreneurs en action du Québec c. Procureur général du Québec*.

⁴⁴ Scotland, *KLR & RCR International Ltd. E al. v The Scottish Ministers* [2020] CSOH 98 P1043/20 of 11 December 2020.

⁴⁵ High Court of Zimbabwe, 'The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others'.

⁴⁶ Council of State, decision of 14 April 2021 no. 451085.

⁴⁷ Appeal Chamber in Administrative Disputes, *Córdoba, Unión de Trabajadores del Turismo, Hoteleros y Gastronómicos de la República Argentina UTHGRA c/ Gobierno de la Provincia de Córdoba*, 14 August 2020.

application of a proportionality test.⁴⁸ On the other hand, a Spanish decision held that the state of emergency, though justifying restrictive measures, may not prevent the application of a thorough proportionality test.⁴⁹

Two decisions concern the same sector (i.e. sports' activities) but reach different conclusions: the French court upheld a ban on the activities, while the Spanish court judged the ban disproportionate.

It is significant that in both cases the notion of state of emergency was substantiated by reference to scientific knowledge.⁵⁰ Regardless of the outcome of the dispute, such aspect seems to indicate how, when the state of emergency is considered, through the application of general legal principles, its content is derived from the assessment of scientific knowledge, so as to avoid excessively abstract references to the notion of emergency.

Finally, it is worth noting that sometimes courts emphasize a specific connection between emergency measures and economic and health policies in order to assess the scope and limits of the judicial review. Some decisions highlighted that the public authorities, when pursuing policy objectives during a health emergency, have a wide discretionary power in balancing conflicting interests, for example economic freedoms and public health.⁵¹ In another decisions, the judge refrained from "second guess policy choices", favoring one method of preventing the spread of the disease over another, provided that such method was reasonable.⁵²

⁴⁸ Council of State, decision of 16 October 2020 no. 445102.

⁴⁹ Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020.

⁵⁰ See § 2.4.3.

⁵¹ Austrian Constitutional Court, V411/2020, V395/2020 et.al., V 396/2020 et.al., decision of 14 July 2020; for Belgium, see Council of State, 24 February 2021, no. 249.904.

⁵² United States District Court for the District of Maryland, *Antietam Battlefield KOA, et al. v. Lawrence J. Hogan, et al.*, 461 F. Supp. 3d 214 (D. Md. 2020).

⁵³ For this second 'group', see Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; High Court of South Africa (Gauteng Division), *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP).

⁵⁴ See, for instance, Arizona Superior Court, *Maricopa County, Aguila v. Ducey*, CV 2020-010282, 8 September 2020 which explicitates how the

2.4.3 The Role of Scientific Knowledge

Courts rely on scientific knowledge to a different extent depending on the concrete issues addressed. Scientific knowledge may be referred to in a broad way, as a form of common knowledge regarding the development of the pandemic and the lack of conclusive scientific evidence. It may also be founded on institutional reports from national or international bodies, such as the WHO.⁵³ Scientific knowledge, in the courts' reasoning, is often used to evaluate the appropriateness of the measure challenged as a reasonable mean to achieve public health objectives.⁵⁴

Courts may refer to scientific information regarding Covid-19 transmission in order to point out the risks connected to the exercise of certain economic activities (i.e., those activities involving continuous communication and exchange between individuals, such as gambling activities, bars or certain sports)⁵⁵ or the sale of specific products (i.e., tobacco products).⁵⁶ The reference to scientific knowledge directly serves the proportionality test, since it justifies the necessity and appropriateness of a certain measure (such as the closure of business) when compared to other possible, but not equally effective, protection measures.⁵⁷

A decision from Spain assesses the risks of certain activities in light of the previous "wave" of infections. In particular, the judge noted how, after the first "wave", the zones whose bars and restaurants had the most customers later experienced a sharp rise in infections,

restrictions are based on experts data and suggestions concerning the containment of the Covid-19.

⁵⁵ French Council of State, 16 October 2020 no. 445102; for Spain see Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; Superior Court of Justice of the Valencian Community, Administrative chamber 59/2021, 25 February 2021; Superior Court of Justice of the Asturias, Administrative Chamber, 93/2021, 23 February 2021. See also United States District Court – Eastern District of Louisiana, *4 Aces enterprises, LLC, et al. v. Edwards*, civil action no. 20-2150, which referred to scientific opinions to assess the risk of keeping bars open compared to restaurants.

⁵⁶ South Africa, High Court of South Africa (Gauteng Division), *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP).

⁵⁷ French Council of State, 16 October 2020 no. 445102; Council of State, 27 January 2021, no. 448732; High Administrative Court of Thüringen, decision no. 3 EN 105/21 of 9 March 2020.

thus confirming the inherent danger connected to certain activities, albeit carried out with safety measures.⁵⁸

Among decisions quashing emergency measures, scientific knowledge may also be the criterion to assess the distinctions among different economic activities, meaning that public authorities cannot adopt inconsistent measures for different activities without any scientific information suggesting that one activity is more dangerous than another.⁵⁹

2.4.3.1 Scientific Knowledge and Scientific Uncertainty

Scientific knowledge plays a role in the courts' assessment even when it is inconclusive or lacking. Courts are aware of the incompleteness of scientific awareness concerning the spread of Covid-19 and take it into account when evaluating the legitimacy of challenged restrictions.⁶⁰ However, these same courts adopt different approaches to the issue.

Some decisions referred to scientific uncertainty to uphold the challenged measures. Given that there is no sufficient scientific basis or consensus among the scientists concerning the exact transmission channels for Covid-19, a Canadian court held that emergency measures are constantly evolving and aimed at tackling issues as they arise, on the basis of an ongoing process of scientific discovery, thus adapting to the changing circumstances.⁶¹ The uncontrolled and still partly understood spread of the virus founds a presumption that the measures adopted serve at best public health interest in light of the epidemiological situation.⁶²

Following this perspective, a German court argued that the available scientific knowledge was not enough to determine breeding places for viruses which are more dangerous than others.⁶³ As a result, the limitation of business

hours for bars and restaurants aims at tackling the risks connected to gatherings and is therefore an appropriate response to the health emergency.

Scientific uncertainty – and the subsequent impossibility to determine, in the emergency measures' rationale, the specific justifications for limiting certain business activities – may also imply the unreasonableness of the lockdown provisions, due to a lack of certain factual basis. This reasoning is clearly embraced by the Austrian Constitutional Court, which referred to the lack of knowledge regarding the pandemic to quash an emergency measure, which was judged void of sufficiently detailed scientific background.

In a case concerning governmental bans on entering any kind of restaurant-establishment, the Constitutional Court held the unlawfulness of such bans due to the lack of sufficient scientific documentation as the basis for decision-making.⁶⁴ In other decisions, courts referred to the lack of scientific knowledge to hold that it was not apparent, from the legislative measure challenged, which circumstances had led the administration to set the conditions for entering in trading establishments.⁶⁵ Moreover, in another instance, a court stated that it was not apparent, from the legislative measure, which circumstances concerning the possible developments of Covid-19 led the administration to set the conditions for entering in trading establishments.⁶⁶ All these cases appear to question the reasonableness of the challenged measures, given that its factual justification is missing or incomplete.

Lastly, it should be noted how the degree of scientific (un)certainty guides the scrutiny of the reasonableness of the impugned measures also in light of the principle of precaution, as framed within the EU legal system. For an in-depth analysis of the issue we refer to § 4.3.

⁵⁸ Superior Court of Justice of the Valencian Community, Administrative chamber 59/2021, 25 February 2021.

⁵⁹ Italy, Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

⁶⁰ Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review' (n. 2).

⁶¹ Canada, Superior Court of Quebec, *Entrepreneurs en action du Québec vs. Procureur général du Québec*, 19 March 2021.

⁶² This reasoning parallels the one used by courts which judged the emergency measure lawful also because limited in time and subjected to constant

review, so to be amended according to the development of the pandemic (Germany, Federal Constitutional Court 1 BvQ 47/20, 29 April 2020; Scotland, *KLR & RCR International Ltd. E al. v The Scottish Ministers* [2020] CSOH 98 P1043/20 of 11 December 2020).

⁶³ Administrative Court of Karlsruhe, decision no. 3 K 4418/20 of 30 October 2020.

⁶⁴ Decisions no. V405/2020 and V429/2020 of 1 October 2020.

⁶⁵ Decisions no. V411/2020, V395/2020 et.al., V 396/2020 et.al. of 14 July 2020.

⁶⁶ Austrian Constitutional Court V411/2020, V395/2020 et.al., V 396/2020 et.al. 14 July 2020.

3. Models of Adjudication in Comparative Perspective

The grounds to assess the relationship between economic freedoms and public health vary according to the legal systems. The US case law mostly draws its reasoning from the landmark case *Jacobson v. Massachusetts* (1905) which affirmed the legitimacy of restrictions to individual liberty on the basis of public health necessities which empower the state to issue police measures.⁶⁷ As a result, in several cases US federal court judges focused on the assessment of the expansion of police powers derived from the state of emergency declaration at the state level as well as on the respect for the principles of rule of law and nondelegation, without questioning the technical discretion of the authorities or verifying the factual basis for the balancing of different interests to occur within the context of emergency measures.

At the same time, the reference to a wide notion of appropriateness/reasonableness, in place of a more thorough proportionality check, as the only tool to scrutiny the merit of the challenged measures, tends to polarize the results of judicial evaluation, especially in cases where the court quashes the challenged measures. The motivations given tended to question the general power of the state to restrict individual liberties and to set up distinctions among activities, creating, for example, an allegation of violation of the 14th amendment of the US Constitution.

The general landscape appears to be different in Europe. As a general matter, and especially examining the case law on economic freedoms from Belgium, France, Germany and Italy, it can be observed that such freedoms were outweighed by public health necessities.⁶⁸ This trend is different, for example, with regard to

other fundamental rights and freedoms, such as the freedom of association, which courts appeared more eager to protect even in light of the dangers of the pandemic.

The main concern of courts, especially in Italy and France, was of ensuring that public authorities (both local and national) preserved a degree of coherence in the emergency regulations in the differentiations among activities and geographical “zones” subjected to different restrictions.⁶⁹ Even constitutional courts focus on the factual basis of the challenged measures, declaring them unconstitutional when such basis is not complete enough.⁷⁰ Both constitutional and administrative courts refer to the state of scientific knowledge when carrying out this level of scrutiny.

From a broad point of view, the main approach chosen by European courts, often relying on principle derived from EU law (such as proportionality or precaution⁷¹), marks a difference between the European notion of economic freedoms and the US one, with special regard to the framing of business freedom within a social dimension which not only helps interpreting the fundamental right to property but also sets the criteria for its limitations.⁷²

In the U.S., the courts, in most cases, upheld the challenged measures by refraining from questioning their concrete reasonableness or the grounds for the prioritization of certain interests over others, displaying therefore a more deferential attitude toward the emergency policy powers of the governments.⁷³ A partial exception in Europe is represented by Spain, where the courts displayed a higher degree of variety, especially in interim relief proceedings which, in more than one instance, ordered the reopening of business on account of the

⁶⁷ Wendy E. Parmet, ‘Rediscovering Jacobson in the Era of Covid-19’ (2020) *Boston University Law Review Online* 100 117; Daniel Farber, ‘The Long Shadow of *Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts’ *San Diego Law Review* 57 833.

⁶⁸ Arnaud Sée, ‘Les libertés économiques en période de crise sanitaire: un premier état des lieux’ (2020) *Droit et Coronavirus. Le droit face aux circonstances sanitaires exceptionnelles* (Dossier) RDLF 21 <<http://www.revuedlf.com/droit-administratif/les-libertes-economiques-en-periode-de-crise-sanitaire-un-premier-etat-des-lieux/>> accessed 25 October 2021.

⁶⁹ France, Council of State, 30 December 2020, no. 448201; Italy: Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

⁷⁰ Austria, Constitutional Court, decision no. V392/2020 of 1 October 2020; decisions no. V405/2020 and V429/2020 of 1 October 2020.

⁷¹ See § 4.

⁷² Court of Justice of the European Economic Community, Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 03727.

⁷³ See, for instance, Supreme Court of Pennsylvania, *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020); Texas, U.S. District Court for the Western District of Texas, *6th Street Business Partners LLC v. Abbott*.

disproportionateness of the challenged measure (in relation with other viable alternatives) or the lack of grounds to differentiate among different activities.⁷⁴

This approach by Spanish courts marks the difference, for instance, from that of French courts, which is, in general, more deferential to the state. Even with regard to the same concrete issues, for example the ban on sports activities, while the French Council of State focused solely on the danger connected to sports activities and upheld the ban, the Superior Court of Justice of Catalonia considered less restrictive alternatives to a comprehensive ban and allowed activities to be resumed provided they complied with prescribed safety requirements.⁷⁵

In comparative perspective, we may further observe that while Italian courts tend to align to the French approach, German courts differentiate themselves by attaching great importance to the coherence of the logic path followed by the legislature in determining restrictions, but generally upholding emergency measures and quashing them only when manifestly illogical, for instance, in distinguishing among activities.⁷⁶ In other legal traditions (e.g. the Chinese legal system), deference toward the government's political will and the focus on the principle of legality reflects a certain evolution of the notion of rule of law.

Beyond the general comparative classifications, there is a division based on the factual context of the decisions. It is possible to observe two main groups. On the one hand, decisions focusing on the legality of the administrative decision-making process and the respect of the principle of rule of law. This group comprises mostly Chinese and American decisions.⁷⁷ In this last case, the reasoning is consistent with U.S. law, which interprets the rule of law in light of the due process clause as laid out in the U.S. constitution.⁷⁸ On the

other hand, there are decisions outlining a specific relation between economic freedoms and public health, thus carrying out either a balancing (in case of conflict) or an interpretative harmonization between the two. This group mostly comprises European and South American decisions.⁷⁹ A particularly dynamic approach, also grounded on the domestic legal tradition, is displayed by Indian decisions, which deserve further consideration and will therefore be assessed below.

3.1 The Legality of the Administrative Decision-Making Process and the Rule of Law

In some instances, courts focused on the legality of the administrative decision-making process leading to the enactment of the challenged measure. In these cases, a direct reference is made to the principle of rule of law. In practice, however, such principle has been interpreted differently.

In Chinese case law, the principle of rule of law is the only ground on which courts based their adjudication. Their attention was solely focused on the legitimacy of the procedures followed by authorities to issue measures restricting business activities.⁸⁰

In such cases, the issue of balancing is not raised since it is resolved *ex ante* through the consideration that public authorities enjoy full authority to enact restrictive measures in order to pursue public interests.⁸¹ The limit to their action is in the obligation to follow the procedures prescribed by the relevant laws and regulations. When such procedures had not been followed, the court quashed the challenged measures.⁸²

Incidentally, it is worth noting that such approach from Chinese courts is common to other countries in the Eurasian context, such as the Russian Federation, whose courts also refrained from any balancing and instead

⁷⁴ Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020; Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14th September 2020.

⁷⁵ See France, Council of State, decision of 16 October 2020 no. 445102; Spain, Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020.

⁷⁶ Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020.

⁷⁷ See § 3.1.

⁷⁸ See footnote no. 4.

⁷⁹ See § 3.2.

⁸⁰ Intermediate People's Court of Chengde City, 30 November 2020 – Appeal Decision no. 207; Primary People's Court of Kenli District, Dongying City, Decision of 2 June 2020, Administrative decision no. 57.; Wugang Primary People's Court (Hunan Province), 18 September 2020, First Instance Decision (Administrative) no. 127.

⁸¹ *Ibidem*.

⁸² Wugang Primary People's Court (Hunan Province), 18 September 2020, First Instance Decision (Administrative) no. 127.

focused on the respect of decision-making procedures laid out by law.⁸³

In other jurisdictions, potential conflicts between economic freedoms and other fundamental rights are not resolved *ex ante*; however, regarding compliance with the rule of law is a preliminary level of scrutiny which may lead the judge to solve the dispute without even assessing the concrete content of the measure challenged or using such assessment as a supplementary argument.

In U.S. legal system (both at the federal and at the state level), courts used scrutiny to review the legitimacy of emergency measures issued by administrative or executive authorities and therefore not subjected to formal legislative or review procedures. The potential conflict between such measures and the rule of law principle stems from the narrow interpretation of the principle of separation of powers or nondelegation. From this perspective, two American decisions declared lockdown restrictions unlawful and in violation of the economic fundamental rights, especially the right to property. In such cases, the judge pointed out that the state director of the health department did not have any authority to impose state-wide restrictions on business.⁸⁴ The power to close businesses on the basis of administrative orders (and not legislative statutes or regulations) could not be derived by any norm. According to such reasoning, the challenged measures were in violation of the principle of separation of powers. With regard to the principle of nondelegation, a Minnesota county court upheld the challenged measure, considering that subjecting emergency actions to extensive decision-making processes would be unreasonable and that the legitimacy of the measures could be traced back to the power, founded in law, given to the governor to declare a state of emergency.⁸⁵

The Supreme Court of Michigan, instead, focused on procedural guarantees concerning the issuance of a preliminary injunction, pointing out that a decision from the Court of Appeals imposing closure to a barbershop

⁸³See, for instance, Kemerovo Regional Court, decision of 29 June 2020, Case No. 12-239 / 20. In this case, which does not strictly concern business freedom, a business owner was fined for not equipping the store with disinfectants for customers. The court upheld the sanction issued.

⁸⁴Court of Common Pleas of Erie Country, Ohio, *LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et.. al.*, 2020-CV -020 I, 12 June 2020; Court of Common

owner who had kept the business open during the lockdown had been taken without the prescribed unanimity among judges and without respecting procedural guarantees.⁸⁶

In a French case, the Council of State addressed an issue of potential logic conflict between general provisions and special provisions. In particular, while the General Code of Local and Regional Authorities lays out a general power for mayors to take police measures during an emergency, the legal regime enacted by the legislature to fight the Covid-19 pandemic prevents mayors from taking measures unless there are compelling reasons linked to local circumstances. Therefore, a local measure instituting a stricter lockdown than provided for at the national level, in absence of exceptional local circumstances, is illegal and in violation of the freedom of trade.⁸⁷

In summary, the assessment of the compliance of emergency measures with the principle of rule of law, in all the legal systems involved in the analysis, has been scrutinized mainly with regard to procedural features of the administrative decision-making and the separation of powers. The latter issues, especially in the U.S. legal system, dealt with the relation between separation of powers and state of emergency, with the courts acknowledging that the formal declaration of a state of emergency partially reframes the interactions among different powers, imposing a different interpretation of the general principle.

3.2 Economic Freedoms and Public Health

As courts moved beyond the assessment of procedural and formal requirements of challenged measures and instead scrutinized their merit, the core issue was the relation (and potential conflict) between economic freedoms and public health. With regard to the concrete management of the pandemic, the two notions aim at different purposes: on the one hand, economic freedoms protect the autonomy of each business operator to carry out its own

Pleas of Lake County, Ohio, *Rock House Fitness, Inc. v. Acton*, Case no. 20CV000631, 20 May 2020.

⁸⁵ Ramsey County District Court, *Free Minnesota Small Business Coalition v. Walz*, 1 September 2020.

⁸⁶ Michigan Supreme Court, *Department of Health and Human Services v. Karl Manke*, 161394 & (27)(37)(38).

⁸⁷ France, Council of State, 30 December 2020, no. 448201.

activity according to its private interests, thus clashing, in principle, with emergency measures imposing closures or limitations to businesses and economic activities. On the other hand, public health pursues the maximum possible degree of collective protection against the pandemic, not only as a policy objective, but also as implementation of the fundamental right to health of each individual and the whole community. Therefore, public health, in principle, justifies the enactment of strict lockdown measures.

The analysis of case law, though generally in accordance with these premises, offers a landscape dotted with specifications, targeted upon the specific facts of the case examined.

3.2.1 Absence of Conflict Between Economic Freedoms and Public Health

Two decisions, one from Brazil and one from Italy, concern private management of health services, including vaccine distribution and Covid-19 swabs administration.

The Brazilian judge allowed private establishments to purchase and administer vaccines even without following the specific criteria prescribed by the challenged measure, donation to the public health system and immunization of priority groups⁸⁸. In this case, the right to health and the freedom of business were considered by the Court not in conflict but in harmony, calling for the widest vaccine coverage possible, including through vaccines administered by private establishments⁸⁹. Similarly, the Italian court quashed the measure prohibiting certain private establishments from conducting Covid-19 tests, considering that private establishments offer sufficient guarantees for correct performance of the service, as well as the necessity to maximize Covid-19 tests for tracing purposes.⁹⁰

Therefore, in these cases, the potential conflict between fundamental rights does not occur in practice, since private interests align

with public ones in pursuing the widest possible coverage for health services.

Such an alignment, however, might also be due to the specific dimension of the business freedom under scrutiny. In such cases, courts do not deal with businesses which want to keep their premises open or carry on offering services to customers; the debate revolves, instead, around private establishments which, in light of their economic autonomy, want to provide health services to their employees. Therefore, while customers may be in danger when entering a shop in times of pandemic, workers, at least in principle, are certainly not deprived of their right to health when receiving a vaccine from their employer, thus favoring alignment of interests.

3.2.2 Conflict Between Business Freedom and Public Health

In the majority of the selected cases, courts acknowledged a conflict between business freedoms and public health interests at the basis of the challenged measure. Therefore, they deemed it necessary to balance the two elements. From a general point of view, courts recognized that business freedom is not absolute and, as such, it may be limited by public powers in light of public interests and other fundamental rights.⁹¹ However, courts also referred to a wide array of specific circumstances that affected balancing. In other words, the concrete circumstances surrounding the case examined determined the “weight” of the rights and interested balanced.

The most relevant example is that of infection risk, related to specific economic activities, which heightens the importance of public health interests *vis-à-vis* economic freedoms.⁹² Such risk is not necessarily inherent in the activity, but it may also depend on the practical difficulty, for authorities, to monitor certain business fields (such as the transport sector or the informal sector) and

⁸⁸ Brazil, Federal Court - 1st Region, 1013225-55.2021.4.01.3400 Federal Court, 21^a Vara Federal Cível.

⁸⁹ *Ibidem*.

⁹⁰ Italy, Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933.

⁹¹ Italy, Council of State, decision of 27 April 2020, no. 3380.

⁹² France, Council of State, decision of 16 October 2020 no. 445102; Council of State, decision of 26 March

2021 no. 450411; Germany, High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021; Italy, Decree of the Council of State, 22 February 2021 no. 884; Spain, Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; South Africa, High Court of South Africa (Gauteng Division), *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP).

trace possible infection chains.⁹³ Furthermore, the assessment of the risk could also be affected by a general evaluation of the death toll imposed by the pandemic.⁹⁴

In other cases, the balancing is affected by the nature or by the specific conditions of some activities. Therefore, the business freedom of a non-essential activity (such as a leisure place as a town restaurant) is easily outweighed by public health, whereas catering activities in “sensitive” places like hospitals or highways enjoy a stronger protection and may therefore be allowed to stay open.⁹⁵ Again, where a shop is closed down but retains the possibility to carry out at least part of its services (e.g. delivery, pick and collect operations, etc.) its business freedom has been considered not excessively impaired by public health interests motivating lockdown measures.⁹⁶

In a French case, the judge emphasized that the suspension of amateur football championships could not find a claim for interim relief, given that most of the matches had been played at the time of the lockdown and, therefore, the “portion” of economic freedom affected was outweighed by public health.⁹⁷

Among the decisions quashing challenged measures, in some cases the judge focused on the factual basis of the measure (i.e. scientific and epidemiological assessment), deeming it insufficient to justify the distinctions among different activities.⁹⁸ Other decisions instead deemed the challenged measures unjustified because they were in violation of the principle of proportionality, given that other less restrictive alternatives were viable⁹⁹ or that the distinctions established among different activities were unreasonable and not appropriate with regard to the aim pursued.¹⁰⁰

⁹³ Zimbabwe, High Court of Zimbabwe, “The Zimbabwe Chamber for Informal Workers & 2 Others v Minister of Health and Child Care & 6 Others”.

⁹⁴ Superior Court of Justice of the Asturias, Administrative Chamber, 93/2021, 23 February 2021.

⁹⁵ Italy, Advisory Opinion of the Council of State, 28 April 2021 no. 00850/2021.

⁹⁶ French Council of State decisions of 13 November 2020, no. 445883, 445886 and 445899.

⁹⁷ French Council of State, decision of 11 June 2020 no. 440439.

⁹⁸ Austria, Constitutional Court, decision no. V392/2020 of 1 October 2020; decisions no. V405/2020 and V429/2020 of 1 October 2020; Italy, Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

⁹⁹ Spain, Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July

2020; Israel, Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ).

4. *Following. Principles Applied*

In other cases, the relevance of economic freedoms within the balancing was heightened by the consideration of the economic impact of the restrictions upon certain sectors.¹⁰¹ The specific features of such issue will be addressed in section 7, to which we refer.

As noted in the previous paragraph, given the ever-changing circumstances surrounding the development of the pandemic, courts, while addressing potential conflicts between rights and interests, tend to use the concrete circumstances of the case as a starting point to assess which interests should prevail. However, such reference to the facts is complementary to the application of different principles which may orient the balancing or even absorb it.

We have already encountered several of these principles and one, the rule of law, which was in some the courts’ reasoning and even prevents the balancing, by solving the dispute on preliminary formal-procedural grounds. In the Chinese context, the use of the principle of rule of law even amounts to a systemic trait, since it represents the main scrutiny “tool” for judges, giving the *ex ante* solution of any conflict in favor of the public authority’s right to impose restrictions and the citizens’ duty to respect them.¹⁰² In the majority of cases, however, the courts actually assessed the merits of the case as well as the content of the challenged measures. To do so, they referred to a wide array of principles. We will offer a brief overview of the main ones.

¹⁰⁰ Germany, Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020.

¹⁰¹ France, Council of State, 9 June 2020, no. 440809; India, Haryana High Court, *Independent Schools Association ... vs State Of Punjab And Ors*, 30 June 2020, Writ Petition no. 7409/2020; Spain, Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14 September 2020.

¹⁰² It is furthermore worth noting that economic relations and freedoms mentioned in the Chinese constitution cannot be directly invoked before the courts; therefore, none of the parties could raise the issue of a possible conflict.

4.1 Proportionality and Reasonableness

This section outlines how courts applied the proportionality principle and the general notion of reasonableness when assessing emergency measures.

In most cases, references to reasonableness are connected to those to proportionality. However, there are also examples of references to a general notion of reasonableness.¹⁰³ Of particular interest is a Polish decision of the District Court of Olsztyn, which, by employing the notion of reasonableness, echoes the idea of the rationality of the lawmaker in order to provide the plaintiff compensation even if her business did not fulfil all the requirements prescribed by law.¹⁰⁴

A substantial part of the selected decisions carries out a thorough proportionality test, modelled after the tripartite test developed by German courts. As such, the assessment of the adherence to the principle of proportionality implies three different evaluations: first, the lockdown measures should be suitable to achieve a legitimate aim; second, they should be necessary to achieve such aim, so that no less invasive means exist to pursue the same objective; and third, the measures should comply with the criterion of strict proportionality, meaning that they may not, even if appropriate and necessary, excessively hinder conflicting fundamental rights and interests.¹⁰⁵

¹⁰³ High Court of South Africa (Gauteng Division), *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP); Order of the Regional Administrative Tribunal of Lazio, 15 June 2020, No. 3832; Decree of the Council of State, 26 June 2020, No. 5013; Order of the Council of State, 17 July 2020, No. 5013.

¹⁰⁴ Wyrok Sądu Okręgowego w Olsztynie z dnia 02 września 2020 r. (sygn. akt IV U 1195/20), decision of 2 September 2020.

¹⁰⁵ On the tripartite proportionality test see Benedikt Pirker, 'Proportionality Analysis and Models of Judicial Review' (Europa Law Publishing 2013) 13 ff. and, for a specific focus on the German system, 105 ff.; Takis Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny', in Evelyn Ellis, 'The Principle of Proportionality in the Laws of Europe' (Hart Publishing 1999) 65-84.

¹⁰⁶ *Ibidem*.

¹⁰⁷ Belgium, Council of State, 24 February 2021, no. 249.904; France, Council of State, 16 October 2020 no. 445102, Council of State, 27 January 2021, no. 448732; Germany, Administrative Court of Karlsruhe, 3 K 4418/20, 30 October 2020, Federal Constitutional

Indeed, the conceptual distinctions among the three "steps" are not always clear in the decisions selected, thus confirming some of the long-lasting issues in the application of the tripartite test.¹⁰⁶ However, particular attention is reserved by some decisions to the search for less invasive or less demanding containment measures against Covid-19. Most of such decisions are "located" within the European Union, confirming the familiarity of European countries' judges with the tripartite test, also embraced by the CJEU.¹⁰⁷

The disproportionate character of the challenged measures has been traced back to different factual circumstances. A German court judged a ban on integration assistance activities for mentally disabled people disproportionate since it did not add any protection in addition to that already ensured by the ban on external visits in facilities.¹⁰⁸ A Spanish court, on the other hand, suspended a ban on activities in sporting facilities, suggesting that the facilities could resume activities in compliance with safety requirements laid out by the regional Council of Sport in an Action Plan.¹⁰⁹

In these two cases, the focus of the court was not on the limitation itself, but on its comprehensiveness, which was judged unnecessary and not appropriate in light of the infection risk and the alternative measures available to safely resume activities. The Spanish judge refers to the scientific

Court 1 BvQ 47/20, 29 April 2020, Federal Constitutional Court 1 BvR 2530/20, 11 November 2020, High Administrative Court of Berlin-Brandenburg, decisions no. S 22/21 and S 23/21 of 3 March 2021, High Administrative Court of Berlin-Brandenburg 11 S 17/21, 5 March 2021, High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021, Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020; Italy, Council of State, 13 November 2020, no. 248.918; Ordinance of the Regional Administrative Tribunal of Lazio, 12 February 2021 no. 827, Decree of the Council of State, 22 February 2021 no. 884; Ordinance of the Council of State, 5 March 2021 no. 1061; Latvia, Constitutional Court of the Republic of Latvia, decision of 11 December 2020, no. 2020-26-0106; Spain, Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020. On the role of the principle of proportionality in European case law see Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) European Law Journal 16(2) 158.

¹⁰⁸ Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020.

¹⁰⁹ Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020.

knowledge incorporated in the Council of Sport's Action Plan to determine the existence of a viable alternative to the challenged measures¹¹⁰; on the other hand, the German judge focuses solely on the inner rationality of the ban, considering that, since the facilities' staff had already been in contact with the patients, further activities could not represent an additional source of risk.¹¹¹

Proof of the use of proportionality tests also comes from Israel, where it is put in relation with the principle of equality. In particular, the Israeli judge, while not referring to the standard tripartite test as known in the EU, mentions that proportionality imposes on the state the obligation to consider, when issuing a restrictive measure, the alternative which least hinders the equal treatment of business activities.¹¹² Such approach confirms a trend already identified by comparative studies and which sees the Israeli judiciary increasingly employing proportionality (and especially the necessity and appropriateness tests) to scrutiny public policies.¹¹³

Other decisions trace a connection between proportionality and reasonableness. Courts, rather than carrying out a complete proportionality test, mostly focus on its second element, i.e. the appropriateness of the measure challenged, linking it with the wider criterion of reasonableness. In these cases, reasonableness becomes, indeed, part of a "partial" proportionality test. Such appropriateness is often related to the consideration of emergency circumstances.¹¹⁴

An Italian case discusses the logical relation between the emergency circumstances and the

principles of proportionality and reasonableness with regard to the specific public health interests underlying the challenged measure. In particular, the court stated that preventing private establishments from doing Covid-19 testing was inconsistent with the necessity to maximize tracing.¹¹⁵ The decision further applies proportionality pointing out that, while the public "monopoly" over Covid-19 testing could in principle be justified due to the necessity of ensuring an appropriate level of safety and a correct transmission and registration of results, such circumstances could change over time. Therefore, the principle of proportionality imposes a constant review of the measures adopted in order to avoid excessive penalizations of the different interests involved.

Two other Italian decisions connected reasonableness to the urgency of the need for protective equipment (i.e. masks), which justifies a quick and flexible procurement procedure¹¹⁶, as well as the withdrawal of a procurement procedure, due to new necessities arisen during the pandemic.¹¹⁷ In two other decisions, European courts highlighted that the reasonableness and proportionality of the restrictions stemmed from their limitedness, given that the challenged measures were temporary and constantly reviewed¹¹⁸, that such measures only obliged shops to adopt certain precautions to stay open¹¹⁹ or that the restrictions intervened at a time when the involved activity (i.e. a football league) was mostly finished.¹²⁰

¹¹⁰ *Ibidem*.

¹¹¹ Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020.

¹¹² Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ).

¹¹³ Talya Steiner, 'Proportionality Analysis by the Israeli Supreme Court', in Mordechai Kremnitzer, Talya Steiner, Andrej Lang, *Proportionality in Action. Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press 2020) 285-384.

¹¹⁴ Italy, Advisory Opinion of the Council of State, 28 April 2021 no. 00850/2021; United States District Court for the Northern District of California, *Altman v. County of Santa Clara*, 464 F.Supp.3d 1106 (N.D. Cal. 2020); United States District Court for the District of Connecticut, *Connecticut Citizens Defense League v. Lamont*, 465 F.Supp.3d 56 (D. Conn. 2020); United States District Court for the Central District of California, *McDougall v. County of Ventura*, No. 2:20-cv-02927-CBM-AS, 2020 WL 6532871 (C.D. Cal. Oct. 21, 2020); Supreme Court of New Mexico, *Grisham v. Reeb*,

No. S-1-SC-38336, 2020 WL 6538329 (N.M. Nov. 5, 2020); *Supreme Court of Pennsylvania, Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020); see also Austrian Constitutional Court, decision no. V392/2020 of 1 October 2020.

¹¹⁵ From this perspective, see Italy, Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933, which, however, also mentions proportionality.

¹¹⁶ Administrative Regional Tribunal of Campania, decision of 18 November 2020.

¹¹⁷ Administrative Regional Tribunal of Trentino Alto-Adige, decision of 23 December 2020.

¹¹⁸ Germany, Federal Constitutional Court 1 BvQ 47/20, 29 April 2020; Scotland, *KLR & RCR International Ltd. E al. v The Scottish Ministers* [2020] CSOH 98 P1043/20 of 11 December 2020.

¹¹⁹ Germany, Federal Constitutional Court 1 BvQ 47/20, 29 April 2020.

¹²⁰ France, Council of State, decision of 11 June 2020 no. 440439.

4.2 Non-Discrimination

As previously mentioned, courts refer to the principle of non-discrimination especially when assessing the legitimacy of criteria introducing distinctions among economic activities in lockdown measures, imposing different restrictions upon various sectors. At the same time, in some cases courts used non-discrimination as a criterion to assess the reasonableness and proportionality of the challenged measures.¹²¹ Where distinctions among activities were deemed to be grounded on objective differences concerning the impact of the activities on the health crisis, the measures were upheld.¹²²

In other cases, discrimination among activities affected the judgment of proportionality. For instance, a German court held that different restrictions for integration activities with children and with mentally disabled people were not related to any objective difference in their impact on the epidemiological situation.¹²³ The harsher restrictions on activities with mentally disabled people were therefore deemed disproportionate. In several cases, high risks of virus transmission associated with certain activities justified the distinctions laid out in the emergency regulations.¹²⁴ For instance, a Spanish court upheld the legitimacy of a measure which opened restaurants but kept gambling establishments closed, considering that the risk of spreading a virus in a gambling establishment is higher than in a restaurant and therefore the two economic activities cannot be treated equally.¹²⁵ Similarly, a U.S.

court justified restrictive measures for restaurants on the basis of the specific risks associated with the activity of eating and drinking in public places.¹²⁶

Another U.S. decision pointed out that bars serve primarily as a place for people to socialize, whereas in restaurants people mostly eat in small groups.¹²⁷ Therefore, according to the court, a different treatment for bars and restaurants (i.e. allowing consumption of foods and alcohol in restaurants while prohibiting them in bars) does not violate the principle of equality¹²⁸. In another relevant decision, the Austrian Constitutional Court ruled that a measure banning entrance to a stand-alone car wash plant but allowing entrance to a plant attached to a gas station violated the principle of equality, since it did not provide any reason justifying the distinction between stand-alone plants and plants attached to gas stations.¹²⁹

Of particular interest is a set of French cases concerning the closure of bookshops during lockdowns.¹³⁰ The Council of State pointed out that bookshops contribute to the effective exercise of freedom of speech and to the free communication of ideas and opinions, and that books – although not first level necessity goods like food products – have an essential character which must be taken into consideration by the government. However, when assessing the specific measure, the court noted that bookshops were allowed to stay open for delivering, pick-up and collection activities and that book selling in supermarkets had been forbidden in order to protect bookshops. Therefore, the court stated that the closure of

League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, No. 20-Civ-1581, (6th Cir. 2020).

¹²⁵ Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021.

¹²⁶ United States, United States District Court, Western District of Michigan, Southern Division, *Michigan Restaurant and Lodging Association v. Gordon*, 1:20-cv-1104, 20 November 2020.

¹²⁷ United States Court of Appeal for the Fifth Circuit, *Big Tyme Investments, LLC v. Edwards*, No. 20-30526 (5th Cir. Jan. 13, 2021).

¹²⁸ *Ibid.* Along the same line of reasoning, with regard to movie theaters and performance venues see also United States District Court, Western District of Michigan, Southern Division, *CH Royal Oak, LLC v. Whitmer*, 472 F.3d 410 (W.D. Mich. 2020).

¹²⁹ Constitutional Court, decision no. V392/2020 of 1 October 2020.

¹³⁰ Council of State decisions of 13 November 2020 no. 445883, 445886 and 445899.

¹²¹ Belgium, Council of State, 28 October 2020, no. 248.781; Council of State, 13 November 2020, No. 248.918; France, Council of State, 11 June 2020, no. 440439; Germany, Thuringian High Administrative Court, 3 EN 254/20, decision of 29 April 2020; Spain, Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; Spain, Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14 September 2020.

¹²² See, for instance, Belgium, Council of State, 28 October 2020, no. 248.781.

¹²³ Thuringian High Administrative Court, 3 EN 254/20, decision of 29 April 2020.

¹²⁴ Zimbabwe, High Court of Zimbabwe, 'The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others'; Belgian Council of State, 24 February 2021, no. 249.904; Constitutional Court of the Republic of Latvia, decision of 11 December 2020, no. 2020-26-0106; for Spain see Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021; United States Court of Appeal of the Sixth Circuit,

bookshop, as required by public health interests, did not harm the freedom to conduct a business and the right to non-discrimination.

We already noted that the notion of non-discrimination is referred to by courts to assess the legitimacy of the distinctions between essential and non-essential activities. In particular, an Israeli decision deals with emergency regulations which, while allowing only essential stores to be open during the lockdown, does not distinguish between essential and non-essential products to be sold, with the consequence that those essential stores sold non-essential goods as well whereas the petitioners (some toy stores) could not sell their products since they were not essential stores.¹³¹ The court argued that such a mechanism was unjustifiably discriminatory against non-essential stores and that the respondent public authority had to amend the measures in order to prevent essential stores from selling non-essential goods.¹³²

A peculiar approach is adopted in a U.S. decision concerning a request for injunction ordering the reopening of business facilities. The judge asserted that acting upon the distinction between essential and non-essential businesses is discriminatory since it does not focus on the capability of the business operators to provide a safe environment but rather on the “identity” of the business itself¹³³. Furthermore, the judge noted, in other U.S. states the very same business operator had been allowed to reopen according to safety requirements. This decision is particularly relevant since it uses non-discrimination as a conceptual tool to question the legitimacy of the very distinctions between “essential” and “non-essential” activities, from a general and systemic point of view.

The comparative analysis puts on display the dynamic nature of the principle of non-discrimination, reflecting different concrete forms of discrimination which may be caused by emergency measures. The most relevant

one, in quantitative terms, on the basis of the selected cases, is that among different business owners, directly connected to fundamental economic freedoms.

Lockdown measures, however, have an impact on customers as well. In the German case concerning limitations on integration activities for mentally disabled people, for example, the court noted how the challenged measure produced an unjustified discrimination between mentally disabled people and children, thus harming the former’s fundamental rights. Such aspect, however, does not clearly emerge from the selected decisions, which, apart from the aforementioned German exception, focused mainly on the potential discrimination involving the plaintiff, namely the business owner.

4.3 Precautionary Principle

The decision of the Superior Court of Justice of the Valencian Community referred to the precautionary principle to uphold the legitimacy of the challenged measure.¹³⁴ In particular, the court pointed out that, based on this principle, the public authority, in order to protect public health, may take protective measures (such as restrictions on business activities) not only when there is an actual danger, but also in the presence of a potential risk.¹³⁵ Once again, the court referred to the scientific knowledge available in order to assess the potential risks, mentioning a report by the Deputy Director General for Epidemiology, Health Surveillance and Environmental Health which had pointed out how, even when complying with strict safety requirements, the economic activity involved (i.e. gambling establishments) were a high-risk environment due to the frequent sharing of gaming elements by customers.

A general reference to the precautionary principle also led a Spanish court to justify a wide discretion of public powers in

¹³¹ Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ).

¹³² Although it is not explicit in the decision, it seems that the Israeli judge confirmed the fundamental connection which must exist between, on the one hand, the distinction between essential and non-essential activities and, on the other hand, the concrete interests and necessities of the people or the consumers. In times of emergency, therefore, only goods which

satisfy fundamental needs of the consumers may be sold.

¹³³ United States, Court of Common Pleas of Erie County, Ohio, *LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et.. al.*, 2020-CV -020 I, 12 June 2020.

¹³⁴ Administrative Chamber, 94/2021, decision of 17 March.

¹³⁵ See also Superior Court of Justice of the Asturias, Administrative Chamber, 93/2021, 23 February 2021.

determining the criteria for the restrictions.¹³⁶ Other decisions of the Italian courts, refer to the precautionary principle just to outline the common purpose of all protective measures taken by authorities during the pandemic.¹³⁷ One of the decisions, however, refers to the principle to emphasize that its application must be reasonable and proportional and cannot be the legal ground for unjustifiable discrimination between different economic activities.¹³⁸

The precautionary principle is recognized by European law and, as such, is referred to by courts of EU Member States. However, even within Europe, it can be observed that relatively few decisions applied it, compared to the higher number of cases mentioning reasonableness or proportionality.

Indeed, even without referring to precaution, these two principles allowed courts to inquire as to the factual justification of challenged measures in light of the risks (both actual and potential) connected to certain activities. The same pattern, as already noted, was replicated by courts outside Europe.

5. The Determination of Remedies

As far as remedies are concerned, the selected decisions may be roughly grouped under three main categories.

In the first group, we have decisions granting interim relief or injunctive relief in urgency/interim procedures, in the form of suspension of the challenged measures, thus, in most cases, allowing business owners to reopen¹³⁹. As already noted, there is at least one decision that does not suspend the efficacy of the challenged measure (in that case, a

decision to terminate football championships) but only one of its consequences (i.e. relegation of two teams in the lower league), ordering a supplementary review of the conditions for resuming games.¹⁴⁰

In the second group, there are decisions which annul the challenged measures or declare them unconstitutional, therefore quashing them.¹⁴¹ It should be noted that some of these decisions quashed the measures on preliminary grounds concerning the respect of the principles of legality and rule of law. A decision from the Israeli Supreme Court, while finding the challenged measure unlawful, did not directly quash it, but rather gave the applicable public authority a term to amend it, in light of the adverse consequences of an outright cancellation of the measure.¹⁴²

A third group of decisions concerns monetary compensation, sought by plaintiffs on account of allegedly unlawful closures. In an Italian case, the plaintiff specifically asked for compensation, but the court rejected the claim, while also upholding the challenged measure.¹⁴³ In another case, the Campania Regional Administrative Tribunal awarded monetary damages to an essential business activity (a wholesale retailer of electric components) which had been unlawfully closed down by the local government.¹⁴⁴ The court verified that a causal link existed between the closure of the business and the loss of income sustained in the time-period considered.

Of particular interest is a decision from the U.S. which offered two grounds for the rejection of the compensatory claim: first, the lack of *locus standi* of the defendant (the State governor), and second, the defendant would be protected by sovereign immunity and could not be liable for damages.¹⁴⁵

¹³⁶ Superior Court of Justice of the Asturias, Administrative Chamber, 93/2021, 23 February 2021.

¹³⁷ Decree of the Council of State, 26 June 2020, No. 5013; Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933.

¹³⁸ Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862.

¹³⁹ Please refer to table in § 2.2 and to the subsequent analysis for exact quotation of such decisions.

¹⁴⁰ French Council of State, 9 June 2020, no. 440809.

¹⁴¹ See § 2.2.

¹⁴² Supreme Court of Israel, *Idan Center Dimona Ltd. v Government of Israel* [2020] 6939/20 HCJ (HCJ).

¹⁴³ Advisory Opinion of the Council of State, 28 April 2021 no. 00850/2021.

¹⁴⁴ Italy, Administrative Regional Tribunal of Campania, 4 February 2021, no. 789.

¹⁴⁵ United States, Texas, U.S. District Court for the Western District of Texas, *6th Street Business Partners LLC v. Abbott* (1:20-cv-00706). The court discusses in depth the *Ex parte Young* doctrine (from the landmark case of the U.S. Supreme Court in 1908) which allows suits in federal courts against states' officials. Such doctrine allows suits against state officials attempting to enforce unconstitutional provisions, even if founded on state legislation. In particular, the Supreme Court held that attempts to enforce unconstitutional law are not protected by sovereign immunity. The doctrine was based on the legal fiction that lawsuits concerning such matters were not against the state but against the state officials in their individual capacity, as such not protected by immunity. However, in present case, the

6. *Following. A Focus on Some Indian Decisions*

A separate analysis of a further set of Indian decisions provides insights into means of judicial assessment of socio-economic conflicts arising from the pandemic. Such features are framed within the peculiar character of the Indian economic constitution, which designs an active role for the State in order to tackle social inequality and foster balanced development. At the same time, however, the Indian judiciary, mostly modelled upon the common law and thus employing remedies such as writs of *mandamus* and prohibition¹⁴⁶, directly carries out important functions of social engineering when implementing socio-economic rights enshrined in the Constitution.

It is indeed relevant that decisions from the High Court of Manipur referred to the Directive principles of State policy, enshrined in the Indian constitution, as general principles to justify an order, addressed to public authorities, to take support and relief measures for school students' transporters, a category which were greatly damaged by the lockdown and the suspension of "on-site" education activities.¹⁴⁷

Such Directive Principles are a set of policy clauses contained in the Indian Constitution which created requirements for positive actions to be taken by the State in pursuit of development and welfare objectives. Their specific legal status is controversial, as is their legal force and effect¹⁴⁸. However, during the pandemic, Indian courts often referred to that

concept in order to justify specific orders issued to give public authorities command to take positive actions. From a broader perspective, their recognized function as interpretative criteria represents, for the courts, a useful tool to adjudicate complex social conflicts.

Apart from the reference to general principles, the dynamic character of Indian case law is displayed by diversity of the remedies issued to face the socio-economic consequences of the pandemic, in light of a proper balancing not only between business freedom and public health, but also between economic freedom in the sense of freedom to manage business according to private interests and economic freedom as a justification for support and relief measures issued to tackle economic hardships caused by the pandemic.

As a brief overview focusing on such issues, three decisions have been selected, covering vastly different practical issues. The first originates from a dispute between a hotel owner and two financial institutions concerning repayment of loans. The business owner decided to file a petition in order to be granted a moratorium on payment on the basis of a circular of the Indian Central Bank. The second decision concerns a request for positive actions to be taken in support of the transport sector, severely hit by the pandemic. The third decision concerns the payment of wages during the lockdown when business are closed and workers stay at home.

court pointed out that none of the requirements of such doctrine were satisfied. In particular, the court highlighted that, while the state official (Governor Abbott) did promulgate the challenged measure, he does not have, under the applicable law, any power to enforce it, which is instead vested in another authority. The *Ex parte Young* doctrine, therefore, may not be applied and the governor is protected by immunity according to the 11th amendment of the U.S. constitution.

¹⁴⁶ S.N. Jain, 'Judicial System and Legal Remedies', in Joseph Minattur (ed), *Indian Legal System* (Tripathi 1978) 133-147. In the legal terminology of common law legal systems, a writ of *mandamus* (or of mandate)

is, in essence, an order compelling someone (usually a public authority) to carry out an action or execute a duty on the basis of a legal obligation. A writ of prohibition is instead issued by superior courts to prevent lower courts from deciding cases exceeding their jurisdiction or taking actions contrary to justice.

¹⁴⁷ High Court of Manipur, *All Manipur School Student Transporter Association v. The State of Manipur and Ors.*, - WP (C) No. 459 of 2020.

¹⁴⁸ See Gautam Bhatia, 'Directive Principles of State Policy', in Sujit Choudry, Madhav Khosla, Pratap B. Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

Decision	Reasoning	Remedy
<p>High Court of Karnataka, <i>Velankani Information Systems Limited v. Secretary, Home Affairs, Government of India</i>, WP No. 6775 of 2020, MANU/KA/2455/2020</p>	<p>The regulatory policies of the Reserve Bank of India cannot, with binding force, order a bank to issue a moratorium; however, it is mandatory for the bank to ensure the continuity of viable businesses.</p>	<p>Where the denial of such moratorium hinders the survival of a business, the court may grant a proper remedy ordering the bank to issue the moratorium.</p>
<p>High Court of Manipur, <i>All Manipur School Student Transporter Association v. The State of Manipur and Ors.</i>, - WP (C) No. 459 of 2020</p>	<p>The lack of support actions for school students' transportation drivers during the lockdown is unconstitutional.</p>	<p>Order to the state government to take an appropriate decision for providing financial help within a month and to constitute a committee to verify the genuineness of the claims and submit a report to state government.</p>
<p>Supreme Court of India, <i>Ficus Pax Private Limited vs Union of India</i>, 12th June, 2020, Writ Petition no. 10983/2020</p>	<p>The Court recognized that paying wages during the lockdown could negatively impact on the financial situation of certain operators; at the same time, it stated that the workers' interests should be protected.</p>	<p>The Court called for negotiations between employers and employees in order to regulate the issues concerning wages during the lockdown period. If an agreement could not be reached, the Court then called for the parties to submit a request to the concerned labour authorities who are entrusted with the obligation to conciliate the dispute between the parties. In case an agreement was reached, the Court declared that it should be applied regardless of the provisions contained in the challenged measure.</p>

The common approach displayed by such decisions focuses on the social and economic consequences of the pandemic, incorporating them not only in the assessment of the legitimacy of the challenged measures, but also in the determination of the specific remedy. In the first decision, for instance, the Court focused on the one hand on the discretion enjoyed by the bank in its lending policies as derived from a general freedom of business and, on the other hand, on the duty to ensure the survival of viable businesses during the pandemic.¹⁴⁹

In the second decision, the Court pointed out that the lack of support actions for school students' transportation drivers during the lockdown was unconstitutional since it violated, among others, the freedom to conduct a business by depriving the workers of a chance to earn income. As a consequence, the Court ordered the state government to take an appropriate decision for providing financial help within a month and to constitute a committee to verify the genuineness of the claims and submit a report to state government. The Court also ruled that, if necessary, the state government could approach the central government for grant of a financial package so that it could extend help to students' transportation's drivers, at least on humanitarian grounds.¹⁵⁰

In the third decision, the Court recognized that paying wages during the lockdown could negatively impact on the financial situation of certain operators; at the same time, it stated that the workers' interests should be protected. As a solution, the Court did not openly question the legitimacy of the measure challenged (it had already expired at the time of the decision). Instead, it called for negotiations to initiate between employers and employees in order to regulate the issues concerning wages during the lockdown period. If an agreement could not be reached, the Court then called for the parties to submit a request to the concerned labour authorities who are entrusted with the obligation to conciliate the dispute between the parties. In case an agreement was reached, the court declared that it should be applied regardless of the

provisions contained in the challenged measure.¹⁵¹

7. The Assessment of Economic Losses Suffered by Business Operators and the Determination of Correspondent Remedies

The pandemic itself implied extensive economic consequences for the business operators (or workers and consumers) involved, either in form of losses or in form of relief measures.

In the selected cases, the issue is considered by courts from two different perspectives. First, the impact of existing relief measures on the assessment of the challenged restrictions' legitimacy, especially from the perspective of their proportionality and reasonableness. Second, the consideration of economic losses as grounds to issue specific remedies or grant, by order of the court, monetary relief for closed activities.

7.1 Relief Measures as Counterbalancing Forces in the Balancing Judgment

In several European decisions the consideration of economic losses and corresponding recovery measures for business activities which were closed was linked with the assessment of proportionality and reasonableness.

The fact that a business operator could have access to support and recovery measures, especially in terms of economic assistance, led courts to find the restrictive measures reasonable and/or proportional, since their negative impact was counterbalanced (at least partially) by positive actions of support.

In a French decision, even the mere announcement of compensatory measures for ski lifts closed during the lockdown was used to uphold the legitimacy of the challenged restrictions, given the prospective support enjoyed by business owners.¹⁵² In similar cases, the existence of support schemes for fair operators and gyms was referred to by judges as an element counterbalancing the adverse impact of the challenged restrictions, therefore rendering such restrictions proportional.¹⁵³

¹⁴⁹ High Court of Karnataka, *Velankani Information Systems Limited v. Secretary, Home Affairs, Government of India*, WP No. 6775 of 2020, MANU/KA/2455/2020.

¹⁵⁰ High Court of Manipur, *All Manipur School Student Transporter Association v. The State of Manipur and Ors.*, - WP (C) No. 459 of 2020.

¹⁵¹ Supreme Court of India, *Ficus Pax Private Limited vs Union of India*, 12 June, 2020, Writ Petition no. 10983/2020.

¹⁵² France, Council of State, decision of 11 December 2020 no. 447208.

¹⁵³ France, Council of State, 27 January 2021, no. 448732; Council of State, decision of 1 April 2020, no. 439762; Germany, High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021; Italy, Regional Administrative Tribunal of Rome, decision of 19 August 2020 no. 5408; see also the decision of the Latvian Constitutional Court, No. 2020-26-0106, of 11 December 2020.

It is not explicitly mentioned in such decisions what could have happened if the compensatory measures had not been in place. It seems implied, however, that, in absence of support schemes, the judge should have carried out a more thorough proportionality test, verifying, in particular, viable alternatives to prevent the concrete economic damage sustained by the economic operator involved.

7.2 Economic Losses as Grounds for Issue Specific Remedies. Interim Relief Claims Requesting Suspension

Other European decisions addressed the issue of economic losses when judging requests for interim relief, especially with regard to the requisite of urgency.

An Italian court rejected a request for interim relief, holding that the nature of the damages alleged in the complaint in principle permits their subsequent monetary compensation, in the event that the judgment is favorable to the plaintiff.¹⁵⁴ The Belgian Council of State held that the necessity to limit an economic loss deriving from an emergency measure during the pandemic may not ground a request for interim relief, since it does not integrate the element of urgency.¹⁵⁵

Another Belgian decision, in rejecting a request of suspension of emergency measures, focused on economic loss as an autonomous element, stating that, while it is known that several business activities suffered losses during the pandemic, a specific request may not be founded on the allegation of such losses.¹⁵⁶ The Belgian judge stated that there must instead be the proof of specific damages and losses suffered by the establishment putting forward the claim, and that these damages must be different from the “general” losses widespread among the economic operators. Similarly, the French Council of State rejected a request for interim relief on account of the lack of specific elements to assess the financial hardships alleged.¹⁵⁷

A Spanish decision considered economic losses in an urgency procedure concluded with the suspension of the challenged measure. The Court, on the basis of the materials submitted for the

dispute, analyzed in detail the losses suffered by three restaurants, which are not specifically identified and do not correspond with the plaintiffs, but represent a plausible example of how the economic sector was affected by the lockdown¹⁵⁸. First, the Court considered the losses derived from the expenses borne to organize events then cancelled, and second, it considered personal and moral damages suffered by the plaintiffs as a consequence of the cancellation of such events, albeit not quantifying them. The reference to economic losses, however, mainly served the purpose of justifying the criterion of urgency of the request, while the assessment of the reasonableness of the challenged decisions relied on other considerations.

The French Council of State, instead, took account of the prospective losses suffered by teams relegated to the second division of the football championship due to such championship’s early termination on account of the pandemic.¹⁵⁹ Regarding the request for interim relief, the Court decided to suspend the implementation of the decision to terminate championships early, given the immediate and significant losses faced by some football clubs. The decision to terminate, however, was not in itself scrutinized. The Court merely ordered the football association to carry out another review on the conditions to orderly resume the games.

Some U.S. courts, once again regarding injunctive relief, also took into account the issue of economic losses when granting injunctions upholding the reopening of closed businesses. They assessed the concrete harm, in terms of economic losses, suffered by the plaintiffs on account of the lockdown requirements.¹⁶⁰ Even when injunctions were denied, the court referred to economic losses in order to determine that private interests were at stake and a balancing had to be carried out.¹⁶¹

7.3 Following. Monetary Compensation, Relief Measures and Economic Terms and Conditions of Business

The reasonableness of the emergency measures also implies that they do not cause unjustified

¹⁵⁴ Italy, Regional Administrative Tribunal of Rome, decision of 19 August 2020 no. 5408.

¹⁵⁵ Belgian Council of State, decision of 15 September 2020 no. 248270.

¹⁵⁶ Belgium, Council of State, 29 October 2020, no. 248.798.

¹⁵⁷ Council of State, 23 February 2021, no. 449577.

¹⁵⁸ Spain, Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14 September 2020.

¹⁵⁹ France, Council of State, 9 June 2020, no. 440809.

¹⁶⁰ United States, Court of Common Pleas of Erie County, Ohio, *LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et. al.*, 2020-CV -020 I; Court of Common Pleas of Lake County, Ohio, *Rock House Fitness, Inc. v. Acton*, Case no. 20CV000631.

¹⁶¹ United State District Court – Southern District of New York, *The Cloister East, Inc., et al. v. New York State Liquor Authority*, 20-cv-6545 (LAK).

losses to certain business activities and provide rational relief schemes to business owners. When the consequences of the lockdown create imbalances in the economic interests of the different actors involved, court may design appropriate remedies.

The most “classic” of such remedies, monetary compensation, was used in the Italian decision awarding damages to a wholesale retailer unlawfully closed during the pandemic.¹⁶² After acknowledging the causal link between the challenged measure and the damages sustained, the court determined the compensation in light of the loss of income suffered.¹⁶³ Indeed, the court considered that the ordinary income of the plaintiff could be taken as criterion to determine damages, since the exceptional circumstances of the pandemic, even if the activity had not been closed, would have reduced the trade volume. Given the general reduction in goods’ demand and the technical difficulties of an exact ascertainment of the prospective income lost, the Court awarded damages on the basis of equity, according to Art. 1226 of the Italian Civil Code.¹⁶⁴

In some cases, the courts assessed the criteria chosen by the legislature to award monetary relief. A Polish decision held that a business operator in the fitness sector whose activity had been closed was entitled to obtain “stoppage compensation” even though she did not meet all the conditions literally specified in the Covid Act.¹⁶⁵ In particular, Article 15zq of the Act of March 2, 2020 – on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and the emergencies caused by them – provided that “stoppage compensation” (*świadczenie postojowe*) should be given to all business whose revenue in May 2020 was at least 15% lower than the revenue of April 2020.¹⁶⁶ However, in this case, the business owner had no revenue in both April and May 2020, therefore, according to a narrow interpretation of the law, was not qualified to access the relief measure. The Court stated that such an interpretation would render the rule unreasonable and declared that the plaintiff was entitled to obtain relief.¹⁶⁷

A Scottish decision dealt with the criteria to issue relief grants according to a legislative measure to support the hotel sector. The plaintiff

claimed that the decision not to grant the maximum amount of relief provided by the law (£25,000) for each one of his properties was irrational. The Court held instead that grants could be provided “up to” the maximum amount and thus the law did not create specific legitimate expectations so to justify claims from an economic operator receiving less money than what he expected.¹⁶⁸

Outside the European context, courts appeared even more proactive in using the assessment of economic losses as a ground to issue specific remedies, not refraining from designing innovative and targeted remedies.

For example, the innovation of the remedy sought by parties was explicitly discussed in an Argentinian interim proceeding, where several manual workers and artisans asked for monetary compensation as interim relief, given the precarious economic circumstances brought about by the lockdown.¹⁶⁹ The Court first found that the government had enacted support schemes for closed businesses but that the plaintiff could not access to them due to lack of the ability to meet different requirements. However, the Court also noted that for the plaintiffs (i.e. manual workers and artisans) the sale of manufactured products was the only source of revenue and, as such, embodied their right to work, as protected by Article 14 of the Argentinian constitution.¹⁷⁰ The exceptionality of the measure requested clearly reflects, according to the Court, the unusual circumstances brought about by the pandemic which require the protection of both the public health, by limiting risk of infection, and the rights and interests of the business and workers impacted by the lockdown. The Court decided, therefore, to grant the plaintiffs interim relief as requested, in the form of monetary compensation both for the past period of closure and for the future, until the lockdown measures are lifted.

Of interest here is the approach taken by some Indian courts, in particular, the decision of the Haryana High Court which emphasized economic losses in connection with the necessity to balance conflicting interests coming from different social groups. Therefore, the court allowed the economic operators to charge fees, but pointed out that such fees should be limited to the actual expenditures

¹⁶² Italy, Administrative Regional Tribunal of Campania, 4 February 2021, no. 789.

¹⁶³ *Ibidem*.

¹⁶⁴ *Ibidem*.

¹⁶⁵ Poland, Olsztyn District Court, Wyrok Sądu Okręgowego w Olsztynie z dnia 02 września 2020 r. (sygn. akt IV U 1195/20).

¹⁶⁶ *Ibidem*.

¹⁶⁷ *Ibidem*.

¹⁶⁸ Scotland, *Jon Sharp v The Scottish Ministers* [2020] CSOH 74 P352/20 of 23 July 2020.

¹⁶⁹ Tribunal of first instance for administrative and tributary disputes no. 2 of the city of Buenos Aires, secretaria no. 4, *S.M.I. Y otros contra Gcha sobre otros procesos incidentales* – Amparo, 29 May 2020.

¹⁷⁰ *Ibidem*.

incurred in during the lockdowns.¹⁷¹ The court specifically focused on the necessity to take into account the interests of both the schools and the families of students.

In another Indian decision, the petitioner, a charitable education society running government-supported schools, asked for a suspension of certain financial obligations toward the State, namely deposits for distribution of teachers' salary, due to the pandemic.¹⁷² The Court fully considered the economic losses suffered by the petitioner during the pandemic, but also noted that the petitioner itself had already submitted a request for relief to the Delhi government. Therefore, the Court decided to dispose of the petition and wait for the relief measures to be issued by the public authorities.¹⁷³ At the same time, however, it reserved the petitioner's rights to obtain a remedy after such measures are issued, in case they do not grant relief to the petitioner and are challenged.¹⁷⁴ In a similar case, the High Court of Patna held instead that, since the demand for the performance must precede the application for a remedy and the petitioner did not issue such demand nor was met with a refusal from the school, the Court may not grant an issue. Anyway, the Court states, the petitioner must approach the authority concerned and ask for the appropriate solution and the authority concerned must consider the matter and decide it expeditiously in light of the principles of natural justice and of the opportunity of hearing afforded to the parties.¹⁷⁵

7.4 Some Comparative Remarks

In the above decisions, courts acknowledged the relevance of economic losses caused by the lockdown. However, their concrete response to the issue was different depending on the legal systems.

In Europe, most of the decisions dealt solely or primarily with requests of annulment of interim suspension of the challenged measures. Therefore, they mostly referred to economic losses as complementary elements in their reasoning, to assess the reasonableness and proportionality of the emergency provisions or to assess the existence of the requirements for the issuance of interim relief, especially urgency.

¹⁷¹ India, Haryana High Court, Independent Schools Association ... vs State Of Punjab And Ors, 30th June 2020, Writ Petition no. 7409/2020.

¹⁷² India, Delhi High Court, *Raisina Bengali School Society vs Directorate Of Education Govt. Of NCT of Delhi & ANR*, WP 3267/2020.

¹⁷³ *Ibidem*.

¹⁷⁴ *Ibidem*.

With regard to monetary compensation, there were different approaches. The lack of a necessary connection between lockdown measures and compensation to business activities, at the general level, adversely affected by the restrictions was clearly pointed out by the Austrian Constitutional Court.¹⁷⁶ However, the above-mentioned decision of the Campania Regional Administrative Tribunal found that, in presence of a causal link between an unlawful restriction and a loss of income sustained by a business activity, the public administration should be held liable and pay compensation.¹⁷⁷ Furthermore, European courts did not refrain from scrutinizing the reasonableness of the relief schemes enacted by authorities, also granting certain economic operators access to schemes from which they had been previously excluded.

A second group of decisions, composed by the Argentinian and Indian rulings clearly reflects a more "interventionist" approach by courts, which at the request of the plaintiffs also designed specific remedies not necessarily linked to existing relief schemes but rather aimed at solving concrete economic imbalances. Significantly, the complex socio-economic conflicts caused by lockdown measures were assessed not only in light of economic freedoms but also in light of other fundamental rights (such as the right to work) or general instances of social harmony.

From this perspective the decisions selected, albeit relatively few, seem to confirm the general interpretations of business freedom enshrined in the economic constitutions of the different legal systems.

8. Conclusions

This survey has described the wide array of legal problems faced by courts when dealing with emergency measures concerning businesses. At the same time, it has shown how judges have addressed these issues and the types of remedies they have provided. In so doing, it has attempted to provide, or at least outline, some comparative remarks concerning different approaches developed by courts of different legal systems, more often than not connected to values and concepts enshrined in the respective legal traditions.

¹⁷⁵ *Rajnikanth Pathak v. The State of Bihar and Others*, Civil Writ Jurisdiction Case No.11940, 5 July 2021.

¹⁷⁶ Austria, Constitutional Court, decision of 14 July 2020, no. G202/2020.

¹⁷⁷ Italy, Administrative Regional Tribunal of Campania, 4 February 2021, no. 789.

Surely, the analysis of the litigation suggests that courts are well aware that the protection of public health should, in general, prevail over economic freedoms, which may therefore be restricted. At the same time, such restrictions must adhere to some criteria, implying rational distinctions among economic activities and prescribed limitations. At the same time, restrictions must be interpreted in light of the emergency (regardless of its formal declaration), a sometimes abstract notion which is specified by references to scientific information concerning the evolution of the pandemic.

Courts also widely employ specific legal principles to balancing between different rights or to assess, in practice, the legitimacy of the challenged measures. The specific content of such principles may depend on the legal traditions in different models, as has happened with the principles of proportionality and precaution in the European decisions. On the other hand, courts may also refer to more general concepts, such as reasonableness, either in connection with a specific principle or by itself, interpreting it in light of factual circumstances. Sometimes, as noted, the courts had to deal with a further level of complexity represented by the balancing, in concrete, of different and potentially conflicting economic interests of social groups hit by the pandemic.

This is the area where future litigation may therefore offer new and interesting conclusions about possible applications for some general principles, such as proportionality. In particular, the problems related to compensation of losses caused by lockdowns or the issues related to the criteria to deliver mitigation measures have already been the object of some interesting decisions and could further lead judges to assess proper and effective remedies for businesses suffering economic hardships. Such considerations also refer to an underlying background concerning the positive duty of the state to formulate proper economic policies to support economic operators harmed by the emergency measures. From this perspective, the notion of balancing and the logical hierarchy of public health interests may also be linked with an issue of substantial equality in the post-Covid societies. It remains to be seen whether the courts will address these topics.

It is, obviously, for future surveys to assess the viability and concrete usefulness of such considerations in light of future case law. Considering that the pandemic is still ongoing and that case law trends will further evolve, it might be difficult to derive, from the previous analysis,

general considerations concerning convergences and divergences between legal models of judicial decision making. From a very broad point of view, we may conclude, for instance, that European courts rely on established principles of EU law such as proportionality and precaution, to carry out balancing or to assess the legitimacy of challenged measures. In European decisions, even the reference to reasonableness seems to be mostly referred to the appropriateness as laid out in the proportionality test.

American and African courts, on the other hand, referred to proportionality and reasonableness without employing specific tests or implying a decades-long interpretative background concerning these concepts. Their approach was somewhat more concrete. Chinese courts, while refraining from any kind of balancing and fully upholding the prevalence of public health interests over private ones, insisted on the respect of the principle of legality. Indian courts developed a very dynamic approach, laying out remedies containing positive actions with a special emphasis on the composition of social conflicts. Such approach was to some extent mirrored by Argentinian courts.

Beyond the possible distinctions, however, it is evident that certain considerations, such as those related to scientific knowledge or those related to the state of emergency or the essentiality of business activities, were common to different jurisdictions. These are not intended as definitive assumptions, but only as a preliminary sketch of the judicial landscape emerging from selective case law analysis related to the relationship between health protection and economic freedoms. From this perspective, future research should also assess how different trends of Covid-related case law could connect with the development of the relevant legal systems and families of comparative law.

**APPENDIX
TABLE OF CASES**

DECISIONS	
Africa	
South Africa , High Court of South Africa (Gauteng Division), Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP) ¹⁷⁸	Claim rejected
Zimbabwe , High Court of Zimbabwe, The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others	Claim rejected
Asia	
China , Wugang Primary People's Court (Hunan Province), 18th September 2020, First Instance Decision (Administrative) no. 127	Claim upheld, administrative sanction quashed on purely procedural grounds
China , Chengde City Intermediate People's Court, 30th November 2020 – Appeal Decision no. 207	Claim rejected
China , Primary People's Court of Kenli District, Dongying City, Decision of 2nd June 2020, Administrative decision no. 57	Claim rejected
India , Haryana High Court, Independent Schools Association ... vs State Of Punjab And Ors, 30th June 2020, Writ Petition no. 7409/2020 ¹⁷⁹	Claim upheld, decision partly quashed – schools are allowed to charge fees but only within the limits of actual expenditures
India , High Court of Karnataka, Velankani Information Systems Limited v. Secretary, Home Affairs, Government of India, WP No. 6775 of 2020, MANU/KA/2455/2020 ¹⁸⁰	Claim upheld, grant of a moratorium on bank loans

¹⁷⁸ Available (in English) at: <<http://www.saflii.org/za/cases/ZAGPPHC/2020/>> accessed 5 July 2021.

¹⁷⁹ Available (in English) at: <<https://indiankanoon.org/doc/189693756/>> accessed 5 July 2021.

¹⁸⁰ Available (in English) at: <<https://indiankanoon.org/doc/130747696/>> accessed 5 July 2021.

India , High Court of Manipur, All Manipur School Student Transporter Ass. v. The State of Manipur and Ors., WP (C) No. 459 of 2020 ¹⁸¹	Order to the government to provide financial help
India , Supreme Court of India, Ficus Pax Private Limited vs Union Of India, 12th June, 2020, Writ Petition no. 10983/2020 ¹⁸²	Order for negotiations between conflicting parties to be held
India , Delhi High Court, Raisina Bengali School Society vs Directorate Of Education Govt. Of NCT of Delhi & ANR ¹⁸³	Claim rejected
India , High Court of Patna, <i>Rajnikanth Pathak v. The State of Bihar and Others</i> , Civil Writ Jurisdiction Case No.11940, 5 July 2021.	Claim rejected
Israel , Supreme Court of Israel, HCJ 6939/20 Idan Mercaz Dimona Ltd.v. Government of Israel, decision of 2 February 2021	Claim upheld, grant of a time period for the government to amend the challenged measure
Europe	
Austria , Constitutional Court, decision no. V392/2020 of 1 October 2020; decisions no. V405/2020 and V429/2020 of 1 October 2020 ¹⁸⁴	Claim upheld, unconstitutionality of the challenged measure
Austria , Constitutional Court V411/2020, V395/2020 et.al., V 396/2020 et.al. 14 July 2020 ¹⁸⁵	Claim upheld, unconstitutionality of the challenged measure
Austria , Constitutional Court, decision of 14 July 2020, no. G202/2020 ¹⁸⁶	Effectiveness of the challenged measure already expired at the time of the judgment
Belgium , Council of State, 24 February 2021, no. 249.904 ¹⁸⁷	Claim rejected

¹⁸¹ Available (in English) at: <<https://indiankanoon.org/doc/150681730/>> accessed 5 July 2021.

¹⁸² Available (in English) at: <<https://indiankanoon.org/doc/7216703/>> accessed 5 July 2021.

¹⁸³ Available (in English) at: <<https://indiankanoon.org/doc/186058257/>> accessed 5 July 2021.

¹⁸⁴ Available (in German) at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20201001_20V00392_00> accessed 5 July 2021; <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20201001_20V00405_00> accessed 5 July 2021.

¹⁸⁵ Available (in German) at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20200714_20V00411_00> accessed 5 July 2021.

¹⁸⁶ Available (in German) at: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20200714_20G00202_00> accessed 5 July 2021.

¹⁸⁷ Available (in French) at: <<http://www.raadvst-consetat.be/Arrets/249000/900/249904.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=38650&Index=c%3a%5csoftware%5cdtsearch%5cindex%5ccarrets%5ffr%5c&HitCount=2&hits=1a+1b+&041010202198>> accessed 5 July 2021.

Belgium , Council of State, 28 October 2020, no. 248.781 ¹⁸⁸	Claim rejected
Belgium , Council of State, 29 October 2020, no. 248.798 ¹⁸⁹	Claim rejected
Belgium , Council of State, 13 November 2020, no. 248.918 ¹⁹⁰	Claim rejected
Croatia , Croatian Constitutional Court, decision No. U-I-2162/2020 of 14 September 2020	Claim rejected
France , Council of State, 27 January 2021, no. 448732 ¹⁹¹	Claim rejected
France : Council of State, decision no. 445102 of 16 October 2020 ¹⁹²	Claim rejected
France , Council of State, decision no. 440439 of 11 June 2020 ¹⁹³	Claim rejected
France , Council of State, decision no. 447208 of 11 December 2020 ¹⁹⁴	Claim rejected
France , Council of State, decision no. 451085 of 14 April 2021	Claim rejected
France , Council of State, 30 December 2020, no. 448201 ¹⁹⁵	Claim upheld, reversal of the first instance decision

¹⁸⁸ Available (in French) at: <<http://www.raadvst-consetat.be/Arrets/248000/700/248781.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=38081&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets%5ffr%5c&HitCount=2&hits=15+16+&0431482021814>> accessed 5 July 2021.

¹⁸⁹ Available (in French) at: <<http://www.raadvst-consetat.be/Arrets/248000/700/248798.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=38083&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets%5ffr%5c&HitCount=2&hits=20+21+&0418262021912>> accessed 5 July 2021.

¹⁹⁰ Available (in French) at: <<http://www.raadvst-consetat.be/?page=news&lang=fr&newsitem=638>> accessed 5 July 2021.

¹⁹¹ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-01-27/448732>> accessed 5 July 2021.

¹⁹² Available (in French) at: <<https://www.conseil-etat.fr/Media/actualites/documents/2020/10-octobre/445102-445186-445224-445225-salles-de-sport.pdf>> accessed 5 July 2021.

¹⁹³ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-11/440439>> accessed 5 July 2021.

¹⁹⁴ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-12-11/447208>> accessed 5 July 2021.

¹⁹⁵ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-12-30/448201>> accessed 5 July 2021.

France , Council of State, 9 June 2020, no. 440809 ¹⁹⁶	Claim upheld, suspension of the implementation of the challenged measure
France , Council of State decisions no. 445883, 445886 and 445899 of 13 November 2020	Claim upheld, annulment of the challenged measure
France , Council of State, 23 February 2021, no. 449577	Claim rejected
Germany , Administrative Court of Karlsruhe, 3 K 4418/20, 30 October 2020 ¹⁹⁷	Claim rejected
Germany , Federal Constitutional Court 1 BvQ 47/20, 29 April 2020 ¹⁹⁸	Claim rejected
Germany , Federal Constitutional Court 1 BvR 2530/20, 11 November 2020 ¹⁹⁹	Claim rejected
Germany , High Administrative Court of Thüringen 3 EN 105/21, 9 March 2021 ²⁰⁰	Claim rejected
Germany , Thuringian High Administrative Court, 3 EN 254/20, 29 April 2020 ²⁰¹	Claim upheld, interim suspension of the challenged measure
Germany , High Administrative Court of Berlin-Brandenburg, decisions no. S 22/21 and S 23/21 of 3 March 2021 ²⁰²	Claim rejected
Germany , High Administrative Court of Berlin-Brandenburg 11 S 17/21 ²⁰³	Claim rejected
Italy , Advisory Opinion of the Council of State, no. 00850/2021, 28 April 2021 ²⁰⁴	Claim rejected

¹⁹⁶ Available (in French) at: <<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-09/440809>> accessed 5 July 2021.

¹⁹⁷ Available (in German) at: <http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=Verwaltungsgerichte&Art=en&Datum=2020-10&nr=32841&pos=2&anz=65> accessed 5 July 2021.

¹⁹⁸ Available (in German) at: <http://www.bverfg.de/e/qk20200429_1bvq004720.html> accessed 5 July 2021.

¹⁹⁹ Available (in German) at: <http://www.bverfg.de/e/rk20201111_1bvr253020.html> accessed 5 July 2021.

²⁰⁰ Available (in German) at: <[http://www.thovg.thueringen.de/webthfj/webthfj.nsf/6DAA484FDFFED13CC125869600262263/\\$File/21-3EN-00105-B-A.pdf?OpenElement](http://www.thovg.thueringen.de/webthfj/webthfj.nsf/6DAA484FDFFED13CC125869600262263/$File/21-3EN-00105-B-A.pdf?OpenElement)> accessed 5 July 2021.

²⁰¹ Available (in German) at: <<https://landesrecht.thueringen.de/perma?d=MWRE200001674>> (accessed 5 July 2021).

²⁰² Available (in German) at: <<https://gesetze.berlin.de/perma?d=JURE210003805>; <<https://gesetze.berlin.de/perma?d=JURE210003812>> accessed 5 July 2021.

²⁰³ Available (in German) at: <<https://gesetze.berlin.de/bsbe/document/JURE210004133>> accessed 5 July 2021.

²⁰⁴ Available (in Italian) at: <https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=consul&nrng=202100115&nomeFile=202100850_27.html&subDir=Provvedimenti> accessed 5 July 2021.

Italy , Decree of the Council of State, No. 884, 22 February 2021 ²⁰⁵	Claim rejected
Italy , Administrative Regional Tribunal of Trentino Alto-Adige, decision of 23 December 2020 ²⁰⁶	Claim rejected
Italy , Administrative Regional Tribunal of Campania, decision of 18 November 2020 ²⁰⁷	Claim rejected
Italy , Regional Administrative Tribunal of Lazio, 26 October 2020, no. 10933 ²⁰⁸	Claim upheld, annulment of the challenged measure
Italy , Administrative Regional Tribunal of Lazio, 16 February 2021, no. 1862	Claim upheld, annulment of the challenged measure
Italy , Administrative Regional Tribunal of Campania, 4 February 2021, no. 789	Claim upheld, monetary compensation
Italy , Ordinance of the Regional Administrative Tribunal of Lazio, No. 827, 12 February 2021	Claim rejected
Italy , Decree of the Council of State, 26 June 2020, No. 5013 ²⁰⁹	Reversal of the first instance decision, rejection of the suspension of the challenged measure
Italy , Regional Administrative Tribunal of Rome, decision no. 5408, of 19 August 2020	Claim rejected
Italy , Council of State, decision of 27 April 2020, no. 3380 ²¹⁰	Claim rejected
Latvia , Constitutional Court of the Republic of Latvia, decision of 11 December 2020, no. 2020-26-0106 ²¹¹	Claim partially upheld, partial unconstitutionality

²⁰⁵ Available (in Italian) at: <https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=cds&nrg=202101551&nomeFile=202100884_16.html&subDir=Provvedimenti> accessed 5 July 2021.

²⁰⁶ Available (in Italian) at: <https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_tn&nrg=202000139&nomeFile=202000213_01.html&subDir=Provvedimenti> accessed 5 July 2021.

²⁰⁷ Available (in Italian) at: <https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_na&nrg=202001827&nomeFile=202005307_01.html&subDir=Provvedimenti> accessed 6 July 2021.

²⁰⁸ Available (in Italian) at: <<https://www.giustizia-amministrativa.it/web/guest/dcsnpr>> accessed 5 July 2021.

²⁰⁹ Available (in Italian) at: <<https://www.giustizia-amministrativa.it/en/dcsnpr>> accessed 5 July 2021.

²¹⁰ Available (in Italian) at: <<https://www.giustizia-amministrativa.it/web/guest/dcsnpr>> accessed 6 July 2021.

²¹¹ Available (in Latvian) at: <https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-26-0106_Spriedums.pdf#search=2020-26-0106> accessed 6 July 2021.

Scotland , Outer House Court of Session, [2020] CSOH 98 P1043/20 of 11 December 2020	Claim rejected
Scotland , Outer House, Court of Session, decision [2020] CSOH 74 P352/20 of 23 July 2020	Claim rejected
Spain , Superior Court of Justice of the Valencian Community, Administrative Chamber, 94/2021 of 17 March 2021	Claim rejected
Spain , Superior Court of Justice of the Valencian Community, Administrative chamber 59/2021, 25 February 2021	Claim rejected
Spain , Administrative Chamber of the Superior Court of Justice of Catalonia, Resolution of 29 July 2020 ²¹²	Claim upheld, suspension of the challenged measure
Spain , Superior Court of Justice of Zaragoza, no. 286/2020, decision of 14 September 2020	Claim upheld, suspension of the challenged measure
North America	
Canada , Superior Court of Quebec, Entrepreneurs en action du Québec c. Procureur général du Québec	Claim rejected
United States , United States District Court for the Northern District of California, Altman v. County of Santa Clara, 464 F.Supp.3d 1106 (N.D. Cal. 2020) 227 A.3d 872 (Pa. 2020) ²¹³	Claim rejected
United States , United States District Court, Western District of Michigan, Southern Division, Michigan Restaurant and Lodging Association v. Gordon, 1:20-cv-1104, 20 November 2020	Claim rejected
United States , United States District Court, Western District of Michigan, Southern Division, CH Royal Oak, LLC v. Whitmer, 472 F.3d 410 (W.D. Mich. 2020) .	Claim rejected

²¹² Available (in Spanish) at: <http://www.gencat.cat/eapc/revistes/RCDP/dossier/RCDP_covid/Sentencies/ATSJ_225_2020.pdf> accessed 6 July 2021.

²¹³ Available (in English) at: <<https://casetext.com/case/altman-v-cnty-of-santa-clara-1>> accessed 6 July 2021.

United States , Supreme Court of Pennsylvania, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020) ²¹⁴	Claim rejected
United States , Texas, U.S. District Court for the Western District of Texas, 6th Street Business Partners LLC v. Abbott	Claim rejected
United States , Court of Common Pleas of Lake County, Ohio, Rock House Fitness, Inc. v. Acton, Case no. 20CV000631, 20 May 2020	Claim upheld, injunction given (\$ 0 bond for reopening of business during lockdown)
United States , Court of Common Pleas of Erie County, Ohio, LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et al., 2020-CV -020 I, 12 June 2020	Claim upheld, reopening of business facilities
United States , Michigan Supreme Court, Department of Health and Human Services v. Karl Manke, 161394 & (27)(37)(38)	Decision quashed on procedural grounds
United States , United States Court of Appeal of the Sixth Circuit, League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, No. 20-Civ-1581, (6th Cir. 2020) ²¹⁵	Claim rejected
United States , United States Court of Appeal for the Fifth Circuit, Big Tyme Investments, LLC v. Edwards, No. 20-30526 (5th Cir. Jan. 13, 2021) ²¹⁶	Claim rejected
United States , United States District Court – Eastern District of Washington, Slidewaters v. Washington State Department of Labor and Industries, no. 2:20-CV-0210-TOR, 14 July 2020	Claim rejected
United States , Court of Appeals of the State of Minnesota, Free Minnesota Small Business Coalition v. Walz, no. A20-0641, 26 May 2020	Claim rejected
United States , United States District Court for the District of Maryland, Antietam Battlefield KOA, et al. v. Lawrence J. Hogan, et al., 461 F. Supp. 3d 214 (D. Md. 2020) ²¹⁷	Claim rejected

²¹⁴ Available (in English) at: <<https://law.justia.com/cases/pennsylvania/supreme-court/2020/68-mm-2020.html>> accessed 6 July 2021.

²¹⁵ Available (in English) at: <<https://ij.org/wp-content/uploads/2020/06/Document.pdf>> accessed 6 July 2021.

²¹⁶ Available (in English) at: <<https://law.justia.com/cases/federal/appellate-courts/ca5/20-30526/20-30526-2021-01-13.html>> accessed 6 July 2021.

²¹⁷ Available (in English) at: <https://casetext.com/case/antietam-battlefield-koa-v-hogan?_cf_chl_jschl_tk_=451176fa73c29cee9dcdce3f835fc5e556da2ec4-1625563066-0-AdflopNXCWIKraX4aPv99HG3mSEenxcuqJEo82Jcvii5>

United States , Arizona Superior Court, Maricopa County, <i>Aguila v. Ducey</i> , 8 September 2020	Claim rejected
United States , United States District Court – Eastern District of Louisiana, civil action no. 20-2150, 4 Aces enterprises, LLC, et al. v. Edwards ²¹⁸	Claim rejected
United States , United States District Court for the District of Connecticut, Connecticut Citizens Defense League v. Lamont, 465 F.Supp.3d 56 (D. Conn. 2020) ²¹⁹	Claim upheld, suspension of the challenged measure
United States , United States District Court for the Central District of California, McDougall v. County of Ventura, No. 2:20-cv-02927-CBM-AS, 2020 WL 6532871 (C.D. Cal. Oct. 21, 2020)	Claim rejected
United States , Supreme Court of New Mexico, Grisham v. Reeb, No. S-1-SC-38336, 2020 WL 6538329 (N.M. Nov. 5, 2020) ²²⁰	Grant of a writ of superintending control, emergency restrictions upheld
United States , United State District Court – Southern District of New York, The Cloister East, Inc., et al. v. New York State Liquor Authority, 20-cv-6545 (LAK)	Claim rejected
South America	
Argentina , Appeal Chamber in Administrative Disputes, Córdoba, Unión de Trabajadores del Turismo, Hoteleros y Gastronómicos de la República Argentina UTHGRA c/ Gobierno de la Provincia de Córdoba, 14 August 2020 ²²¹	Claim rejected

9tT-ya6uXSyJ1iWLZzZQK5e2zbrtu04yn4bs09Q8Is2lWvkQ13Nw-kj8kZCDUvT4tuvqgGT-BluR57esEuvjwWrq9f2JhZty9e_1oM8lTcHqzvuS1KdkSGyIKCb86RiBYPzmrLwvpm8SXVbJ-JduMSD5g84cyKIDSyw6bc9MV9wmrJrDsUVNXKbKC3ktW6fjqVlc0tmjVFcZv8HhQxdd3YBuyE940FO6WYR2JEYE7uXNzsoytFKsyArMw50e6oZJ2fgUT14pdCMiVzzDKBvyI3kuvbUItYThfquAG-dEnAD2XvvGvsRMa_uMESBgOB8HxFdwYqBgBO7IS4fm7BAUYAuEnsLJy54RfPw71ZCzIaYxdfIM-iBVyjoYrXZcgtlElxGA0nnQJlEDQPP9xB9sqIb0Q2zjA3TB4M52P85JjZ0uXo6jLZPrI0q_VFsNSCZ6umZImVRpqrk5_DzeVA> accessed 6 July 2021.

²¹⁸ Available (in English) at: <<https://law.justia.com/cases/federal/district-courts/louisiana/laedce/2:2020cv02150/246700/50/>> accessed 6 July 2021.

²¹⁹ Available (in English) at: <https://ecf.ctd.uscourts.gov/cgi-bin/show_public_doc?2020cv0646-70> accessed 6 July 2021.

²²⁰ Available (in English) at: <<https://nmonesource.com/nmos/nmsc/en/488119/1/document.do>> accessed 6 July 2021.

²²¹ Available (in Spanish) at: <<http://www.saij.gob.ar/camara-apelaciones-contencioso-administrativa-1ra-nom-local-cordoba-union-trabajadores-turismo-hoteleros-gastronomicos-republica-argentina-uthgra-gobierno-provincia-cordoba-amparo-ley-4915-fa20160043-2020-08-14/123456789-340-0610-2ots-eupmocsollaf?>> (accessed 5 July 2021).

<p>Argentina, Tribunal of first instance for administrative and tributary disputes no. 2 of the city of Buenos Aires, secretaría no. 4, S.M.I. Y otros contra Gcba sobre otros procesos incidentales – Amparo, 29 May 2020²²²</p>	<p>Claim upheld, interim relief (monetary compensation) given</p>
<p>Brazil, Federal Court - 1st Region, 1013225-55.2021.4.01.3400 Federal Court, 21^a Vara Federal Cível, decision reached on the 25/03/2021</p>	<p>Claim upheld, unconstitutionality of the challenged measure</p>

²²² Available (in Spanish) at: <https://cijur.mpba.gov.ar/files/articles/1891/S.M.I.y_otros_contra_GCBA-_amparo.pdf> accessed 5 July 2021.

The Changing Role of Judicial Review During Prolonged Emergencies: The Israeli Supreme Court During COVID-19

*Ittai Bar-Siman-Tov, Itay Cohen and Chani Koth**

Abstract. This article explores the role of the Israeli Supreme Court in exercising judicial review of Covid-19 control measures. It argues that the Court exhibited changes in its review methods and adapted its role throughout this prolonged crisis. At the first stage, the Court focused on protecting institutional democratic safeguards, while exercising judicial restraint and greater deference than usual in its substantive review of the content of Covid-19 measures. The second stage (after nearly a year into the pandemic), was characterized by more significant judicial intervention and a growing propensity to hold Covid-19 measures unconstitutional, based on a combination of stricter substantive judicial review and increased demand for an evidentiary and scientific basis to justify infringement of rights. Therefore, the Israeli case demonstrates the broader question of the changing role of judicial review, and, more specifically, of evidence-based judicial review, during prolonged emergencies.

Keywords: *COVID-19, Coronavirus, Pandemic, Crisis, Judicial Review, Evidence-based Judicial Review, Courts, Separation-of-powers, Israel*

1. Introduction

In this article, we explore the role of the Israeli Supreme Court in reviewing Covid-19 control measures. We argue that there is a changing judicial role throughout the Covid-19 crisis. At the first stage (February 2020-January 2021), the judicial role is characterized by restraint in substantive review of the content of Covid-19 measures and marked by significant greater deference than in regular times, while maintaining and protecting institutional democratic safeguards. The second stage (beginning in February 2021) is characterized by more significant judicial intervention and a growing propensity to hold Covid-19 measures unconstitutional. This second stage was marked by broader substantive judicial review, as well as increased demand for a factual and scientific infrastructure to justify the infringement of rights. We argue that the change in the Court's approach can be seen as an adaptation of the judicial role as

circumstances have changed. In the first stage, Covid-19 was perceived as an imminent, new, and unknown threat. In the second stage, the sense of danger diminished, and growing data and knowledge were accumulated. Hence, the Court adapted its role and demands from the other branches of government accordingly. The Israeli case demonstrates the general question of the changing role of judicial review during prolonged emergencies. It also demonstrates the ideas of evidence-based judicial review and shifting demand for evidence-based legislation during ongoing crises.

This article examines how the Israeli Supreme Court responded to the challenges of prolonged crisis in cases dealing with restrictions on freedom of movement, demonstration, and assembly during the Covid-19 crisis. The article is structured as follows. Part 1 very briefly sketches the theoretical background about judicial review in emergencies and pandemics and the idea of evidence-based

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judicial review. Part 2 presents our argument about the changes in the judicial role of the Israeli Supreme Court.

Given space limitations, we do not purport to provide an extensive literature review in the theoretical background section, nor do we attempt to provide an exhaustive review of the Israeli Court's entire case-law on Covid-19 related issues. Instead, in this brief paper, we present a limited number of representative cases. We based our case selection on two guiding principles. First, we chose leading and particularly illustrative cases from each stage. Second, given the substantive focus of this special issue on restrictions on freedom of movement, demonstration, and assembly, we focused on cases dealing with these rights.¹

2. Theoretical Background

Emergencies are typically associated with the (perceived and real) need for rapid and effective government responses to imminent dangers and threats, often in the context of insufficient information. Typically, responses involve an accumulation of powers by the executive branch and the adoption of rights-restricting measures. This raises many questions about the role of courts during emergencies and whether and how their role should change compared to regular times. These include questions such as the appropriate degree of deference to the government and the extent that courts should and can assume a role in safeguarding democracy, ensuring a proper institutional balance between the executive and the legislature, balancing between the needs for effectiveness and expediency on the one hand, and accountability and fundamental rights, on the other.² One of the main dilemmas for the judicial

role in emergencies is how courts should ensure that rights-infringing emergency measures are justified, required, and appropriate for dealing with the emergency. In addition to established debates on doctrinal and balancing tools (such as proportionality), a crucial question is how courts can ensure that the governmental responses are based on sufficient factual and scientific basis. This relates to questions of whether and how courts should exercise evidence-based judicial review of rights-restricting measures or require the government and legislature to exercise evidence-based decision-making processes when adopting such measures.³

3. The Changing Role of the Israeli Supreme Court during COVID-19

3.1. The First Stage

The first stage of the judicial response to the Covid-19 crisis was characterized by markedly greater deference than regular times, and great judicial restraint in reviewing Covid-19 measures. This first period can be demonstrated by cases concerning restrictions on freedom of movement in the form of imposing a closure on some urban regions.

During April 2020, particularly during the Passover holiday, the government adopted various temporary measures based on emergency regulations that significantly limited freedom of movement.⁴ This included *cordon sanitaire* decisions – temporarily declaring certain areas as “restricted areas,” such that entry to and exit from these areas were prohibited, except for specified permitted purposes (such as medical treatment, participation in legal proceedings, or the funeral of a first-degree relative).⁵ Among the declared

¹ Therefore, important cases such as the cases dealing with privacy infringements and location-tracking by the General Security Service, which could also demonstrate our argument about the changing role of the Court, are not discussed in depth. For discussions of these and additional cases dealing with other rights, see, e.g., Einat Albin, Ittai Bar-Siman-Tov, Aeyal Gross and Tamar Hostovsky-Brandes, 'Israel: Legal Response to Covid-19', in Jeff King and Octavio Ferraz (eds) *The Oxford Compendium of National Legal Responses to Covid-19* (2021); Ayal Gross, 'Like a Dystopian Nightmare: Human Rights, Democracy, and Politicization and Securitization of Health in Constitutional and Global Law in the Shadow of the COVID-19 Crisis' (forthcoming 2021) *Mishpat Umimshal* (Hebrew); see also Myssana Morany, *The Israeli Supreme Court and the COVID-19 Emergency* (Adalah, 2021), which was published after this article was written and shortly before it went to press.

² For recent overviews see, Fabrizio Cafaggi and Paola Iamiceli, 'Global Pandemic and the Role of Courts' (2021) 1(1-2-3) *Legal Policy & Pandemics The Journal of the*

Global Pandemic Network; Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2020) 52 (University of Chicago, Public Law Working Paper no 747) *Virginia Public Law and Legal Theory Research Paper*; Jan Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?' (2020) 8 *Theory & Pract. Legis.* 7, 92.

³ Ittai Bar-Siman-Tov, 'The dual meaning of evidence-based judicial review of legislation' (2016) 4(2) *Theory & Pract. Legis.* 107, 133; Patricia 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' (forthcoming, 2021) *Eur. J. Risk Regul.* 1, 26.

⁴ Einat Albin and others (n.1).

⁵ Declaration of Areas in the City of Jerusalem as a 'Restricted Area' According to the Emergency Regulations (New Corona Virus) (Israeli Government, 2020) <https://www.gov.il/he/departments/policies/dec4978_2020> accessed 2 August 2021.

“restricted areas” were the large city of *Bnei-Brak* and the *Ramot-Alon* neighborhood in Jerusalem (the city’s largest neighborhood with a population of about 51,000 residents). Residents of *Bnei-Brak* and *Ramot-Alon* filled two separate petitions to the Supreme Court. They argued that these government decisions represented disproportionate violations of their rights. They further argued that the government’s decision should be invalidated because it was not anchored in a solid factual infrastructure regarding the morbidity data in their area.⁶

The Supreme Court rejected both petitions and upheld the government’s restrictive measures. In the *Bnei-Brak* case, Justice Amit began his legal analysis by stating:

“On the legal front, the pandemic leads us in unsown land, in legal and constitutional areas and paths which were not foreseen even by doomsayers. Basic constitutional rights such as the right to privacy, property, freedom of occupation and freedom of movement within Israel are dumb struck in the face of terms such as closure and quarantine, blockade, road blocks, location-tracing of phones by the General Security Service, social distancing and more. All these pass before us like a dystopian nightmare in a democratic state where civil liberties are the basis of its existence. In ordinary times, these measures would have been disqualified on site as manifestly illegal, but the days are not ordinary days...”⁷

Justice Amit then proceeded with examining the measure through the usual constitutional limitation-clause tests. At the end of the analysis, he noted, however, that his analysis of this case was unusual:

“We are standing in an unprecedented situation of fear of rapid spread of the Covid-19 pandemic at high rates, for all that it entails in terms of morbidity, mortality and the collapse of the health care system. In the horizontal balance between rights, this time, against the infringement of freedoms and basic rights such as freedom of movement, we place the right to life and the integrity of the body, an uncommon situation in our legal system. In this horizontal balance, the hand of the right to life prevails.”⁸

A similar approach was echoed by Justice Baron in the *Ramot Alon* case. Justice Baron ended her legal analysis with a strong statement about the exceptionality of the situation, which merits a more accommodating view toward rights-infringing measures than in regular times:

“As my colleague Justice Y. Amit noted in the judgment in the *Bnei-Brak* petition, in routine times it would not have been possible to accept such a serious infringement of constitutional rights such as freedom of movement and the right to privacy, property and freedom of occupation. But the days are ‘Corona days,’ and the dangers inherent in the spread of this pandemic are immediate and palpable. This pandemic has already claimed the lives of tens of thousands of people around the world, and the number of sick and dead is still rising at a dizzying pace. In horror and fear we watch the collapse, one after another, of health systems in Western countries which do not meet the burden of the respiratory patients. Concern for the well-being of patients and anxiety about the fate of the country cross sectors and we are all partners in it... In these exceptional circumstances, and despite the heavy toll it places upon the population in Israel... it is clear that there is no escape from overall social support for the fight against the spread of the virus...”⁹

To clarify, we do not argue that the Court was necessarily wrong in upholding these temporary measures in these two cases. Instead, our aim is to illustrate how the perception of Covid-19 as an exceptional and unprecedented situation, which entails fear from potential catastrophic consequences, has caused the Court to adopt a much more deferential approach toward rights-infringing measures than in normal times. These two cases illustrate the Court’s general practice throughout the first year of the Covid-19 pandemic, in which the Court appeared reluctant to second-guess the necessity of public health interventions to control the pandemic.

In additional cases, the Court refused to intervene in Covid-19 measures, while candidly stating that these were “far-reaching restrictions ... on basic constitutional rights ... which, in normal times, would have been disqualified instantly as patently unconstitutional.”¹⁰ Interestingly, in

⁶ HCJ 2435/20 *Yedidya Loewenthal v. Prime Minister* (2020) (Isr.); HCJ 2491/20 *Community Administration Ramot Alon v. The Government* (2020) (Isr.).

⁷ HCJ 2435/20 *Loewenthal, id.*, at para. 1.

⁸ *Ibidem* at par. 23.

⁹ *Community Administration Ramot Alon, supra* note 6, at para. 11.

¹⁰ HCJ 2705/20 *Smadar v Prime Minister* (2020) (Isr.); See also, HCJ 6774/20 *Gertal v Government of Israel* (2020) (Isr.); HCJ 6575/20 *Granot v Prime Minister*

(2020); Albin et al., *supra* note 1; Elena Chachko and Adam Shinar, *Israel pushes its emergency powers to their limits*, *The Regulatory Review* (28 April 2020); Ayal Gross, *Rights Restrictions and Securitization of Health in Israel During COVID-19*, *Bill of Health* (29 May 2020); Gross, *supra* note 1; Jeremie Bracka, ‘Israel’ in Bonavero Reports: A Human Rights and Rule of Law Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic Across 27 Jurisdictions (Bonavero Institute of Human Rights 2020); Morany, *supra* note 1.

addition to a general view that the balance between rights and public interests should change during such an emergency, the Court seemed to alter its usual balancing method. In normal times, the typical balancing approach would be vertical balancing, which places against the infringed right, a public interest, such as public health. In such a balancing method between rights and public interests, the rights tend to have the *a priori* upper hand. Yet, as the *Bnei-Brak* case illustrated, instead of balancing between individual rights and public interests, the Court viewed this case as involving fundamental rights at both sides, as the public health interest was considered a manifestation of the individual right to life.¹¹ When infringed rights are balanced against the very right to life, the chances that the Court would intervene in the rights-infringing health measure are much lower.¹²

The Court's manifest reluctance to intervene in Covid-19 measures during the first stage, has led some human rights organizations in Israel to criticize it for being overly deferential to a degree abdicating its role during emergencies.¹³ While we share the descriptive observation that the Court eschewed substantive judicial intervention in the government's health measures, we believe it would be incorrect to assume that the Court remained completely passive during this first stage of its response to the pandemic. Instead, it limited its role to ensuring structural separation-of-powers safeguards, by upholding the parliament's ability to control the government's measures.

When the pandemic hit Israel, the country was in the midst of an unprecedented political crisis, with a care-taker government (headed by the recently indicted Prime Minister Netanyahu) and a

newly elected parliament, after three rounds of elections.¹⁴ The Court seemed to realize that such an unelected care-taker government that adopts far-reaching rights-restricting measures in the fight against Covid-19 must be supervised by an operating parliament. Hence, when the outgoing Speaker of the parliament (from Netanyahu's party) was trying to prevent the new parliament from forming committees and electing a new Speaker (which are required for the parliament to begin to operate and start overseeing the government), the Court did not hesitate to intervene. In *The Movement for Quality Government in Israel v Knesset* case, the Court held that the outgoing Knesset Speaker's "continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process" and "clearly harms the status of the Knesset as an independent branch of government," and therefore this was "one of those exceptional cases in which the intervention of this Court is required in order to prevent harm to our parliamentary system of government."¹⁵ Similarly, in the *Ben Meir v Prime Minister* case, the Court warned that it would issue a temporary order that would stay the government's decision to allow the General Security Service to track the location of Israeli citizens if the parliamentary committee in charge of supervising this measure would not be formed (which indeed led to its formation); and latter held in its final ruling that such a far-reaching measure may only be authorized by parliament through primary legislation (while adding that such legislation should be enacted as temporary legislation with a sunset clause).¹⁶ Hence, when Justice Amit proclaimed in the *Ramot Alon* case that

¹¹ Einat Albin and others (n.1).

¹² Ittai Bar-Siman-Tov 'Legislatures and Rights: Comment on Legislated Rights – Securing Human Rights Through Legislation' (2020) 21 Jerusalem Rev. Leg. Stud. 112–128.

¹³ Morany, *supra* note 1.

¹⁴ Ittai Bar-Siman-Tov, 'Covid-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures' (2020) 8 Theory & Pract. Legis. 11–48; Tamar Hostovsky Brandes, 'Israel's Perfect Storm: Fighting Coronavirus in the Midst of a Constitutional Crisis' (*VerfBlog*, 7 April 2020) <<https://verfassungsblog.de/israels-perfect-storm-fighting-coronavirus-in-the-midst-of-a-constitutional-crisis/>> accessed 2 August 2021; Tamar Hostovsky Brandes, 'A Year in Review: COVID-19 in Israel: A Tale of Two Crises' (*VerfBlog*, 13 April 2021) <<https://verfassungsblog.de/a-year-in-review-covid-19-in-israel/>> accessed 2 August 2021.

¹⁵ HCJ 2905/20 *The Movement for Quality Government in Israel v. Knesset* (2020) (Isr.); Bar-Siman-Tov, 'Covid-19 Meets Politics', *supra* note 13; Nadiv Mordechay and Yaniv Roznai, 'Constitutional Crisis in Israel: Coronavirus, Interbranch Conflict, and

Dynamic Judicial Review' (*VerfBlog*, 2020) <<https://verfassungsblog.de/constitutional-crisis-in-israel-coronavirus-interbranch-conflict-and-dynamic-judicial-review/>> accessed 9 April 2020.

¹⁶ HCJ 2109/20 *Ben Meir v. Prime Minister* (2020) (Isr.) (English translation available at <<https://versacardozo.yu.edu/opinions/ben-meir-v-prime-minister0>>); Chachko and Shinar, *supra* note 10. Another example is HCJ 1633/20 "*Basket*" *Nursing Services v The State of Israel* (2020) (Isr.), invalidating the general "Sickness Certification" issued by the Ministry of Health for people under isolation or quarantine. This was largely a statutory interpretation case, but we see it as another example of the Court's structural separation-of-powers approach, because the bottom line of the holding was that the Ministry of Health exceeded its authority and therefore the sweeping certification it issued should be invalidated as *ultra vires*. The Court rejected the state's argument that the exceptional situation in the face of Covid-19 justifies its broad interpretation of the relevant legislation as providing it the necessary authority to issue this certification. Justice Stein, who wrote the main opinion, held, *inter alia*: "We are in an unprecedented

“[e]ven when the Coronavirus is roaming our streets, the muses are not silent and parliamentary and judicial oversight are not silenced,” this was not empty rhetoric.¹⁷

3.2. The Second Stage

After about a year into the pandemic, we observe a change in the Court’s approach to the extent and manner of judicial intervention in Covid-19 measures. The Court began showing greater willingness to exercise stricter substantive scrutiny of Covid-19 measures, while also emphasizing the importance of relying on factual and scientific infrastructure in adopting rights-infringing measures. Since February 2021, there has been a series of cases in which the Court found various Covid-19 measures unconstitutional.¹⁸ Given the focus of this special issue and limitation of space, we will focus on two representative cases on freedom of demonstration and travel.

3.2.1. The Ruling regarding Restrictions on Demonstrations¹⁹

In July-October 2020, Israel faced the “second wave” of outbreaks of the pandemic. As part of the response steps taken, the government decided in September 2020 to impose a total closure on the state of Israel. While in previous lockdowns the right of demonstration was exempted, this time, the government also temporarily prohibited demonstrations that exceeded 1,000 meters from the demonstrator’s residence. Six different petitions were filed against this decision. Although

the temporary limitation that was in force in October 2020 already expired by the time the Court rendered its decision in April 2021, the majority opinion retroactively invalidated the regulation that limited demonstrations, deeming the fines imposed by the regulations null and void. The Court held that the limitation did not pass the constitutional tests due to the severe violation of freedom of demonstration and freedom of expression. Furthermore, the Court recognized the place of protest as an essential part of the demonstration’s message, especially when it comes to the official residence of a public official and given the importance of criticizing the government in times of emergency.²⁰

The majority opinion, written by the Court’s President, Hayut, emphasized the importance of the evidence-based data that the respondents should have presented as a sufficient basis for the infringement of fundamental rights such as the right of demonstration and assembly:

“Against the gravity of this harm [to rights], stands a benefit whose exact degree is unknown and unproven... As the respondents themselves have stated, they do not have any data on the extent of infections in demonstrations. Thus, the attempt to hinge on to the decrease in general morbidity after the imposition of closures, as a fact justifying the imposition of restrictions relating to demonstrations, suffers from the fact that it does not indicate a proven causal link between the two.”²¹

Due to this lack of an evidence-based justification for restricting demonstrations, President Hayut held that the limits imposed on

state of national emergency. We all worry, we all take care, and we all wear masks to prevent infection. At the same time, we continue to speak the same language and make use of the same legal principles that have been successfully used since ancient times” (id par. 31.). CJ Hayut added that the sweeping Sickness Certification issued by the Ministry has broader consequences for the rights of the parties to the employment relationship and is therefore “not within the authority of the executive body in the Ministry of Health - it is subject to the legislature” (Id, Hayut, par. 3).

¹⁷ Community Administration Ramot Alon, *supra* note 6, Amit J. at para. 1. To be sure, some critics of the Court argue that the Court should have done even more in accepting structural and separation-of-powers petitions during this period (Morany, *supra* note 1), while others criticized it for being too excessive in its intervention (Rivka Weill, ‘Judicial Intervention in Parliamentary Affairs to Prevent a Coup d’état’ (forthcoming, 2021) *Maryl. L. Rev.* 1–19). At any rate, both claims do not contradict our descriptive claim that during the first period, the Court eschewed substantive judicial intervention in the government’s health measures, while focusing on the protection of structural separation-of-powers safeguards.

¹⁸ e.g., HCJ 6939/20 *Idan Mercas Dimona Ltd.v. Government of Israel* (2021) (Isr.) ; HCJ 6732/20 *Association for Civil Rights in Israel v Knesset* (2020) (Isr.); HCJ 1107/21 *Oren Shemesh v Prime Minister* (2021) (Isr.); HCJ 158/21 *Physicians for Human Rights v. Minister of Public Security* (2021) (Isr.); HCJ 5469/20 *Achrayut leumit– Israel is my home v. Government of Israel* (2021) (Isr.).

¹⁹ *Achrayut leumit– Israel is my home v. Government of Israel, Id.*

²⁰ Justice Solberg, in a minority dissent opinion, opined that since the 1,000-meter limit expired about six months before the judicial decision was rendered, after being in effect for only 13 days, days of considerable aggravation in corona morbidity – the issue has become theoretical at this stage. He opined that since there is no concrete petitioner claiming to have been fined in those days (and anyone who has been fined can seek to have the fine overturned or tried instead), there is no good enough reason to invalidate the regulation enacted by the entire government with the approval of the Knesset’s Constitution, Law, and Justice Committee, long after it has expired (Id.)

²¹ *Achrayut leumit– Israel is my home v. Government of Israel, President Hayut, Id.* at para 64.

demonstrations did not meet the balancing test that required “near certainty of harm to the public wellbeing” to justify restricting the right of demonstration.²²

Justice Mazuz, in a minority opinion, exhibited an even more robust semi-procedural approach,²³ opining that the entire regulation (not only its subsection that limited demonstrations) should be invalidated due to a material defect in the process of its adoption: its nightly approval by telephone between the Ministers without presenting the protocols of the discussion before their approval, the insufficient factual infrastructure presented to the government, and the lack of documentation regarding the alternatives examined.

3.2.2. The Ruling on the Prohibition of Entry to Israel²⁴

Since January 2021, there have been restrictions on leaving and entering Israel due to the discovery of new variants of the coronavirus, for which there is concern about the vaccine’s effectiveness. The limits applied for an extended period and have been imposed without giving sufficient time for citizens to prepare and without clarifying the date on which they would be entirely removed, which was necessary because of the proximity to election day in Israel.

The Court accepted the petition against these restrictions. The Court held that the right to leave a person’s country of citizenship and enter it is based on the right to freedom of movement, which has been recognized in Israeli case law as a supreme right, with particular strength and status among the individual’s rights and freedoms, derived from being a free person and the state’s character as a democracy.²⁵ Thus, the exercise of the rights to enter and leave the country may be a condition for the practice of fundamental rights such as freedom of occupation, family life, freedom of association, the right to education, and more. Many of the petitioners complain about the inability to leave the country or return to it and about accompanying violations of additional rights, including the right to family life and the right to vote and be elected.²⁶

In addition to exercising substantive constitutional judicial review of the content of the restrictions and their proportionality, President Hayut emphasizes the necessity of a factual infrastructure to impose restrictions that infringed fundamental rights. President Hayut ruled that the limits were set without the government having any

factual or empirical evidence, or any data on the number of citizens abroad seeking to return to Israel. Additionally, no explanation had been given as to why the daily passenger quota was set at 3,000 persons. The impression was that concerning the spread of variants, the government preferred to implement a regime of entry quotas, which is simpler to implement but whose violation of fundamental rights is much more harmful. She observed that:

“During the hearings held in the petitions, it became clear to us that the process for adopting the regulations and restrictions set forth therein also suffered from a lack of a relevant factual infrastructure. As is well known, any decision of an administrative authority, including a decision to enact secondary legislation, must be based on a sufficient factual basis. From the arguments heard before us, it became clear during the discussions that the government does not have any data on the number of citizens abroad seeking to return to Israel. This basic data, which could have illuminated the extent of the expected infringements, was not available to the government during the entire period in which the decisions were made and not even after the filing of the petitions and the holding of hearings on the petitions”.²⁷

The Court added that only later in the judicial proceedings did the government acquire the data, but that:

“It goes without saying that given the short and late period of time in which these data were collected, they do not present an accurate and exhaustive factual infrastructure, and in any case certainly do not cure the defect that initially occurred in the enactment process of the regulations of the absence of any factual infrastructure in this regard. The lack of such an infrastructure also emphasizes the degree of arbitrariness of setting the daily entry quota to 3,000 passengers”.²⁸

4. Conclusion

In this article, we argued that there is an observed change in the Israeli Supreme Court’s approach in reviewing Covid-19 measures. In the first period of the pandemic, the Court exhibited significant judicial restraint, while delineating the judicial review for assuring institutional safeguards. Our finding that during the first phase of the crisis, the Court has shown much greater deference in reviewing governmental Covid-19 measures than

²² *Ibidem*.

²³ Ittai Bar-Siman-Tov, ‘Semiprocedural Judicial Review’ (2012) 6 *Legisprudence* 271.

²⁴ HJC 1107/21 *Oren Shemesh v Prime Minister* (2021) (Isr.)

²⁵ *Ibidem* at par. 17.

²⁶ *Ibidem* para. 14.

²⁷ *Ibidem*, para. 31.

²⁸ *Ibidem*.

in regular times, is at concert with similar findings from other countries, and is not surprising.²⁹ What's more interesting is our finding that rather than simply taking a passive approach, the Court changed its emphasis from substantive rights-based judicial review to structural separation-of-powers judicial review. This is particularly interesting, as it stands in contrast to the major trend in the Israeli Court's approach during past decades of clearly favoring substantive judicial review and the protection of constitutional rights over structural and procedural judicial review and the protection of structural and institutional constitutional values.³⁰

During the second period, the Supreme Court exercised broader substantive judicial review. This more significant judicial role was also characterized by more substantial evidence-based judicial review.

As time passed, and the sense of danger diminished, the Court started to assert that empirical and scientific evidence could and should have been collected to substantiate the violation of fundamental rights.

Interestingly, this finding is also at concert with similar observations in other countries.³¹

It also emerges from the cases we have presented that the Court observed that the enactment process itself was not evidence-based and that the data was only collected when the Court demanded it. Yet, interestingly, the Court exercised evidence-based judicial review in its two versions identified in the theoretical scholarship:³² first, examining whether the rights-restricting measures were enacted via an evidence-based process, focusing on whether the government had sufficient factual infrastructure at the time of adopting the measure; and second, examining the evidence presented to the Court during the judicial proceedings, and focusing on whether the Court was presented with sufficient factual data for establishing a connection between the restrictive means and its stated justification.

While some have criticized the Court for being overly deferential during the first stage of the pandemic, we believe that over time, the Israeli Court has shown a commendable ability to adapt its role in the face of a challenging situation that began

as a new, unknown and threatening emergency and developed into a prolonged crisis.

²⁹ Cafaggi and Iamiceli, *supra* note 2.

³⁰ Ittai Bar-Siman-Tov, 'Revolution or Continuity? Bank Hamizrachi's Role in the Development of Judicial Review Models in Israel' (2018) *Law and Government* 271 (Hebrew); Amichai Cohen and Yaniv Roznai, 'Populism and Israeli Democracy' (forthcoming 2021) *Tel Aviv University Law Review* (Hebrew); Barak Medina and Asor Watzman 'The Constitutional Revolution or Human-Rights Revolution? The Constitutional Basis of "Institutional" Norms' (2018) 40 *Tel Aviv University Law*

Review 595– 662 (Hebrew). Albeit, there may be basis to argue that first hints of this change preceded the Covid-19 crisis. See, Yaniv Roznai, 'Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset' (2018-2019) 51(4) *VRÜ* 415.

³¹ Cafaggi and Iamiceli, *supra* note 2; Popelier *et al.*, *supra* note 3.

³² Bar-Siman-Tov, 'The dual meaning of evidence-based judicial review of legislation', *supra* note 3.

The Judicial Review of Legislative and Administrative Acts in Brazil

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Abstract. The purpose of this report is to analyze the judicial review of legislative and administrative acts in Brazil during the Covid-19 pandemic. Departing from the empirical evidence collected, it focuses on three main aspects: 1. The general characteristics of the judicial review of legislative and administrative acts during the pandemic; 2. The intensity of the judicial review, compared to before the pandemic; 3. Whether the pandemic has redesigned the role of the courts compared to before the pandemic. The framework is the Brazilian constitutional court, Supremo Tribunal Federal, and its rulings regarding the competencies of the three levels of the Brazilian federation, federal, state and municipal. The sources are legislative and administrative acts published in the official gazettes of the federal, state, and local governments and the official website of the Supremo Tribunal Federal. Regarding the political declarations and events related to the coronavirus outbreak, the source is the newspaper Folha de S. Paulo. Through an applied research methodology, using qualitative and quantitative analysis, this report will present conclusions regarding the role played by the Constitutional Court in the redesign of Brazilian federative system during the Covid-19 pandemic.

Keywords: *Covid-19, litigation, federation, competency, Brazil*

1. Introduction

This section will introduce the subject of the judicial review of legislative and administrative acts in Brazil during the Covid-19 pandemic.

Moreover, departing from the empirical evidence collected, it will draw conclusions on the following focus points:

- The general characteristics of the judicial review of legislative and administrative acts during the pandemic.
- The intensity of the judicial review, compared to the period previous to the pandemic.
- Whether or not the pandemic has redesigned the role of the courts compared to the period previous to the pandemic.

The framework for this research will be the Brazilian constitutional court, Supremo Tribunal Federal, and its rulings regarding the competences of the three levels of the Brazilian federation.

The reason why this framework is established is that the competence to legislate and promote

policies in response to the Covid-19 pandemic is at the core of the federative conflict that arose in Brazil during the year 2020.

The sources researched are legislative and administrative acts published in the official gazettes of the federal, regional, and local governments¹ and the official website of the Supremo Tribunal Federal. Regarding the political declarations and events related to the coronavirus outbreak, the source is the newspaper Folha de S. Paulo, which is not only the largest and oldest newspaper in Brazil, but also complies with the highest information literacy standards.²

2. The General Characteristics of the Judicial Review of Legislative and Administrative Acts by the Constitutional Court in Brazil

Brazil is a federation composed of the indissoluble union of three levels of government: the Union (federal or national), the federal states (regional), and the municipalities (local), as predicted by Article 1 of the Constitution of the Federative Republic of Brazil. The Federal District is

¹ Tito Maíra, 'The Effects of the Pandemic in Regional and Local Governance: The federal system in Brazil as a case study', (1 June 2021) Working Paper CEDIS VARIA, ISSN 2184-5549 <https://cedis.fd.unl.pt/wp-content/uploads/2021/06/WP-VARIA_2021_JUN-01.pdf> accessed 5 October 2021.

² ALA-ACRL. Information literacy competency standards for higher education. Chicago, Illinois: The Association of College and Research Libraries. The American Library Association; 2000.

considered a *suis generis* unit, and it can perform the functions of federal state and municipality. The competences to legislate and to adopt public policies at each level are described in Articles 21 to 32 of the Constitution.

This federal system is supported by the principles of political autonomy and division of powers, where power slots are allocated to political entities and allows them to make decisions under the terms of the Constitution and seeking to maintain the federative pact.³ The division of competences is provided by the Constitution, and it is divided into administrative competence (executive power) and legislative competence (legislative power), since the presidential system allocates a significant amount of power to the executive.

The administrative competence concerns the decision-making process of political-administrative acts, the implementation of public policies and the general management of public administration at all levels.⁴ It is classified as exclusive or common. In the case of exclusive competence, the Constitution establishes precisely what governmental level has jurisdiction over the policy (Articles 21 and 30), which cannot be transferred to another level. For instance, the collection of income tax is an exclusive responsibility of the federal government. In common competence, the jurisdiction over the decision-making process is simultaneously assigned to the Union, the federal states, the Federal District and the municipalities. For instance, the administration of public health services is a common competence (art. 23, II, of the Constitution).

The legislative competence concerns the possibility of issuing mandatory, general and abstract norms, and it is divided into private, concurrent, and complementary or supplementary. The private competence (Article 22) belongs to the Union through the bicameral Congress, which can legislate on civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labour law, among others. Unlike exclusive administrative competence, it admits delegation; federal law may

delegate to a certain federal state the possibility of enacting law on specific topics. As regards to concurrent competence, the Union, the federal states, and the Federal District may legislate on health and social assistance (Article 24, XII), on protection and guarantee of the rights of people with disabilities, on cultural, artistic and historical heritage, among others.⁵ From this competence, derives the complementary or supplementary competence, in which the Union issues general norms, and the states are responsible for the complementary legislative activity (when there is a general law) or supplementary (when in the absence of a general law, the states can fully legislate on the matter). In the case conflict between federal law and state law, the first will suspend the effectiveness of the state legislation⁶.

Therefore, the jurisdiction over public health policies and legislation is common and concurrent, meaning that all three levels of the Brazilian government share the prerogative to adopt public policies but only the federal and state levels can legislate over the matter. When analysing the competence of the municipalities (Article 30), one will find the possibility to legislate over local matters within their territory, a general classification that encompasses, for instance, the opening hours of the commerce, the zoning plan, and the waste management.

3. The Management of the COVID-19 Emergency by the Public Powers

The notoriously negationist discourse regarding the Covid-19 outbreak at the Brazilian federal government was not affected by the major events that took place in March 2020, when the World Health Organization declared the pandemic and issued recommendations of actions to contain the spread of coronavirus.⁷ President Bolsonaro himself disregarded the Covid-19 disease as a "minor case of flu"⁸ and appeared in public without a face mask on several occasions, generating gatherings around him.⁹ He also dismissed the

³ Bulos, Uadi Lammego. *Curso de Direito Constitucional*. São Paulo: SaraivaJur, 2020.

⁴ Scarlet, Ingo Wolfgang. *Curso de Direito Constitucional*. 9^a ed. São Paulo: Saraiva, 2020.

⁵ Silva, José Afonso da. *Curso de Direito Constitucional Positivo*. 37^a ed. São Paulo: Malheiros, 2013.

⁶ Martins, Flavio. *Curso de Direito Constitucional*. 5^a ed. São Paulo: SaraivaJur, 2021.

⁷ World Health Organization, 'Timeline: WHO's COVID-19 response' <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline>> (accessed 5 October 2021).

⁸ Folha De S. Paulo, 'Não vai ser uma gripezinha que vai me derrubar, diz Bolsonaro sobre coronavírus' *Folha de S. Paulo* (20 March 2020) <<https://www1.folha.uol.com.br/poder/2020/03/nao-vai-ser-uma-gripezinha-que-vai-me-derrubar-diz-bolsonaro-sobre-coronavirus.shtml>> accessed 5 October 2021.

⁹ Folha De S. Paulo, 'Em dia com 965 mortos pela Covid, Bolsonaro ouve panelaço, come cachorro-quente e provoca aglomeração' (*Folha de S. Paulo*, 23 May 2020) <<https://www1.folha.uol.com.br/poder/2020/05/em-dia-com-965-mortos-pela-covid-bolsonaro-ouve-panelaco-com-e-cachorro-quente-e-provoca-aglomeracao.shtml>> accessed 5 October 2021.

Minister of Health Luiz Henrique Mandetta¹⁰ and pressured the following Minister of Health Nelson Teich to adopt hydroxychloroquine as the standard protocol treatment on Covid-19 cases, which lead to the resigning of Teich¹¹, leaving the federal health authority headless for four months.¹² The following Minister was Eduardo Pazuello¹³, also quickly dismissed by the President. Finally, the current Health Minister Marcelo Queiroga, appointed one year after the outbreak emergency was declared by the World Health Organization, is supporting the vaccination campaign and social distancing measures.¹⁴

Recently, a parliamentary committee of inquiry, known as “CPI da Covid”, has been approved and launched by the Brazilian congress. The parliament members are currently focusing on the responsibility of the federal government in the alleged mismanagement of the Covid-19 outbreak, resulting on the death of almost five hundred thousand Brazilian citizens.¹⁵ There are records of about two hundred speeches of the President disregarding the pandemic, the vaccine and the need for social distancing.¹⁶ A “shadow cabinet” was allegedly formed by the President to advise the

management of the outbreak, disregarding the role of the Ministry of Health.¹⁷ In the course of the statements, former members of the government argued that this cabinet circulated, though unsuccessfully, a proposal of decree to include Covid-19 in the recommendations of the package leaflet of the hydroxychloroquine.¹⁸

Furthermore, the testimonials suggest that President Bolsonaro supported, along with the state government of Amazonas, the testing of a “herd immunity without vaccination”, which lead to the collapse of the public health system in the state capital Manaus.¹⁹ The summoned civil servants also presented proof that the federal government refused to buy vaccine for months during 2020, leaving dozens of emails and offers from the pharmaceutical company Pfizer unanswered.²⁰

The legislative and administrative measures established at the federal level are consistent with the scenario unveiled by the parliamentary commission of inquiry. The Act 13.979/2020, approved by congress in February, contained measures concerning exclusively the management of the public health system, namely the isolation and quarantine of suspect or confirmed Covid-19

¹⁰ Folha De S. Paulo, ‘Bolsonaro demite Mandetta e convida Nelson Teich para o Ministério da Saúde’ *Folha de S. Paulo* (16 April 2020) <<https://www1.folha.uol.com.br/poder/2020/04/bolsonaro-demite-mandetta-e-convida-nelson-teich-para-o-ministerio-da-saude.shtml>> accessed 5 October 2021.

¹¹ Folha De S. Paulo, ‘Após ultimato sobre cloroquina, Teich pede demissão do Ministério da Saúde’ *Folha de S. Paulo* (15 May 2020) <<https://www1.folha.uol.com.br/equilibriosaude/2020/05/apos-ultimato-sobre-cloroquina-teich- pede-demissao-do-ministerio-da-saude.shtml>> accessed 5 October 2021.

¹² Folha De S. Paulo, ‘Após quatro meses como provisório-eterno, General toma posse como Ministro efetivo da saúde’ (*Folha de S. Paulo*, 16 September 2020) <<https://www1.folha.uol.com.br/equilibriosaude/2020/09/apos-quatro-meses-como-provisorio-eterno-general-tom-a-posse-como-ministro-efetivo-da-saude.shtml>> accessed 5 October 2021.

¹³ Folha De S. Paulo, ‘Bolsonaro adota Plano Vacina para tentar estancar perda de popularidade’ *Folha de S. Paulo* (9 March 2020) <<https://www1.folha.uol.com.br/poder/2021/03/bolsonaro-adota-plano-vacina-para-tentar-estancar-perda-de-popularidade.shtml>> accessed 5 October 2021.

¹⁴ Folha De S. Paulo, ‘Saiba quem é Marcelo Queiroga, o novo ministro da Saúde de Bolsonaro’ *Folha de S. Paulo* (14 March 2020) <<https://www1.folha.uol.com.br/equilibriosaude/2021/03/saiba-quem-e-marcelo-queiroga-o-novo-ministro-da-saude-de-bolsonaro.shtml>> accessed 5 October 2021.

¹⁵ Folha De S. Paulo, ‘Brasil registra 2.344 mortes por Covid em 24 h e total passa de 482 mil’ *Folha de S. Paulo*, (10 June 2020) <<https://www1.folha.uol.com.br/equilibrio esaude/2021/06/brasil-registra-2344-mortes-por-covid-em-24-h-e-total-passa-de-482-mil.shtml>> accessed 5 October 2021.

¹⁶ Folha De S. Paulo, ‘CPI mira discursos do governo e levanta 200 falas negacionistas de Bolsonaro’ *Folha de S. Paulo* (30 April 2021) <<https://www1.folha.uol.com.br/poder/2021/04/cpi-mira-discursos-do-governo-e-levanta-200-falas-negacionistas-de-bolsonaro.shtml>> accessed 5 October 2021.

¹⁷ Folha De S. Paulo, ‘Documentos do Planalto entregues à CPI mostram 24 reuniões com atuação de ‘ministério paralelo’ na gestão da pandemia’ *Folha de S. Paulo* (27 May 2021) <<https://www1.folha.uol.com.br/poder/2021/05/documentos-do-planalto-entregues-a-cpi-mostram-24-reunioes-com-atuacao-de-ministerio-paralelo-na-gestao-da-pandemia.shtml>> accessed 5 October 2021.

¹⁸ Folha De S. Paulo, ‘Mandetta reafirma proposta de alterar bula da cloroquina e diz que Nise agia como urubu na carniça’ *Folha de S. Paulo* (1 June 2021) <<https://www1.folha.uol.com.br/colunas/monicabergamo/2021/06/mandetta-reafirma-proposta-de-alterar-bula-da-cloroquina-e-diz-que-nise-agia-como-urubu-na-carnica.shtml>> accessed 5 October 2021.

¹⁹ Folha De S. Paulo, ‘Vice do Amazonas diz que política de imunidade de rebanho apoiada por Bolsonaro levou Manaus ao colapso’ *Folha de S. Paulo* (5 May 2021) <<https://istoe.com.br/vice-do-amazonas-diz-que-imunidade-de-rebanho-apoiada-por-bolsonaro-levou-manaus-a-colapso/>> accessed 5 October 2021.

²⁰ Folha De S. Paulo, ‘Senador fala em 81 emails da Pfizer enviados ao governo, e coronel responde que eram repetidos’ *Folha de S. Paulo* (9 June 2021) <<https://aovivo.folha.uol.com.br/poder/2021/06/09/5998-braco-direito-de-pazuello-no-ministerio-da-saude-fala-agora-a-cpi-da-covid-acompanhe.shtml>> accessed 5 October 2021.

cases, the testing plan, and the protocol of treatment. From the negationist discourse and lack of effective action of the federal government concerning the pandemic, a gap in the power balance emerged and made it possible for the states and municipalities to take control of the decision-making process. This conclusion will be further explored in the next sections.

4. The Intensity of the Judicial Review Previously to and During the pandemic

From the brief description of the Brazilian federative system in section I, a reasonable number of questions arise, as it happened when the time came to adopt policies and legislate about the measures to fight the Covid-19 pandemic. The conflicts between the legislation issued by the federal government and the measures adopted by the states and municipalities were then posed to the constitutional court on a paramount case – ADI 6341 – that will be analysed in this section. But firstly, an introductory approach to the Brazilian constitutional court activity is required.

A general overview of two decades of activity of the Supremo Tribunal Federal, from 1988 – the year the Constitution was granted – to 2018, shows that 1.957.206 claims have been filed. From those, 626.223 are related to Public Law and Administration, 417.014 to Taxation Law, 347.668 to Procedural Law, 296.252 to Social Security Law, and 270.049 to Labour Law.²¹ Most of those proceedings are appeals from state courts and from the superior court Superior Tribunal de Justiça. From the claims filed directly at the Supremo Tribunal Federal, in the same period, 5.421 are Ações Diretas de Inconstitucionalidade, like the one that will be thoroughly examined in this report. The other types of constitutional procedures submitted

to the court are Mandados de Injunção (6.649), Arguições de Descumprimento de Preceito Fundamental (444), Ações Declaratórias de Constitucionalidade (49) and Ações Diretas de Inconstitucionalidade por Omissão (33).²²

The Covid-19 pandemic raised judicial conflicts of a great range, generating 8.517 claims at the constitutional court, from which 38 approach constitutional individual rights and guarantees. From those 38 proceedings, the claims for suspension of decrees – a formal act issued by the executive power to establish public policy – that imposed restrictions of citizens' mobility and closure of non-essential businesses were mostly ruled in favour of the state or municipality (Rcl 41890; Rcl 39976; Rcl46178; Rcl 45721; SS 5456; SL 1432; Rcl 46442; HC 199449 e Rcl 45201), thus acknowledging their concurrent and common competence to combat the Covid-19 pandemic.²³

However, the cases not only addressed the federative division of competences but also the merit of decrees that required social isolation and lockdown. In those cases, the Supremo Tribunal Federal has been in favour of the isolation measures proposed by federal states and municipalities, as the right to collective health overlaps with the individual right to mobility or commerce, for instance.²⁴

From the 38 claims, many addressed the matter of services provided by public schools, such as the functioning of the canteens during the pandemic²⁵ and the availability of computers for students to attend online classes.²⁶ The court rulings were in favour of the maintenance of canteens services but acknowledged the lack of obligation of schools to provide computers, tablets or other devices to all students.

Under the scope of criminal law, the court was questioned about the obligation to hold the in-

²¹ Pereira, Thomaz; Arguelhes, Diego Werneck; Almeida, Guilherme da Franca Couto, 'VIII Relatório Supremo em Números: Quem decide no Supremo?: tipos de decisão colegiada no tribunal' (Rio de Janeiro: FGV Direito Rio, 2020, p. 144).

²² Pereira, Thomaz; Arguelhes, Diego Werneck; Almeida, Guilherme da Franca Couto, 'VIII Relatório Supremo em Números: Quem decide no Supremo?: tipos de decisão colegiada no tribunal' (Rio de Janeiro: FGV Direito Rio, 2020)

²³ Supremo Tribunal Federal 'Painel de Ações Covid-19' <<https://transparencia.stf.jus.br/single/?appid=615fc495-804d-409f-9b08fb436a455451&sheet=260e1cae-f9aa-44bb-bbc4-9d8b9f2244d5&opt=nointeraction&select=clearall>> accessed 5 October 2021.

²⁴ 'Rcl 41890' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5950207>>; 'Rcl 39976' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5892019>>; 'HC 184423' <<http://portal.stf.jus.br/processos/detalhe>

<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5896673>>; 'Rcl46178' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6126333>>; 'Rcl 45201' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6071641>>; 'Rcl 45721' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6094816>>; 'SS 5456' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6080529>>; 'SS 5456' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6080529>>; 'SL 1432' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=613541>>; 'Rcl 46442' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6138370>>; 'HC 199449' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6138511>> accessed 5 October 2021.

²⁵ '38. STP 652' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5997466>> accessed 5 October 2021.

²⁶ 'Pet 9620' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6164770>> accessed 5 October 2021.

person preliminary hearing of the defendant²⁷ - as predicted in the international agreement Pacto de San José da Costa Rica -, about the possibility of the defendant remaining in freedom during criminal prosecution²⁸, and also about the application of the principles of broad defence and contradictory under the extraordinary circumstances.²⁹ The conclusion of this analysis is that the court rulings were coherent with the grounds adopted in similar cases in pre-pandemic times.³⁰

As regards the power balance between the levels of the Brazilian federation, the research reveals 248 claims at the Supremo Tribunal Federal under the subject “federative conflict”, as described in Article 102, I, *f* of the Constitution. From those, 113 have been dismissed for representing a conflict not relevant to the foundations of the federal system or not observing the requirements to file action. From the ones taken to trial, 89 refer to Taxation and Financial Law and 42 to subjects as Environmental and Energy Law, indigenous people rights, immigration policies, and conflicts related to public estates and buildings. Only 4 of those claims have as subject the explicit constitutional competences of the federal, state, and local governments.³¹

From those four proceedings, two are related to public health services in circumstances other than the pandemic scenario, and two concern the Covid-19 pandemic.

In Ação Cível Originária 3.055³², Justice Ricardo Levandowski faces a conflict regarding the financial transfers between federal and state levels in the state of Maranhão. The Ministry of Health had destined to the state a budget of twenty million reais, to be used in installation of public health units in remote areas. When the state requested the availability of the budget, the Ministry revoked the previous act. The state filed action against the revoking act and Justice Levandowski reaffirmed the concurrent competency to provide public health services through the universal healthcare system, declaring the invalidity of the Minister of Health act that suspended the transfer of budget to the state of Maranhão. The decision also carries a content related to the merit of the administrative act; it has been registered that no technical evidence was presented to justify the suspension of the financial transfer.

In Recurso Extraordinário 855.178³³, Justice Luiz Fux confirmed judicial precedents concerning the common competency of the states and federal governments to provide public healthcare and determined that the costs of the medication needed by the claimant should be supported in a ratio of 50% each by the state of Sergipe and the Health Ministry.

The research identifies similar characteristics in other decisions of the constitutional court. In

²⁷ ‘ADPF 347’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560>> accessed 5 October 2021.

²⁸ ‘HC 183064’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5881811>> accessed 5 October 2021.

²⁹ ‘Rcl 40737’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5914833>> accessed 5 October 2021.

³⁰ ‘MS 37086’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5896035>>; ‘MS 37090’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5897476>>; ‘ARE 1312081’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6113919>>; ‘HC 200318’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6151155>>; ‘MS 37637’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6084538>>; ‘MS 37637’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6084538>>; ‘MS 37637’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6084538>>; ‘Pet 8753’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5884516>>; ‘HC 187092’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5937106>>; ‘HC 187122’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5937237>>; ‘Rcl 43917’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6021653>>; ‘Rcl 44557’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6044914>>; ‘HC 195186’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6068180>>; ‘ARE 1321563’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6153444>> accessed 5 October 2021.

‘ARE 1321563’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6153444>> accessed 5 October 2021.

³¹ Brasil, Supremo Tribunal Federal <<https://jurisprudencia.stf.jus.br>> accessed 5 October 2021.

³² ‘A revogação de ato administrativo deve ser motivada de modo explícito, claro e congruente (art. 5º, VIII, § 1º, da Lei de Processo Administrativo Federal). A inexistência de motivação acarreta a nulidade do ato’ (Ricardo Lewandowski, *Supremo Tribunal Federal*, 28 September 2020) <<https://jurisprudencia.stf.jus.br/page/s/search/sjur433145/false>> accessed 5 October 2021.

³³ ‘É da jurisprudência do Supremo Tribunal Federal que o tratamento médico adequado aos necessitados se insere no rol dos deveres do Estado, porquanto responsabilidade solidária dos entes federados. O polo passivo pode ser composto por qualquer um deles, isoladamente, ou conjuntamente. A fim de otimizar a compensação entre os entes federados, compete à autoridade judicial, diante dos critérios constitucionais de descentralização e hierarquização, direcionar, caso a caso, o cumprimento conforme as regras de repartição de competências e determinar o ressarcimento a quem suportou o ônus financeiro’ (Justice Luiz Fux, *Supremo Tribunal Federal*, 23 May 2019) <<https://jurisprudencia.stf.jus.br/pages/search/sjur422158/false>> accessed 5 October 2021.

Suspensão de Tutela Provisória 299³⁴, Justice Luiz Fux suspended an act of the Governor of the State of Bahia, which restricted the transit of interstate bus transportation as a measure to contain the coronavirus. Again, the grounds were that, even though the state has such jurisdiction because of the common competency, the Governor did not present technical evidence to support the measure; there weren't mobility data or health indicators showing the effectiveness of the restriction. In Suspensão de Tutela Provisória 173³⁵, Justice Dias Toffoli also acknowledges the common competency of the state of Maranhão to establish sanitary barriers to contain the pandemic but declares de invalidity of the sanitary barrier set at the state airport, again for lack of technical support from the federal agencies responsible for the related policies. Therefore, the administrative measures merits were repelled by the court for lack of sufficient justification, even though the ruling on the competences has remained bound to precedents.

The constitutional court decisions analysed, either previously or during the pandemic, are aligned with the historical background of the Brazilian government in supporting the fundamental rights established by the Constitution; the right to universal and free healthcare is expressly granted by Articles 6, 30, VII, 194 and 196. As described before, promoting the health of the population is the responsibility of the Union, the federal states, the Federal District and the municipalities and that includes providing the necessary financial funds to guarantee the fundamental right.

The Federative Republic of Brazil has historically positioned itself in favour of international agreements aimed at strengthening national health.

There are institutional partnerships in effect with international organizations such as the Pan American Health Organization and the World Health Organization, cooperation projects within

the scope of the Community of Portuguese Language Countries and of the Amazon Cooperation Treaty Organization. Under the Mercosur agreements, the summit of Health Ministers and the work subgroup number 11 (SGT-11) are headed by Brazil. Along with the United Nations agencies, Brazil plays a significant role in the South-South Cooperation Project to strengthen the international actions of the Ministry of Health, under the joint United Nations Program on HIV/AIDS (UNAIDS), based in Brasília. Brazil is also signatory to numerous international treaties aimed at promoting health.³⁶

Bearing in mind this panoramic overview, it is necessary to focus on the milestone events of the federative conflict that arose from the Covid-19 pandemic. The article 102, I, *f*, of the Brazilian constitution establishes the jurisdiction of the Supremo Tribunal Federal to rule in legal actions that represent a conflict between the regional and federal levels of the federation, either if they are at the same level or different levels of government. Therefore, cases that represent conflicts of the nature "state *versus* the Union" or "state *versus* state", should be posed by the constitutional court. The municipalities are not expressly included in this rule, however they were subject of the Presidential Provisional Measure 926/2020 and for that reason they were part of the paramount case ADI 6341, which will be detailed below.

On February 6, 2020, the Brazilian Congress enacted a law proposed by President Jair Bolsonaro, containing the measures that could be adopted in the national territory to fight the outbreak. The later called Act 13.979/2020 measures concerned exclusively the health system activity, namely the isolation and quarantine of suspect or confirmed Covid-19 cases, the testing plan, and the protocol of treatment.

³⁴ 'Em tempos de pandemia, os inevitáveis conflitos federativos decorrentes da adoção de providências tendentes a combatê-la devem ser equacionados pela tomada de medidas coordenadas e voltadas ao bem comum, sempre respeitada a competência constitucional de cada ente da Federação para atuar dentro de sua área territorial, com vistas a resguardar sua necessária autonomia para assim proceder. É inviável, assim, que a imposição de restrições à circulação de ônibus interestaduais seja feita sem a prévia análise de informações estratégicas da área de saúde, conforme previsto no art. 3º, § 1º, da Lei No. 13.979/20' (*Justice Luiz Fux, Supremo Tribunal Federal*, 16 September 2020) <<https://jurisprudencia.stf.jus.br/pages/search/sjur434718/false>> accessed 5 October 2021.

³⁵ 'Em tempos de pandemia, os inevitáveis conflitos federativos decorrentes da adoção de providências

tendentes a combatê-la devem ser equacionados pela tomada de medidas coordenadas e voltadas ao bem comum, sempre respeitada a competência constitucional de cada ente da federação para atuar dentro de sua área territorial e com vistas a resguardar sua necessária autonomia para assim proceder. É inviável, assim, que, em aeroportos, sujeitos à administração da Infraero, possa o estado-membro implantar barreiras sanitárias dissociadas de ações coordenadas pela Anvisa' (*Justice Dias Toffoli, Supremo Tribunal Federal*, 08 September 2020) <<https://jurisprudencia.stf.jus.br/pages/search/sjur434127/false>> accessed 5 October 2021.

³⁶ Brazil, Ministry of Health <<https://antigo.saude.gov.br/assessoria-internacional/organizacoes-internacionais#13>> accessed 5 October 2021.

On the same day, President Jair Bolsonaro issued the Provisional Measure 926/2020³⁷, an instrument conceived by Article 62 of the Constitution whose effects are equivalent to Congress-approved legislation. Provisional Measure 926/2020 established that the policies against the outbreak that could restrict the citizens' mobility, or the businesses and services operations would remain under the jurisdiction of the federal authorities, unless those authorities expressly delegate to the states and municipalities.³⁸ This is the second milestone event the research reveals.

Between March 12, and April 6, 2020 – almost in as orchestrated manner – the Brazilian states and the Federal District, as well as their capitals, issued decrees containing response regulations and policies to the Covid-19 pandemic. Moreover, they were not limited to the cases determined by Provisional Measure 926/2020 but adopted restrictions that broadly affected citizens' mobility and non-essential services and business operations in their territories. In the Brazilian civil law presidential system, decrees have the same nature of legislation, except for being issued by the executive power and not the legislative.

Three categories of measures were identified in the decrees: a) measures within the public administration, such as the establishment of the teleworking regime for civil servants and mandatory use of hand sanitizer in public buildings; b) measures under the framework of the Federal Act 13.979/2020, establishing the isolation, quarantine, testing and treatment protocol for Covid-19 cases; and c) measures that broadly affected the citizens' mobility and non-essential services and businesses operations, namely the closure of stores, malls, cinemas and theatres, schools and public spaces and the prohibition of large social events and gatherings.

In the third group of measures, night curfews were established in some places, the freedom of worship was constrained in a few cities by the closure of churches and temples, public and private events and gatherings were banned in most locations, among other personal liberties restrictions.³⁹

On March 23, 2020, the political party Partido Democrático Trabalhista filed the paramount claim Ação Direta de Inconstitucionalidade (ADI) 6341⁴⁰, requesting the ceasing of the effects of Provisional Measure 926/2020. The ADI is an instrument of judicial constitutionality control, and the petition was grounded in arguments related to the conflict between the content of the norm issued by the President and the Constitution itself. The day after the petition was filed, a decision by Justice Marco Aurélio of the supreme court granted provisional effects to the action, acknowledging the common and concurrent competency to implement regulations and policies against the pandemic, therefore allowing regional and local governments to respond to the outbreak, despite what the federal authorities could determine.

With the issuing of that decision, the judicial review of states and municipalities decrees that established policies and restrictions to prevent the spread of Covid-19 became limited by judicial precedent. Unlike the previous cases analysed by the court, this decision had *erga omnes* effect, and the judicial review from that moment on could only be imposed on grossly unlawful cases.

Notwithstanding, President Jair Bolsonaro made a last attempt to overcome the ruling by filing a claim subscribed by himself, another Ação Direta de Inconstitucionalidade (ADI) 6764 against decrees issued in the states of Bahia, Distrito Federal and Rio Grande do Sul which established lockdown measures. The petition was dismissed by the same Justice Marco Aurélio on the grounds of gross error, since the Constitution grants the right to the President to file an ADI, but not in his name, and only representing the Brazilian sovereign State through the competent institution, that would be the Federal Attorney General's Office.⁴¹

Finally, on April 15, 2020, the Supremo Tribunal Federal submitted the ADI 6341 to the panel of Justices that confirmed the initial decision, ruling in favour of states and municipalities to acknowledge their jurisdiction over legislation and policies to guarantee the fundamental right to health and combat the pandemic.

³⁷ Brasil, Palácio do Planalto, 'Medida Provisória No. 926/2020' <http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/Mpv/mpv926.htm> accessed 5 October 2021.

³⁸ Articles 3, §§ 8º, 9º and 10º of the Provisional Measure 926/2020.

³⁹ Tito, Maíra, 'The Effects of the Pandemic in Regional and Local Governance: The federal system in Brazil as a case study', Working Paper CEDIS VARIA, ISSN 2184-5549, (CEDIS, 1 June 2021) <[https://cedis.fd.unl.pt/blog/project/the-effects-of-the-covid-19-](https://cedis.fd.unl.pt/blog/project/the-effects-of-the-covid-19-pandemic-in-regional-and-local-governance-the-federal-system-in-brazil-as-a-case-study/)

[pandemic-in-regional-and-local-governance-the-federal-system-in-brazil-as-a-case-study/](https://cedis.fd.unl.pt/blog/project/the-effects-of-the-covid-19-pandemic-in-regional-and-local-governance-the-federal-system-in-brazil-as-a-case-study/)> accessed 5 October 2021.

⁴⁰ Brazil, Supremo Tribunal Federal, 'Ação Direta de Inconstitucionalidade No. 6341' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5880765>> accessed 5 October 2021.

⁴¹ Brazil, Supremo Tribunal Federal, 'Ação Direta de Inconstitucionalidade No. 6764' <<https://portal.stf.jus.br/processos/detalhe.asp?incidente=6136024>> accessed 5 October 2021.

5. Conclusions on Whether or Not the Pandemic Intensified the Judicial Review or Redesigned the Role of the Court

The conclusion extracted from the scenario described is that the intensity of the submission of federative conflicts to the Brazilian constitutional court has not been affected by the Covid-19 pandemic. The Supremo Tribunal Federal has historically been a protagonist in balancing the powers of the federation. However, the effects of the 2020 precedent can be significantly broader than the ones issued previously to the pandemic. The granting of the ADI 6341 in favour of states and municipalities represents a shift in the power balance within the Brazilian federation.

The regional and local governments in Brazil, during the year 2020, filled the power gap left by the federal government based on such strong grounds that the Brazilian supreme court acknowledged their reasoning and ruled in favour of their jurisdiction over the measures to contain the Covid-19 pandemic. This was a bottom-up process based on interpretation of the Constitution, later submitted to the supreme court, which confirmed the concurrent and common competence of the federal, regional, and local governments to prevent the spread of coronavirus. The court has been bound by precedent since then, maintaining the same foundations on subsequent rulings, and has stated through them that this power is not unlimited; the empirical evidence collected proved that the merit of the administrative and legislative acts were also taken in consideration. The decision was innovative and paramount, but any grossly unlawful excess of legislation or policies by the states and municipalities is not treated with condescendence by the constitutional court.

It is not a new scholarly argument that the era of the Nation-state is coming to an end. The power of the Nation-state is shifting to both regional arrangements in a supranational approach (the European Union, the United Nations, the NAFTA) or an intranational approach (northern Italy, Catalonia, Alsace-Lorraine). In either case, the Nation-states that exercise strong central control in the name of safeguarding their integrity and identity begin to decompose.⁴² This scenario also reveals that layers of governance of the Nation-state are not only being transferred to international organizations, but also local governments. That is why some scholars mention a new era for the City-state.⁴³

In this sense, it is fair to conclude that the Covid-19 pandemic did not redesign the role of the Brazilian constitutional court, which has historically played his part on the federative balance and has been ruling according to judicial precedents. However, the Covid-19 pandemic provided the severe circumstances that led to a paramount decision that acknowledged and confirmed a shift in power balance, after which the Brazilian federation has been - to a certain extent - reshaped by the same court.

⁴² Ohmae, Kenichi, 'The rise of the region state in Foreign Affairs', Spring 1993, p. 80-84 <<https://www.foreignaffairs.com/articles/1993-03-01/rise-region-state>> accessed 5 October 2021.

⁴³ Kotkin, Joel, 'A New Era for the City-state?' (Forbes, 23 December 2010) <<https://www.forbes.com/sites/joelkotkin/2010/12/23/a-new-era-for-the-city-state/>> accessed 5 October 2021.

Judicial Review and Restrictive Measures. How Has the Intensity and Scope of Judicial Review Changed During COVID-19 in Italy?

Chiara Feliziani, Viviana Di Capua and Ilde Forgione

Abstract. The article aims to analyse how the intensity and scope of judicial review has changed during COVID-19 pandemic. In doing this, the analysis will start from a brief critical review of the main legislative and administrative acts issued by the Italian Government to face the crisis. Then, the contribution will focus on the most relevant judicial review adopted during the pandemic to verify the legitimacy of the Regional and Municipal emergency acts which contain restrictive measures.

Keywords: Public Health Emergency, COVID-19 Pandemic, Italian Strategy, Restrictive Measures, Judicial Review

1. Introduction

Italy as a State was born in 1861. After a period of monarchy, in 1946 the Italian form of government became that of a parliamentary republic.¹ The Head of State² is the President of Italian Republic which is elected by the Parliament in joint session every seven years.³ The fundamental law of the State is the Constitution (or Constitutional Charter) which was adopted by the Constituent Assembly on 22 December 1947 and entered into force on 1 January 1948.⁴

As in other modern democracies inspired by liberal constitutionalism theory⁵, in Italy there is the principle of separation of powers. This means that the three powers of the State do not belong to a single body. On the contrary, the legislative power belongs to the Parliament⁶, the executive power belongs to the Government⁷ and, finally, the judicial power belongs to the judiciary.⁸

However, it should be pointed out that there are two cases in which legislative power is (mainly) exercised by the Government. These are the cases of both the Law-Decree and the Legislative Decree.⁹

In the first scenario, according to article 77 Cost., “in exceptional cases of need and urgency,” for example the Covid-19 pandemic, the Government can adopt a decree which has the same legal value of an ordinary law.¹⁰ However, such a decree loses its effectiveness if it is not converted into law by the Parliament within sixty days from its publication.¹¹ In the second scenario, according to article 76 Cost., the Parliament can delegate the legislative power to the Government by a delegation law containing the principles and criteria that must be followed in exercising the delegation.¹²

Thus, in the above mentioned scenarios, the legislative power is concretely exercised by the Government, but the Parliament carries a sort of check on such exercise. In the case of the Law-Decree the control follows the exercise of legislative power by the Government, while in the case of the Legislative Decree the parliamentary control precedes the exercise of legislative power by the Government. As it will be clearly highlighted in section 2 section of this article, both of these types of legislative acts were used extensively during the Covid-19 pandemic.

¹ Albeit its unitary conception, Chiara Feliziani drafted Sections 1 and 3, Viviana Di Capua drafted Section 2, while Ilde Forgione drafted Section 2.1.

² See articles 1 and 55-96 of the Italian Constitution.

³ See articles 83-91 Const.

⁴ Roberto Bin and Giovanni Pitruzzella, *Diritto costituzionale* (Giappichelli 2021) 138.

⁵ Montesquieu, *De l'esprit des lois*, 1748.

⁶ See articles 55-82 Cost.

⁷ See articles 92-100 Const.

⁸ See articles 101-113 Const.

⁹ Roberto Bin and Giovanni Pitruzzella, *Diritto costituzionale*, (Giappichelli 2021) 386.

¹⁰ *Ibidem*, 391.

¹¹ *Ibidem*, cit., 391.

¹² *Ibidem*, cit., 386.

As far as the judicial power is concerned, it should be pointed out that in Italy there is a system based on the principle of double jurisdiction, ordinary jurisdiction and administrative jurisdiction.¹³ The double jurisdiction system has been substantially “created” or “drawn” by the legislature before the advent of the Republic - see both Act 20 March 1865 n. 2248 - Annex E and Act 31 March 1889 n. 5992 - and then it was then confirmed by the Constituent Assembly.¹⁴

In particular, administrative jurisdiction is exercised by the administrative judge¹⁵, whether the Regional Administrative Court (i.e. TAR) in the first instance or the Council of State on appeal. The main task of the administrative law system is opining about the legitimacy of the exercise of power by the public administration¹⁶. As will be clearly highlighted in the below discussion, during the Covid-19 pandemic, the administrative judges have played a very important role with regard to the many administrative measures that were adopted to cope with the health emergency.

Given that, the research presented in this article will first focus on the legislative and administrative measures that were adopted in Italy in response to the pandemic. Second, the article will offer a detailed overview of the “pandemic case law”. More specifically, it will analyse the judicial review made by the Italian administrative judges on the administrative acts adopted during the pandemic and, in particular, on those concerning the freedom of movement. Third, the research will give account of the relationship between the law of the pandemic and the role of Courts, especially analysing the impact of such a legislation on the main features of the judicial review. Finally, the article will formulate some conclusive remarks.

2. Normative Analysis

In Italy, the response of public authorities to the Covid-19 pandemic divided itself in a sequence of legislative and administrative acts aimed, on the one hand, at containing the spread of the contagion and easing the pressure on the national health service through a series of precautionary measures of increasing intensity, affecting the exercise of

some of the most important personal freedoms guaranteed by the Constitution, and, on the other, at supporting the national economy indirectly affected by the crisis.

On 31 January 2020, even before the World Health Organisation declared a global pandemic, the Council of Ministers approved, for the duration of six months, the state of emergency as a result of the health risk related to the outbreak of diseases resulting from transmissible viral agents¹⁷ and gave the Head of the Civil Protection Department the power to issue ordinances in derogation of any provision in force and in compliance with the general principles of the legal system.¹⁸ Starting from 3 February 2020 onward, ordinances were issued by the Head of the Civil Protection Department to coordinate interventions aimed at managing the evolving emergency.¹⁹

The beginning of the pandemic in Italy established the conditions for the preparation of a specific management strategy, which, in the absence of a pandemic plan, was considerably simplified in terms of communication. The strategy was only codified towards the middle of the first phase of the pandemic, finding precise regulation in Annex 10 to the Decree of the President of the Council of Ministers (D.P.C.M.) of 26 April 2020.²⁰

The first pillar of the emergency management regulatory system is the Law-Decrees no. 6 of 23 February 2020 (Urgent measures on the containment and management of the epidemiological emergency from COVID-19), converted, with modifications, into Law no. 13 of 5 March 2020, which gives the competent authorities the power to adopt precautionary measures to contain the spread of the disease among the population.²¹ The decree created the regulatory bases for the construction of two parallel systems of measures differentiated on a territorial basis, consisting, on the one hand, of the implementing Decrees of the President of the Council of Ministers (D.P.C.M.) and a long sequence of administrative acts of various kinds (ordinances, ministerial decrees, circulars, directives, etc.) and, on the other hand, of a plurality of ordinances, clarifications and decrees of the Regions and Municipalities, issued for the specific purpose of addressing the critical

¹³ See articles 111-113 Const. Moreover, see Luca Mannori and Bernardo Sordi, *Storia del diritto amministrativo* (Manuali Laterza 2013) 305; Aldo Travi, *Lezioni di giustizia amministrativa* (Giappichelli 2021) 13.

¹⁴ Aldo Travi, *Lezioni di giustizia amministrativa* (Giappichelli 2021) 13.

¹⁵ See article 103, par. 1, and 113 Const.; Legislative Decree 2 July 2010 No. 104 - Annex 1.

¹⁶ See article 103, par. 1, Cost.. *Amplius*, Aldo Travi, *Lezioni di giustizia amministrativa*, (Giappichelli 2021) 178.

¹⁷ See article 7, paragraph 1, lett. c), and the articles 12, paragraph 1, of Legislative Decree 2 January 2018, No. 1 (Civil Protection Code).

¹⁸ See the article 25 of Legislative Decree No. 1/2018.

¹⁹ On this point, see Matteo Gnes, ‘Le misure nazionali di contenimento dell’epidemia da Covid-19’ (2020) *Giornale di Diritto Amministrativo* 3, 282 ss.

²⁰ See the Annex 10 of D.P.C.M. of 26 April 2020, which contained the principles for health risk monitoring.

²¹ See, in particular, the article 1 (Urgent measures to avoid the spread of COVID-19) of Law-Decree No. 6/2020.

issues arising in the territories of reference.²² Article 1 provides, that in the municipalities or areas 'infected', the authorities may adopt any containment and management measure that is appropriate and proportionate to the evolution of the epidemiological situation²³. This is followed by a non-exhaustive though extensive list of typical measures, including.²⁴ The competent authorities are also given the power to take further precautionary measures in municipalities and areas not yet affected by the infection, without, however, specifying their content.²⁵ In order to implement the law, several D.P.C.M. are issued, providing measures that affect constitutionally guaranteed rights and freedoms, including freedom of movement and residence²⁶ and freedom of assembly and association²⁷ at an increasing scope of jurisdictional application, starting with limited application and, subsequently, extending to the entire nation.²⁸

Article 3, paragraph 2, of Law-Decree no. 6/2020 also conveys the ability, in cases of extreme necessity and urgency and pending the adoption of the D.P.C.M., for the authorities responsible for health emergencies - the Minister of Health, the President of the Region and the Mayor - to take typical and atypical measures to resolve any criticalities that are territorially localised (for example, any outbreaks of infection).²⁹ The purpose of regulating the conditions and methods of intervention of the regions and the municipalities is to combine the national dimension of the emergency with the different territorial concentration of the virus and to ensure a prompt reaction to the occurrence of critical situations in limited areas.³⁰ However, the extreme generality of the legislation has allowed the regional and local authorities to adopt more restrictive measures than

the national measures by means of ordinances of necessity and urgency. The Campania Region, for example, with ordinance no. 15 of 13 March 2020, prohibited individuals residing in the region from leaving their homes, residence, domicile or abode except for work, health or necessity reasons, and in the clarification no. 6 of 14 March 2020, precluded individuals from carrying out in public places or places open to the public not only recreational or leisure activities, but also sports and motor activities individually, in the proximity of the home and in compliance with the rules on interpersonal safety distance, although the fact that such activities were expressly permitted at national level by art. 1 paragraph 1, lett. b) of the Order of the Minister of Health of 20 March 2020.³¹ The violation of these obligations is linked to the application of a criminal sanction³² and of home isolation with active health surveillance (quarantine), which is in this way stripped of its precautionary purpose, resulting in a sanctioning character, as is also shown by the use of the terms "transgression" and "transgressor".³³

The subsequent Law-Decree no. 19 of 25 March 2020 (Urgent measures to deal with the epidemiological emergency caused by COVID-19), converted, with amendments, into Law no. 35 of 22 May 2020, corrects the critical issues that arose at the regional and local levels during the validity of the first one.³⁴ The decree concentrates the power to manage the emergency in the hands of the President of the Council of Ministers, to allow him to maintain the 'direction' of the operation and, at the same time, subjects the power of ordinance of the regions and mayors to a series of assumptions and limits that are precisely defined³⁵. More specifically, it provides that the measures to contain the contagion must be adopted, ordinarily, by the President of the Council of Ministers, with one or

²² On this point, it is allowed postpone Viviana Di Capua, 'Il nemico invisibile. La battaglia contro il Covid-19 divisa tra Stato e Regioni' (20 maggio 2020) Osservatorio Emergenza Covid-19 <<https://www.federalismi.it/ApiOpenFilePDF.cfm?artid=43500&dpath=document&dfile=19052020153424.pdf&content=Il%2Bnemicoinvisibile%2E%2BLa%2Bbattaglia%2Bcontro%2Bil%2BCovid%2D19%2Bdivisa%2Btra%2BStato%2Be%2BRegioni%2B%2D%2Bstato%2B%2D%2Bpaper%2B%2D%2B>> accessed 30 July 2021.

²³ See the article 1, paragraph 1, of Law-Decree No. 6/2020.

²⁴ For example, a ban on entering or leaving the municipality or area concerned.

²⁵ See the article 2, paragraph 1, of Law-Decree No. 6/2020.

²⁶ See the article 16 Const.

²⁷ See the article 17 Const.

²⁸ More specifically, the D.P.C.M. of 9 March 2020 established a ban on all movements of individuals entering, leaving and moving within the territories,

allowing only those seeking to travel for proven work requirements or situations of necessity or by health reasons to do so; a strong recommendation for people with a temperature of over 37.5°C to remain at home; the suspension of demonstrations of all kinds, banning all forms of assemblage of people in public places or places open to the public, etc.; and a ban on the assembly of people in public places or places open to the public.

²⁹ Viviana Di Capua and Ilde Forgiione, 'Salus rei publicae e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19' (2020) *Giornale di Diritto Amministrativo* 3, 330 ss.

³⁰ *Ibidem*, 334.

³¹ Viviana Di Capua, *Il nemico invisibile. La battaglia contro il Covid-19 divisa tra Stato e Regioni*, 335.

³² See the article 650 of the Criminal Code.

³³ *Ibidem*.

³⁴ Viviana Di Capua, Ilde Forgiione, 'Salus rei publicae e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19', cit., 331.

³⁵ *Ibidem*.

more decrees and, depending on whether they concern the regional or national territory, also by the President of the Region concerned or by the President of the Conference of Regions and Autonomous Provinces, who also has the power of initiative.³⁶ However, in an emergency, the Regions may intervene under certain conditions: the exercise of the power of regional ordinance, limited to the adoption of measures that are more restrictive than those already in force, may take place only while the decrees of the President of the Council of Ministers are pending and with limited effectiveness until that time, as well as resort to specific situations of aggravation of the health risk occurring in the regional territory or in a part of it and exclusively within the scope of the activities of their respective competences, without further affecting production activities and those of strategic importance for the national economy.³⁷ These limitations also apply to the powers of ordinance attributed to the Regions in the field of public health by any provision of law previously in force, highlighting in this way the legislative will to close any possible gap opened to the exercise of regional powers by other regulatory provisions not expressly referred to the decree.³⁸ Lastly, Mayors are precluded from adopting contingent and urgent ordinances to face emergencies in contrast with state or regional measures or exceed the limits of paragraph 1, which apply to regional ordinances.³⁹

An interpretation in line with the centripetal orientation underlying the regulatory design, based on the conviction that the policy of mitigation and response to the pandemic emergency must be uniform and homogeneous throughout the national territory⁴⁰, leads to the conclusion that trade union ordinances, in order to be legitimate:

³⁶ See the article 2 of Law-Decree No. 19/2020.

³⁷ Viviana Di Capua, Ilde Forgiione, *'Salus rei publicae e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19'*, 331-332.

³⁸ See the article 2, paragraph 1, of Law-Decree No. 19/2020.

³⁹ See the article 3, paragraph 2, of Law-Decree No. 19/2020.

⁴⁰ Roberto Cherchi, Andrea Deffenu, *'Fonti e provvedimenti dell'emergenza sanitaria Covid-19: prime riflessioni'* (2020) *Diritti Regionali* 1, 648 ss. (670).

⁴¹ Roberto Cherchi, Andrea Deffenu, *'Fonti e provvedimenti dell'emergenza sanitaria Covid-19: prime riflessioni'* *Diritti Regionali* (2020) cit., 676. On this point, see also Ilde Forgiione, *'La gestione locale dell'emergenza da Covid-19. Il ruolo delle ordinanze sindacali, tra sussidiarietà e autonomia'* (2020) *Il diritto dell'economia* 2, 71 ss., in part. 89, who considers admissible, despite the pervasiveness of the executive's actions "an area of integrated and implemented intervention [of the national and regional measures] [...], in a subsidiary function and in loyal cooperation, as well as [...] one of its own, a guide

a) may not derogate national and regional measures by increasing or relaxing their requirements;

b) may have an implementing or supplementary content (in this case, in the absence or with minimal exercise of discretion);

c) may regulate areas that are not already governed by over-regulation acts, provided that they are limited to the introduction of prescriptions with exclusively local effect⁴¹;

d) take the form only of the adoption of one of the measures defined in advance by the emergency legislation.

The D.P.C.M. of 26 April 2020 marks the start of a new phase of emergency management, marked by a progressive relaxation of the measures previously in place.⁴² With regard to freedom of movement, the situations of necessity that justify movements are extended to include meetings with relatives, provided that the prohibition on gathering is respected, that interpersonal distances of at least one metre are maintained and that individual protection devices (masks) are used.⁴³ In addition, there is no longer any spatial limit for motor and sports activities, which are allowed at a safe distance between persons of at least one metre for the former and two metres for the latter. In essence, barriers to movement within the municipal area are partially eliminated, while those to movement between regions remain. Quarantine remains compulsory only for persons returning from abroad, and a total ban is introduced on those suffering from symptoms of respiratory infection and fever (greater than 37.5°C) on moving from home and limiting social contacts.⁴⁴ It introduces an obligation for the population to wear masks in (only) enclosed places, where it is not possible to guarantee a safe interpersonal distance. Funeral

and direction for town life". This in as much as "the Local Authorities don't only have the job of carrying out decisions taken elsewhere, as the last link in the institutional chain, but the must also be a primary institutional spokesman, with the task of adapting, adjusting, informing and balancing on the basis of factual reality".

⁴² Fabio Giglioni, *'Le misure di contrasto alla diffusione dell'epidemia nella fase due'* (2020) *Giornale di Diritto Amministrativo* 4, 414 ss.

⁴³ The Ministry of the Interior Circular No. 15350 of 2 May 2020 specifies that the expression "relatives" includes "spouses, relationships of kinship, affinity and civil union", as well as relationships characterized by "lasting and significant sharing of life and affections" (cfr. Court of Cassation, sez. IV. 10 November 2014, No. 46351).

⁴⁴ The Ministry of the Interior Circular No. 15350 has clarified that the regulation reinforces the preceding measure, consisting of a strong recommendation, and imposing on these individuals "a true and real duty".

ceremonies are permitted, limited to the participation of relatives, compliance with the rules on social distancing and preference for open-air celebrations.

Of particular interest is the provision contained in art. 2, paragraph 11, which attributes to the Regions the function of monitoring the trend of the epidemiological situation in their respective territories, in order to guarantee the safe performance of production activities. Any aggravation of the health risk, identified by applying the principles indicated in annex 10 and the criteria established by the Decree of the Minister of Health of 20 April 2020, entitles the President of the Region to promptly propose the necessary and urgent restrictive measures for the productive activities in the affected regional territory, for the purpose of exercising the power of ordinance under art. 2, paragraph 2, of Law-Decree no. 19/2020.

The regulation also introduces an important limitation on the exercise of the power of regional ordinance which, with regard to economic activities, is anchored to the existence of an actual risk of contagion, the inspection of which presupposes the application of criteria predetermined by the decree, and to the obligation to consult the Minister of Health before adopting the most restrictive measures. The aim is to put a stop to the practice followed by some Regions of further depressing economic activities based in the territory concerned, often on the basis of an increase in the risk of contagion not measured on certain, unambiguous and uniform parameters.

Another important innovation concerns the introduction and codification of the “Principles for health risk monitoring” in Annex 10 to the decree, which are useful for maintaining or moving from one phase to another of pandemic management. The provisions of the D.P.C.M. of 26 April 2020 were partly “absorbed” by Law-Decree no. 33 of 16 May 2020 (Further urgent measures to tackle the epidemiological emergency caused by COVID-19), converted, with amendments, into Law no. 74 of 14 July 2020. It was therefore preferred to define, with a primary source of legislation, the legal regulation of the movement of natural persons and the

exercise of economic activities on the national territory.⁴⁵

With regard to freedom of movement, from 18 May 2020, intra-regional restrictive measures ceased to be effective, and from 3 June 2020, inter-regional restrictive measures ceased to be effective, subject to any reiteration or new adoption exclusively in relation to specific areas of the same territory affected by a worsening of the epidemiological situation, in compliance with the principles of adequacy and proportionality.⁴⁶ From the latter date, travellers were also allowed to move to and from abroad, subject to the same conditions for any future limitation.⁴⁷

The power to issue a trade union order undergoes a further contraction, evident in the provision that allows its exercise limited to the temporary closure of specific public areas or areas open to the public where it is impossible to adequately ensure compliance with social distancing.⁴⁸ Finally, the framework of sanctions and controls is clarified and enriched: the violation of the decrees and ordinances issued in implementation of the decree, unless the fact constitutes an offence other than that provided for in art. 650 c.p., is punished with the administrative sanction referred to in art. 4, paragraph 1, of Law-Decree no. 19/2020⁴⁹. If the infringement is committed in the exercise of a business activity, the accessory sanction of the closure of the business or activity for a period of between 5 and 30 days is added.⁵⁰

In implementation of Law-Decree no. 33/2020, the D.P.C.M. of 17 May 2020 was issued, allowing the resumption of further economic activities, access to “green areas”, and the performance of recreational and leisure activities, while respecting social distancing. The D.P.C.M. of 11 June 2020 marks the end of the lock-down and a resumption of mobility outside national borders and economic activities, although with persistent exceptions and in compliance with biosecurity rules. At the same time, the Council of Ministers decided to extend the state of emergency, at the beginning until 15 October 2020, then until 31 January 2021 and 30 April 2021, and finally until 31 July 2021.

⁴⁵ Fabio Gigliani, ‘Le misure di contrasto alla diffusione dell’epidemia nella fase *due*’ (2020) *Giornale di Diritto Amministrativo*, 414–415.

⁴⁶ See article 1, paragraphs 1 and 3, Law-Decree No. 33/2020.

⁴⁷ See article 1, paragraph 4, Law-Decree No. 33/2020.

⁴⁸ See article 1 paragraph 9, Law-Decree No. 33/2020.

⁴⁹ The article 4, paragraph 1, Law-Decree no. 19/2020, establishes that: “Unless the fact constitutes a crime, failure to comply with the containment measures

referred to in article 1, paragraph 2, identified and applied with the measures adopted pursuant to Article 2, paragraph 1, or article 3, is punished with the sanction administrative payment of a sum from € 400 to € 3.000 e the penalties provided for in the article are not applied 650 of the Criminal Code or any other provision of the law attribution of powers for health reasons, referred to in Article 3, paragraph 3. If failure to comply with the aforementioned measures occurs by using a vehicle the penalties are increased up to one third”.

⁵⁰ See article 2, paragraph 1, Law-Decree No. 33/2020.

Moreover, Law-Decree no. 125 of 7 October 2020, converted, with amendments, into Law no. 159 of 27 November 2020, modifies the power of ordinance of the Regions in the sector of economic activities, introducing the obligation of a prior agreement with the Minister of Health in the hypotheses in which they decide to adopt measures that go beyond what is prescribed by the national measures.⁵¹ The purpose of this provision is to prevent the Regions from issuing more restrictive ordinances concerning the economic activities present on the territory, compromising the unitary strategy of crisis management.

The exponential increase in contagions is matched by the adoption of mitigation measures of progressively increasing intensity⁵²: obligation to carry a mask at all times and to wear it in indoor and outdoor places, if it is not possible to respect the interpersonal safety distance; possibility of closing to the public, after 9 p.m., streets or squares in urban centres where the risk of assemblages is high; suspension of the activities of dance halls, discos and similar places, indoors and outdoors; prohibition of parties in all places; suspension of school trips; restrictions on the activities of restaurants, bars, pubs, ice cream parlours, pastry shops and similar establishments, which are allowed until 6 p.m. with table service, until midnight with take-away and without time restrictions with home delivery; suspension of events, competitions and other sporting events; suspension of contact sports; obligation to hold events exclusively in static form; suspension of conferences, congresses and other events; obligation to hold meetings in public administrations in telematic mode; and “strong recommendation” to individuals not to travel, even by public or private means of transport, except for work, study, health reasons, situations of necessity, or to carry out activities or use services that are not suspended.

The increased pressure on the health system in some Regions has led the Government to partially modify the strategy followed up to that moment and to divide the national territory into three areas (“yellow zone”, “orange zone” and “red zone”) characterised by a scenario of medium, high and maximum severity within which to place the Regions or parts of them that present a more or less critical situation.⁵³ The identification of the Regions to be included in the areas of high and maximum risk is the responsibility of the Minister of Health,

who will issue an order, having consulted the Presidents of the Regions concerned, on the basis of the monitoring of epidemiological data as established by the document “Elements of preparation and response to COVID-19 in the autumn-winter season” and on the basis of the data processed by the “direction cabin”, subject to the opinion of the technical-scientific Committee. The intensity of the mitigation measures is proportional to the severity of the risk in the areas considered: for example, it is foreseen to block intra-municipal mobility in the Regions characterised by a scenario of maximum severity, to close non-essential services, and to limit the activities of catering services, home delivery and take-away.

2.1. Jurisprudential Analysis

The judicial review has mainly concerned the legitimacy of administrative measures for the management of the emergency, in the legal form of ordinances, with which the Regions and Municipalities have ordered stricter measures to contain the contagion than those prescribed by the national emergency measures. The main contentious took place, therefore, before the Regional Administrative Tribunals (TAR) and the Council of State.

The intervention of the Constitutional Court, which is responsible for the judicial review of the constitutional legitimacy of laws and acts equalized (Law-Decrees and Legislative Decrees), has been limited to only two cases. In the first, the Constitutional Court, by order no. 4 of 14 January 2021, suspended the effectiveness of the Law of the Valle d’Aosta Region no. 11 of 9 December 2020, following an appeal by the President of the Council of Ministers.⁵⁴ The challenged Law had allowed certain social and economic activities to be carried out, even in derogation of the prohibitions established by the State legislation on the subject of combating the Covid-19 pandemic. In fact, the regional legislation, which overlapped with that of the State, dictated in the exercise of the exclusive competence in the field of international prophylaxis under Article 117, paragraph 2, letter q) of the Constitution, had in itself exposed to the concrete and current risk that the infection might increase in intensity, since it had provided for less rigorous measures. Taking into account that the way in which Covid-19 spread made any worsening of the risk, even at local level, likely to compromise, in an

⁵¹ See article 1, paragraph 2, letter a), of Law-Decree No. 125/2020.

⁵² First with D.P.C.M. of 13 October 2020 and subsequently with D.P.C.M. of 24 October 2020.

⁵³ Established by the Health Ministry’s Decree of 30 April 2020 and composed of Higher Institute of Health,

Health Ministry and three representatives of the Regions (Lombardy for the North, Umbria for the centre and Campania for the South).

⁵⁴ See Constitutional Court, order 14 January 2021, No. 4.

irreparable way, people's health and the public interest in a unitary management at national level of the pandemic, which, moreover, did not preclude regional diversifications in the framework of a loyal cooperation.

In the second case, the Constitutional Court, by judgment no. 37 of 12 March 2021, declared the constitutional unlawfulness of Articles 1, 2 and 4, paragraphs 1, 2 and 3 of the Law of the Region of Valle d'Aosta no. 11 of 9 December 2020, for violation of art. 117, paragraph 2, letter q), of the Constitution, because those provisions substituted the sequence of regulations drawn up by the State legislature specifically to combat Covid-19, imposing an autonomous and alternative sequence of regulations, which is instead governed by regional legislative provisions and the orders of the President of the Region.⁵⁵

Administrative jurisprudence, in Phases 1 and 2 of the emergency, was mainly oriented towards rejecting the requests for precautionary suspension of the contested measures, except in very rare cases.⁵⁶ The Regional Administrative Court (TAR) of Campania, Naples, section V, by decree no. 416 of 18 March 2020, found ordinance no. 15, and the related clarification no. 6, of the Campania Region to be lawful both because they were based on a number of provisions of Law-Decree no. 6/2020, considered to be the legal basis of the power to adopt measures related to regionally localised situations, with the consequent exclusion of any possible conflict between such measures and those laid down for the entire national territory, and the increase in the number of infections in the Region justifying the extreme gravity and urgency of the more restrictive measures.⁵⁷ Similarly, the TAR of Calabria, Catanzaro, Section I, with presidential decree no. 165 of 28 March 2020, rejected the request for precautionary suspension of the compulsory quarantine order made by a farm worker who had gone to work in the fields, since, in the current pandemic phase, when comparing conflicting interests, it is necessary to give precedence to the public interest inherent in the protection of the community and the need to stem any risk of contagion.⁵⁸ The TAR of Sardinia, Cagliari, section I, by presidential decree no. 122 of 7 April 2020, rejected the application for precautionary suspension of ordinances no. 9 of 31

March 2020 and no. 9 of 31 March 2020 and no. 10 of 2 April 2020, by which the Mayor of Pula had ordered strict limitations, for health reasons related to the emergency in progress, to go out to buy food, in the assessment of conflicting interests, in the current emergency situation, in the face of a compression of certain individual freedoms must be granted prevalence to the measures taken to protect public health.⁵⁹

The decision of the Sardinian judges was, moreover, confirmed by the Council of State which, by presidential decree no. 2020 of 17 April 2020, declared inadmissible the appeal suggested against presidential decree no. 122/2020, stating that the assessment, as a national priority, of the general interest in the strict prevention of Covid-19, does not allow to consider unreasonably compressed, for the period of the emergency, the rights, although significant and fundamental, of private individuals in relation to needs - such as, for example, food supply methods - which, obviously, can be regulated in terms of timing and criteria, in the collective interest certainly prevailing over the individual interest.⁶⁰ The TAR of Sicily, Palermo, by presidential decree no. 458 of 17 April 2020, rejected the application for the suspension of the contingent and urgent ordinance no. 16 of 11 April 2020, by which the President of the Region of Sicily reiterated the prohibition - already provided by the ordinance no. 6 of 19 March 2020 - of any outdoor motor activity, also in individual form, including that of minors accompanied by their parents, since art. 3, paragraph 2, of the Law-Decree n. 19/2020 has peremptorily forbidden only the Mayors to adopt contingent and urgent ordinances aimed at facing the emergency in contrast with the state or regional measures or exceeding the limits of paragraph 1, while a similar prohibition does not appear to be sanctioned for the Regions.⁶¹ The TAR of Veneto, by presidential decree no. 205 of 21 April 2020, rejected the request for precautionary suspension of ordinance no. 23 of 14 April 2020 by the mayor of the municipality of Santa Giustina, which ordered the temporary closure of the cemeteries, since the damage asserted - that is, the preclusion of the exercise of the right of worship and access to the tomb of the son - had already been largely experienced and the remaining period of closure of the cemetery, if compared to that already

⁵⁵ Constitutional Court, judgment 12 March 2021, No. 37.

⁵⁶ On this point, it is allowed postpone Viviana Di Capua, 'La regolazione del rischio di emergenza e la regolazione del «panico del rischio» nella pandemia Covid-19' (2020) P.A. Persona e Amministrazione, 2, 301 ss.

⁵⁷ See TAR Campania, Naples, section V, decree 18 March 2020, No. 416.

⁵⁸ See Calabria, Catanzaro, Section I, presidential decree 28 March 2020, No. 165.

⁵⁹ TAR Sardinia, Cagliari, section I, presidential decree 7 April 2020, No. 122.

⁶⁰ Council of State, presidential decree 17 April 2020, No. 2020.

⁶¹ TAR Sicily, Palermo, presidential decree 17 April 2020, No. 458.

suffered and to the previous period of undisputed exercise (even daily) of the right, does not appear to be of such temporal importance as to aggravate in a decisive manner the damage already suffered.⁶²

This orientation has continued also in subsequent phases. The TAR of Sicily, Palermo, by precautionary decree no. 60 of 21 January 2021, rejected the application for precautionary suspension of regional ordinance no. 10 of 16 January 2021 of the President of the Region, which excluded the applicability, in the regional territory, of the provisions of art. 3 of the D.P.C.M. of 14 January 2021, which authorises travel, once a day, to a single private dwelling, within the limits of two persons, on the grounds that there is no proof of irreparable harm to the fundamental rights of the person, merely because there is a further restriction on freedom of movement.⁶³ The decision was confirmed in second instance, since the Administrative Justice Council, by monocratic decree no. 61 of 25 January 2021, declared the appeal against the TAR decree inadmissible.⁶⁴

Among the very rare cases in which the request for precautionary measures has been accepted, it is worth mentioning TAR of Campania, Naples, presidential decree no. 436 of 21 March 2020, which suspended the injunction to observe the quarantine obligation, since the movement was justified by the applicant's need to assist his mother.⁶⁵ TAR of Toscana, sec. II, sentence no. 334 of 5 March 2021, which annulled order no. 3 of 22 January 2021 of the President of the Tuscany Region, in the part where he had allowed only those who had their own general practitioner in the region to return to Tuscany from other regions to their homes.⁶⁶

It is worth remembering, however, that during the autumn season, when the resurgence of the virus coincided with the resumption of teaching activities in schools of all levels and in universities, the priority subject of administrative litigation became the legitimacy of the orders adopted by the Regions and the Mayors to suspend teaching in the presence of children. Restricting ourselves to a few essential points, in order not to leave the subject matter of the investigation, the orientation of the administrative judges has not been univocal: some pronouncements have 'cancelled' the regional and

trade union ordinances that had suspended teaching in the presence.⁶⁷

It may be noted that, since the measures adopted during the emergency are very limited in time, sometimes lasting only a few days, the precautionary protection before the administrative judge, in the form of emergency protection, has ended up enclosing, in this phase, all the protection that the entire system of judicial guarantees can offer in general.

The governmental power of extraordinary annulment, currently governed by art. 2, paragraph 3, letter p), of Law no. 400 of 23 August 1988 (Discipline of Government activity and organisation of the Presidency of the Council of Ministers), and by art. 138 of Legislative Decree no. 267 of 18 August 2000 (Consolidated act of the laws on the organisation of local authorities), is particularly effective in ensuring the primacy of the law and legal certainty in an emergency context. The institution was used to annul Order No 105 of 5 April 2020, which the Mayor of Messina adopted pursuant to Article 50 of Legislative Decree No 267/2000, in order to require anyone intending to cross the Straits of Messina to register on the portal available on the institutional web page of the Municipality of Messina (providing a series of personal identification data and relating to the place of origin, the place of destination and the reasons for the transit), and to obtain the municipal authorisation to move.⁶⁸ The ordinance was supposed to take effect from 00.01 on 8 April 2020 until 13 April 2020. However, on 7 April, the Presidency of the Council of Ministers requested the intervention of the Council of State, in an advisory capacity, by forwarding a request for an opinion to the Minister of the Interior to start the procedure for extraordinary governmental annulment in order to remove the trade union ordinance. The request was motivated by multiple profiles of illegitimacy of the act (including, violation of law, incompetence, unreasonableness, etc.), as well as by the need to protect the unity of the legal system that risked being compromised by local measures adopted outside the perimeter outlined by the emergency national (legislative and general administrative) acts.

⁶² TAR Veneto, presidential decree 21 April 2020, No. 205.

⁶³ The TAR of Sicily, Palermo, by precautionary decree No. 60, 21 January 2021.

⁶⁴ Administrative Justice Council, by monocratic decree No. 61, 25 January 2021.

⁶⁵ TAR of Campania, Naples, presidential decree No. 436 of 21 March 2020.

⁶⁶ TAR of Toscana, sec. II, sentence No. 334, 5 March 2021.

⁶⁷ Compare TAR Campania, section V, presidential decree, 19 October 2020, No. 1921 and 1922; Naples, section V, monocratic decree No. 142, 20 January 2021; TAR Campania, Naples, section V, monocratic decree no. 153 22 January 2021), others, on the other hand, have 'excused' the actions of local authorities (TAR Campania, Naples, section V, decree No. 302, 16 February 2021.

⁶⁸ Available at <www.sipassaacondizione.comune.messina.it> or at <<https://comune.messina.it>> accessed 30 July 2021.

The Council of State pronounced a favourable judgment on the request for an opinion in a very short time, allowing the procedure to be concluded with the Decree of the President of the Republic of 9 April which, fully accepting the reasons, annulled the ordinance of the Mayor of Messina.⁶⁹ Through a residual institution of the monarchic State, which has raised many doubts on its compatibility with the constitutionalisation of territorial and local autonomies resulting from the reform of Title V of the Constitution, the Government has been able to recover the 'direction' of the crisis management operation, avoiding a further (and unjustified) limitation of the faculties of enjoyment of civil rights and fundamental freedoms already strongly compressed by the emergency legislation.

Although the administrative cases have mainly concerned the legitimacy of regional and trade union ordinances adopting more restrictive measures or in contrast with the national measures, it is important to mention opinion no. 850 of 13 May 2021, issued by the I section of the Council of State, during the extraordinary appeal, which ruled that the use of the Decree of the President of the Council of Ministers as a source of implementation of the primary emergency legislation was legitimate. More specifically, the judges declared the legitimacy of the D.P.C.M. of 24 October 2020 and 3 November 2020, which implemented the provisions of the Law-Decrees governing emergency management. The recourse to implementing decrees made by the previous Law-Decrees is, in fact, consistent with the system of sources for two reasons: first, because the detailed and analytical disciplinary of the regulated cases is not reserved to the primary legislation, and second, because the Law-Decrees, although agile and rapidly approved by Parliament, would not have allowed, in the current historical context, the adaptability and flexibility necessary to adhere to the continuous changeability of the objective conditions of development and trend of the pandemic. The executive instrument of the D.P.C.M., on the other hand, ensures, to a greater extent, the adaptability and flexibility required by the current emergency situation.⁷⁰

The emergency legislation did not reshape the role of administrative judges, nor did it extend the intensity and density of judicial review. In fact, it has been widely observed that jurisprudence did not enter into the merits of the discretion of the

public authorities, essentially confirming the strategy followed for the management of the emergency. Rather, the judges kept within the narrow confines of the law, without extending their power to assess administrative or legislative intervention, precisely recognizing the need for a uniform assessment of the measures to be taken and the need to balance the rights at issue, such as the right to movement and education, with the protection of collective health.

3. Concluding Remarks

The research developed above has firstly focused on the measures – both legislative and administrative– adopted in Italy to cope with the Covid-19 pandemic. In section 2.a, the article provides an account of the legislative and administrative acts aimed, on the one hand, at supporting the national economy elements indirectly affected by the crisis and, on the other hand at containing the spread of the virus and easing the pressure on the national health service. Nevertheless, in so doing, the research has underlined that some of those measures have also affected the exercise of important personal freedoms guaranteed by the Constitution, such as the freedom of movement.

Secondly, the study has offered a detailed overview of the Italian "pandemic case law". More specifically, in section 2.b, the article analysed the jurisprudence of both the Constitutional Court and administrative Courts (i.e. Regional Administrative Tribunals – TAR and Council of State) respectively concerning legislative and administrative acts adopted during the pandemic. However, while "the intervention of the Constitutional Court (...) has been limited to only two cases" (i.e. Const. Court, ord., 14 January 2021 n. 4 and Const. Court, sent., 12 March 2021 n. 37), the administrative case law is very abundant and varied.

In more detail, the analysis on the administrative jurisprudence focused on the intensity of the judicial review made by the Italian administrative judges on those acts concerning the freedom of movement. In doing so, the research pointed out that – in both phase one and two of the emergency – the administrative decisions were "mainly oriented towards rejecting the request for precautionary suspension of the contested measures, except in very rare cases". However,

⁶⁹ Council of State, section I, opinion No. 735/2020, 7 April 2020. For a comment, see Antonio Ruggeri, 'Non persuasivo il parere reso, dietro sollecitazione del Governo, dal Consiglio di Stato su un'ordinanza del Sindaco De Luca relativa all'attraversamento dello stretto di Messina' (10 April 2020) ConsultaOnline; Nicola Pignatelli, 'L'annullamento straordinario ex art. 138

TUEL di un'ordinanza comunale: il Covid-19 non "chiude" lo stretto di Messina' (14 April 2020) *Diritti Regionali*, 1, 555 ss.; Viviana Di Capua, *Il potere governativo di annullamento straordinario e il mito della Fenice (2021) Il Diritto dell'Economia*, 1, 247 ss.

⁷⁰ Council of State, section I, opinion No. 850 of 13 May 2021.

“among the very rare cases in which the request for precautionary measures has been accepted”, the article mentioned TAR of Campania, Naples, presidential decree 21 March 2020 n. 436 and TAR of Toscana, Florence, 5 March 2021 n. 334. Moreover, the article underlined that since October 2020 “the prior subject of administrative litigation became the legitimacy of the orders adopted by the Regions and the Mayors to suspend teaching in the presence of children” and that, in this regard, “the orientation of the administrative judges has not been univocal”.

Thirdly, in section 2.c the research has given account of the relationship between the law of the pandemic and the role of Courts, especially analysing the impact of such a legislation on the main features of the judicial review. In doing so, the article has pointed out that “the emergency legislation did not reshape the role of administrative judges, nor did it extend the

intensity and density of judicial review”. On the contrary, Italian “judges kept within the narrow confines of the law, without extending their power to access administrative or legislative” acts.

Moreover, the article has also remarked that “since the measures adopted during the emergency are very limited in time (...), the precautionary protection before the administrative judge, in the form of emergency protection, has ended up enclosing, in this phase, all the protections that the entire system of judicial guarantees can offer (...)”. These considerations shed light on a particular aspect of the emergency system that has remained at least partially in the shadows: the protection before the administrative court did not prove to be an effective instrument of reaction towards illegitimate measures, highly restrictive of constitutionally guaranteed freedoms and rights (see, for instance, Campania Region ordinance n. 15/2020).

Return of the Facemask Monopoly System in Taiwan to Tackle the COVID-19 Challenge: Is It Successful?

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Abstract. With the global outbreak of coronavirus disease in early 2020, authorities in every country advocated wearing facemasks to control the spread of the virus. However, a shortage of facemasks hit Europe, the US, and Asia. Using facemasks in Taiwan—with a 23-million population, and fewer confirmed cases than in other countries, is common. The export ban, a name-based rationing system, and particularly the facemask monopoly scheme, was responsible for maintaining Taiwan’s relatively modest supply of facemasks in early February 2020. Taiwan also used this opportunity to establish a national industry, producing facemasks during an economic downturn. This study uses document analysis to examine the historical development of this facemask monopoly scheme and conducts an in-depth critical review of such schemes using an interdisciplinary approach. The key research question is whether such a facemask monopoly scheme is better than the free market regime worldwide in dealing with such a facemask shortage.

Keywords: Facemask Expropriation, Name-based Rationing System, Legal Monopoly, COVID-19

1. Introduction

By 5 October 2021 the world had over 235 million confirmed cases of coronavirus disease 2019 (COVID-19).¹ Most countries have adopted unprecedented measures to tackle the pandemic, such as stay-at-home, maintaining social distance,

and mandatory wearing of facemasks in public.² It would have been difficult to imagine a civilised city locked down to prevent the virus from spreading, as in the pandemic movies.³ Facemasks are one of the most effective ways to control the spread of the virus.⁴ However, because the pandemic had a significant impact on China, the

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Management Review, College of Management, National Taiwan University.

¹ L Hurst, ‘Coronavirus: More than 13 million cases confirmed worldwide’ (*Euro News*, 14 July 2020) <<https://www.euronews.com/2020/07/13/coronavirus-who-reports-record-daily-increase-globally-of-over-230-000-cases>> accessed 15 October 2021; WHO, ‘Coronavirus (COVID-19) Dashboard’ (*World Health Organization*, 2021) <<https://covid19.who.int/>> accessed 15 October 2021.

² Enrico Lavezzo and others, ‘Suppression of a SARS-CoV-2 outbreak in the Italian municipality of Vo’ (2020) 584 *Nature* 425–429.

³ Siyue Li, Bo Feng, Wang Liao and Wenjing Pan, ‘Internet use, risk awareness, and demographic characteristics associated with engagement in preventive behaviors and testing: cross-sectional survey on COVID-19 in the United States’, (2020) 26 *JMIR e19782* (*National Library of Medicine*, 16 June 2020) <<https://pubmed.ncbi.nlm.nih.gov/32501801/>> accessed 15 October 2021.

⁴ William Tse and others, ‘Evidence to support wearing masks is helpful during the COVID-19 pandemic’, (2020) OSF Preprints.

primary global supplier of facemasks,⁵ there was a shortage of facemasks in Europe, the US, and Asia, as the virus spread.⁶ Many countries began adopting facemask rationing measures; most commonly, this took the form of price control.⁷

Taiwan, with a population of 23 million, has been successful in avoiding widespread cases, with only 938 confirmed cases and nine deaths, as of 7 April 2021.⁸ Even after the large-scale outbreak in mid-May, only 16,262 confirmed cases were identified by 5 October 2021.⁹ Such success is because of the wide use of facemasks.¹⁰ Even before the panic-buying spree in March 2020, Taiwan had secured its facemask supplies through an export ban, a name-based rationing system, on the Made in Taiwan (MIT) facemasks in early February 2020, and the centralised monopoly scheme to control the price and quota.¹¹ The Taiwanese government utilised this opportunity to establish a national

facemask production team and industry during a time of economic decline.¹² The stable supply of facemasks is a key factor for Taiwan in combating COVID-19.¹³ Taiwan's success in preventing COVID-19 spread is because to two keys: masks and medical care¹⁴

Much of the literature approaches Taiwan's experience from a public health perspective,¹⁵ particularly how wearing facemasks and their stable supply in Taiwan, a non-World Health Organisation (WHO) member, contributed to the lower number of confirmed cases.¹⁶ Most existing studies approach mask-wearing from a general design of the name-based distribution scheme and its role in avoiding virus spreading.¹⁷ These often ignore the economic aspects of the facemask monopoly scheme in Taiwan, prompting the present study. Most studies appraise the success of such a regime, but do not provide a balanced review

⁵ Cyn-Young Park and others, 'Global shortage of personal protective equipment amid COVID-19: supply chains, bottlenecks, and policy implications', (*Asian Development Bank*, 2020) <<https://www.adb.org/publications/shortage-ppe-covid-19-supply-chains-bottlenecks-policy>> accessed 15 October 2021.

⁶ Julii Suzanne Brainard and others, 'Facemasks and similar barriers to prevent respiratory illness such as COVID-19: A rapid systematic review' (*medRxiv*, 06 April 2020) <<https://www.medrxiv.org/content/10.1101/2020.04.01.20049528v1>> accessed 15 October 2021.

⁷ Victor Cha, 'Asia's COVID-19 Lessons for the West: public goods, privacy, and social tagging' (*Taylor and Francis Online*, 16 June 2020) WQ 1–18 <<https://www.tandfonline.com/doi/full/10.1080/0163660X.2020.1770959>> accessed 15 October 2021.

⁸ Taiwan Centers for Disease Control, 'COVID-19 (SARS-CoV-2 Infection)' (*Taiwan Centers for Disease Control*, 2021) <<https://www.cdc.gov.tw/En>> accessed 7 April 2021.

⁹ *Ibidem*.

¹⁰ Wen-Ta Chiu, Ronald P Laporte, and Jonathan Wu, 'Determinants of Taiwan's early containment of COVID-19 incidence' (*American Journal of Public Health*, 2020) 110 *AJPH* 943–944 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7287555/>> accessed 7 April 2021.

¹¹ Chih-Yu Chin, and others, 'How Taiwan, a non-WHO member, takes actions in response to COVID-19' (*Journal of Global Health*, 17 June 2020) 10 *JGH* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7307800/>> accessed 7 April 2021; Lung Wang, 'Why do you wear a face mask? Taiwanese public epidemic awareness of COVID-19 from social media behavior' (*Research Square*, 13 April 2020) <<https://www.researchsquare.com/article/rs-21186/v1>> accessed 15 October 2021.

¹² Ministry of Economic Affairs Bureau of Foreign Trade, 'Taiwan will become the 2nd largest producer of surgical masks' (*Ministry of Economic Affairs Bureau of Foreign Trade*, 13 March 2020)

<<https://www.trade.gov.tw/English/Pages/Detail.aspx?nodeID=855&pid=689849>> accessed 18 February 2021.

¹³ Sheng-Fang Su and Yueh-Ying Han, 'How Taiwan, a non-WHO member, takes actions in response to COVID-19', (2020) 10 *JGH*.

¹⁴ Vincent Yi-Fong Su, and others 'Masks and medical care: Two keys to Taiwan's success in preventing COVID-19 spread', (*Elsevier Public Health Emergency Collection*, 04 June 2020) *TMID* 101780 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7270822/>> accessed 18 February 2021.

¹⁵ Irving Yi-Feng Huang, 'Fighting against COVID-19 through government initiatives and collaborative governance: Taiwan experience' (*Public Administration Review*, 22 May 2020) 80 *PAR* 665 <<https://pubmed.ncbi.nlm.nih.gov/32836446/>> accessed 15 October 2021.

¹⁶ Frank Bickenbach and Wah-sin Liu, 'How Taiwan and South Korea contained the spread of COVID-19 and why this matters for attracting FDI' (*Kiel Policy Briefs*, May 2020) <<https://www.ifw-kiel.de/publications/kiel-policy-briefs/2020/how-taiwan-and-south-korea-contained-the-spread-of-covid-19-and-why-this-matters-for-attracting-fdi-14581/>> accessed 15 October 2021.

¹⁷ Tsung-Ling Lee, 'Legal preparedness as part of COVID-19 response: the first 100 days in Taiwan' (*BMJ Global Health*, 2020) e002608 <<https://pubmed.ncbi.nlm.nih.gov/32434776/>> accessed 15 October 2021; Lin Ching-Fu, Chien-Huei Wu, and Chuan-Feng Wu, 'Reimagining the administrative state in times of global health crisis: an anatomy of Taiwan's regulatory actions in response to the COVID-19 pandemic' (*European Journal of Risk Regulation*, 2020) 11 *EJRR* 256 <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/reimagining-the-administrative-state-in-times-of-global-health-crisis-an-anatomy-of-taiwans-regulatory-actions-in-response-to-the-covid-19-pandemic/A279AD25F9F98A3C964F6E6134229C00>> accessed 15 October 2021.

of this scheme. This study attempts to answer whether such a scheme is better than other schemes in dealing with the supply crisis of facemasks from February to April 2020.

This study summarises the historical development of the facemask monopoly scheme in Taiwan and conducts an in-depth critical review of this scheme, particularly examining the lessons learned. It aims to provide a balanced thinking approach to evaluating Taiwan's facemask monopoly scheme.

For this purpose, this article first outlines the facemask monopoly scheme in Taiwan. Next, it investigates the economics, human rights, and legal issues during implementation. Our preliminary finding is that such a unique scheme relying on MIT facemasks alone and a lack of price signals to encourage market supply may not alleviate Taiwan's facemask shortage situation. A free-market model may prove its success, even in such an urgency.

2. Evolution of the Facemask Monopoly System in Taiwan

2.1. Severe Acute Respiratory Syndrome (SARS) Crisis in 2003

SARS is a viral respiratory illness caused by the coronavirus acute respiratory syndrome coronavirus (SARS-CoV). SARS was first reported in Asia in February 2003. The illness spread to over two dozen countries in North America, South America, Europe, and Asia before the SARS global outbreak of 2003.¹⁸

The facemask monopoly scheme originated in the facemask expropriation scheme during the shortage of facemasks in the SARS crisis in 2003.¹⁹ To provide facemasks for medical staff, the

Industrial Development Bureau of the Ministry of Economic Affairs launched the first wave of expropriation of four medical facemask companies from 6 May to 10 May 2003. The expropriation included 1.2 million facemasks of the N95 and disposable types, priced at 25 NTD/piece (N95) and 3 NTD/piece (disposable), respectively.²⁰ In addition to local production measures, the Centers for Disease Control (CDC) announced the expropriation of facemask imports without goods declaration on 14 May 2003; two days later, they expropriated 201,000 facemasks (mainly non-N95) for medical staff. Finally, unsold N95 facemasks in local warehouses were released for medical use.²¹ Following a similar scheme during the COVID-19 pandemic, the government expropriated 4.55 million N95 and 15.98 million non-N95 facemasks.²²

The slow expropriation process led to widespread criticism from the medical sector and the resignation of the Minister of Health.²³ To facilitate and legalise the expropriation process, Article 53 was added to the Communicable Disease Control Act to confer power on the central government to expropriate or requisite private land, products, buildings, devices, facilities, pharmaceuticals, and medical devices for disease control practices, facilities for the treatment of contamination, and transportation means for disease control.²⁴ At the time of the outbreak of COVID-19, a similar clause was provided in Article 54 of the Communicable Disease Control Act of 2019.²⁵ However, until early 2020, this clause was never used.

2.2. Early January 2020

Before the Wuhan City lockdown on 23 January 2020,²⁶ the prices and supply of facemasks were modest. For instance, a 50-piece box cost 150 NTD

¹⁸ Centres for Disease Control, 'Severe acute respiratory syndrome (SARS)' (CDC, 6 December 2017) <<https://www.cdc.gov/sars/index.html>> accessed 15 October 2021.

¹⁹ Yu-Chen Hsu, and others, 'Risk and outbreak communication: lessons from Taiwan's experiences in the Post-SARS era' (Health Security, 2017) 15, 165 <<https://pubmed.ncbi.nlm.nih.gov/28418746/>> accessed 15 October 2021.

²⁰ Legislative Yuan Republic of China (Taiwan), 'Four dollar price difference after recruiting mask factories! Cho, Po-Yuan, member of Legislative Yuan, asked Control Yuan to investigate' (*Legislative Yuan Republic of China*, 22 May 2003) <<https://www.ly.gov.tw/Pages/Detail.aspx?nodeid=5476&pid=46481>> accessed 18 February 2021.

²¹ Su, S-I I., Liou, D-M., Shih, T-Y., Lee, L-H., Peng, Y-J., Pan, M-L, 'Study on rational inventory level and the supply chain model of national material stocks for the infectious disease with focus on personal

protection equipments' (*Soochow University Department of Business Administration*, 2006) <https://www.cdc.gov.tw/uploads/files/3ac8da6d-9b11-4381-9e7d-52f35b9356ca.pdf>> accessed 18 February 2021.

²² The Storm Media (2020), 'Where is the production capacity? SARS made factories coming back to Taiwan for expansion Covid-19 period happens masks shortage again' (*The Storm Media*, 7 February 2020) <<https://www.storm.mg/article/2260945>> accessed 15 October 2021.

²³ The Storm Media, 'Where is the production capacity? SARS made factories coming back to Taiwan for expansion Covid-19 period happens masks shortage again' (*The Storm Media*, 7 February 2020) <<https://www.storm.mg/article/2260945>> accessed 15 October 2021.

²⁴ Communicable Disease Control Act 2004, s. #.

²⁵ Communicable Disease Control Act 2019, s. #.

²⁶ Lily Kuo, 'Coronavirus: panic and anger in Wuhan as China orders city into lockdown'

on 17 December 2020.²⁷ The price on 4 January was 109 NTD.²⁸ Therefore, the price ranged from 1 to 3 NTD per piece, depending on the selling channel. However, with government intervention, a sudden change occurred in supply, demand, and prices.

2.3. Facemask Version 1.0 Since 2 February 2020

The Taiwanese government banned the export of surgical masks on 24 January 2020 three days after it confirmed the first COVID-19 case in Taiwan, causing a surge in domestic demand. One week later, it required all facemask factories to control the distribution and output, as panic buying began after more cases were reported.²⁹ Facing a global supply shortage during the outbreak, the government began collaborating with 30 Taiwanese machinery and automation companies as a national team. Such a team effectively reduced the production cycle of mask equipment from two months to one week and increased production to meet domestic demand.

Taiwan became the second-largest global producer of surgical masks because of these measures.³⁰

The centralised facemask monopoly scheme has been in operation since January 2020. All local facemask manufacturers were required to provide and sell all of their facemasks to the government under Article 54 of the Communicable Disease Control Act of 2019. The Special Act for Prevention, Relief and Revitalisation Measures for Severe Pneumonia with Novel Pathogens of 2020 passed

by the parliament and published on 25 February 2020 endorses such provisions by providing an extra and similar legal basis in its Article 5:³¹

‘To produce disease prevention supplies specified in Paragraph 1, Article 54 of the Communicable Disease Control Act, where necessary, government authorities on all levels may, based on instructions of the Commander of the Central Epidemic Command Center, expropriate or requisition required production equipment and raw materials and provide appropriate compensation.’

Initially, the government ordered convenience stores to sell facemasks at eight NTDs per piece between 28 January and 30, 2020. The public could purchase three masks every three consecutive days.³² However, after the Lunar New Year vacation, a new scheme came into play. From 2 February all facemask purchases became name-based.³³ Only 6,505 pharmacies and drugstores that contracted with the National Health Insurance (NHI) could sell MIT facemasks.

The government banned other original primary suppliers before launching Facemask Version 1, such as convenience stores/cosmeceuticals and e-commerce platforms, except for local district public health centres.

The price was subsequently reduced to five NTDs.³⁴ Under this name-based regime, wherein identification of the buyers’ identity and quota is necessary, presenting the NHI card became mandatory. Office workers and those with disabilities or children could ask their family members/friends to purchase on their behalf.³⁵

(*The Guardian*, 23 January 2020). <<https://www.theguardian.com/world/2020/jan/23/coronavirus-panic-and-anger-in-wuhan-as-china-orders-city-into-lockdown>> accessed 18 February 2021.

²⁷ Line Shopping, ‘Blue Eagle Mask’ (*Line Shopping*, 2020) <<https://buy.line.me/s/%E8%97%8D%E9%B7%B9%E7%89%8C%20%E5%8F%A3%E7%BD%A9>> accessed 18 February 2021.

²⁸ 9x9 Stationery, ‘Let-Green Bacterial Filtration Face Mask’ (9x9 Stationery, 2020) <https://www.9x9.tw/m/mod/product/index.php?REQUEST_ID=55a65ce32a0f9d7015e5755b7e11e3b5ce4a80426f475eb1a94f34c378b77a19> accessed 15 October 2021.

²⁹ Focus Taiwan, ‘Taiwan’s ban on mask exports to be extended until end of June’ (*Focus Taiwan*, 13 April 2020) <<https://focustaiwan.tw/society/202004130017>> accessed 18 February 2021.

³⁰ Ministry of Economic Affairs Bureau of Foreign Trade, ‘Taiwan will become the 2nd largest producer of surgical masks’, (*Ministry of Economic Affairs Bureau of Foreign Trade*, 13 March 2020) <<https://www.trade.gov.tw/English/Pages/Detail.aspx?nodeID=855&pid=689849>> accessed 18 February 2021.

³¹ Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens 2020, s. 5.

³² Global News for New immigrants, ‘Government and enterprises ensure enough face mask supply in convenience stores’, (*Immigration.gov*, 30 January 2020) <<https://news.immigration.gov.tw/PH/NewsTopic.aspx?NEWSGUID=8b7cd9c1-ee51-493e-ab74-8b9ce3af73bc>> accessed 15 October 2021.

³³ Keoni Everington, ‘Taiwan’s new mask-rationing system kicks in on Thursday’ (*Taiwan News*, 4 February 2020). <<https://www.taiwannews.com.tw/en/news/3870428>> accessed 15 October 2021.

³⁴ Lee I-chia, Liang Hsiao Tung, and Lin Liang-Sheng, ‘Virus outbreak: NHI cards required to purchase masks’ (*Taipei Times*, 4 February 2020) <<http://www.taipetimes.com/News/front/archives/2020/02/04/2003730320>>-accessed-15-October-2021.

³⁵ Taiwan Centers for Disease Control, ‘Name-based rationing system for purchases of masks to be launched on February 6; public to buy masks with their (NHI) cards’, (*Taiwan Centers for Disease Control*, 4 February 2020) <<https://>

The government also softened the strict import rules for medical devices, including surgical facemasks and forehead thermometers, owing to supply needs. On 3 February 2020 the Customs Administration temporarily lifted Taiwan's restrictions on surgical mask imports. Before 30 April citizens could import a maximum of 1,000 pieces for self-use, requiring no medical license.³⁶ This privatisation was extended to the end of June 2020.³⁷ However, there was no such privilege.

Despite the above measures, citizens waited in lines to purchase quotas at each pharmacy every day or found that the pharmacies had sold out.³⁸ However, this was a common global scenario. In February 2020, thousands of people were caught on film queuing to buy facemasks in South Korea.³⁹

Finally, facemask pricing in late January and early February 2020 draws a focus. As there was no global panic buying, it was unclear why the price under the monopoly scheme increased from 1 to 3 NTD to 8 NTD, before reducing it to 5 NTD per piece.

Thus far, the government has not provided a clear pricing formula.

2.4. Facemask Version 2 From 12 March 2020

To distribute facemasks more efficiently and avoid queuing, a new online mask-rationing system began taking pre-orders on 12 March.⁴⁰ To use the online ordering system, consumers need access to a card

reader or download the NHIA app.⁴¹ Since 12 March customers have had two options to reserve facemasks online. One way is to pre-order facemasks through the e-Mask website. To do so, one must register first with the NHI card and set a password, and mobile number verification is mandatory. Another option is to download the NHI Express app and complete binding within the device.⁴² Those unable to complete the registration process can request support from the NHI Administration.⁴³

Those who successfully order facemasks online will receive a payment notification with instructions to complete the payment. Afterwards, customers can pick them up at convenience stores with their NHI card or proof of purchase certificate. Orders that are not picked up within a certain period are cancelled. During the trial period, only adult facemasks were available, with each adult eligible for three facemasks every week. The consumer submitting the order must pay an additional delivery fee for seven NTDs.

Despite the new online purchase methods, consumers prefer to purchase masks in pharmacies. Nearly 1.8 million people in Taiwan ordered online during the first round.⁴⁴ This figure seems low for a population of 23 million people. The red tape registration discouraged older and even middle-aged consumers from using the system.⁴⁵ Therefore, buyers wait in long lines from March to

www.cdc.gov.tw/En/Bulletin/Detail/ZlJrIunqRjM49LIBn8p6eA?typeid=158 accessed 15 October 2021.

³⁶ Customs Administration, Ministry of Finance. (2020b), 'COVID-19 Custom Regulations' (Customs Administration, 4 June 2020) <<https://web.customs.gov.tw/cp.aspx?n=8FBEOEFF7E281849&s=C60A755346B658C5>> accessed 15 October 2021.

³⁷ Taiwan CDC, 2020. Extra Information on the Customs Administration, Ministry of Finance is available here: <<https://www.cdc.gov.tw/Category/QAPage/fAjRRRm9w2HwmtbonLjoYA>> accessed 15 October 2021.

³⁸ W Yen and HY Lee, 'Difficulty buying face masks extends to foreign community' (*Focus Taiwan*, 7 February 2020) <<https://www7.focustaiwan.tw/society/202002070020>> accessed 15 October 2021.

³⁹ Chris Pleasance, 'Thousands of people queue to buy face masks in astonishing drone footage from South Korea as the country is gripped by coronavirus outbreak' (*Mail Online*, 24 February 2020) <<https://www.dailymail.co.uk/news/article-8037595/Coronavirus-Thousands-queue-buy-face-masks-South-Korea.html>> accessed 15 October 2021.

⁴⁰ Keoni Everington, 'Taiwan's online mask-rationing system to take pre-orders

Thursday' (*Taiwan News*, 10 March 2020) <<https://www.taiwannews.com.tw/en/news/3894393>> accessed 15 October 2021.

⁴¹ National Health Insurance Administration-Ministry of Health and Welfare, 'Name-Based Mask Distribution System (Start from 3/12)' (*National Health Insurance Administration- Ministry of Health and Welfare*, 7 April 2020) <https://www.nhi.gov.tw/english/Content_List.aspx?n=022B9D97EF66C076> accessed 15 October 2021.

⁴² Vivian Hsiao, 'Taiwan new face masks registration system goes online' (*The China Post*, 11 March 2020) <<https://chinapost.nownews.com/20200311-1092371>> accessed 15 October 2021.

⁴³ Taiwan Centers for Disease Control, 'Online ordering mechanism to be added to the name-based rationing system for face masks on March 12' (*Taiwan Centers for Disease Control*, 10 March 2020) <https://www.cdc.gov.tw/En/Bulletin/Detail/IHbdHSeA0j_P4rtnJcgT2g?typeid=158> accessed 15 October 2021.

⁴⁴ WT Chen, C-W Hsu, L. Ko, , 'Second round of online ordering of face masks to begin Wednesday' (*Focus Taiwan*, 23 March 2020) <<https://oia.ncku.edu.tw/p/406-1032-205611,r2888.php?Lang=en>> accessed 15 October 2021.

⁴⁵ Taipei Times, 'Mask system has left some behind' (*Taipei Times*, 16 April 2020)

mid-April.⁴⁶ The heavy workload on pharmacists, including unpacking and packing facemasks, forced hundreds of pharmacies to withdraw from selling facemasks.⁴⁷

It is important to compare Taiwan's situation with that of the neighbouring countries/regions which did not implement a monopoly scheme and relied on the free market. Unlike the shortage of supply and high prices in neighbouring regions, supply increased in late February, for example, in Hong Kong.⁴⁸ Prices were reduced from 2,000 NTD/per 50 pcs in early February to 1,000 NTD/per 50 pcs on 20 February. The price was further reduced to 500 NTD/per 50% in mid-April.⁴⁹ China has already faced oversupply in late March.⁵⁰ In the first five months of 2020, 70,802 new companies registered in China to make or trade facemasks, a 1,56% increase in 2019, and 7,296 new companies registered to make or trade meltblown fabric, a key component of facemasks, a 2,277% increase from 2019.⁵¹ Therefore, despite the absence of a facemask monopoly scheme such as Taiwan, consumers in Hong Kong and China could already buy boxes of facemasks online, without queuing or rationing.

2.5. Facemask Version 3 From 22 April

The third version of the facemasks scheme began on 22 April by adding the important function of completing pre-orders in convenience stores, while still providing previous purchase methods. Consumers could place pre-orders at convenience stores for their bi-weekly rations.⁵² Those with NHI cards could bring their cards to the kiosk machine at a convenience store, select the epidemic prevention campaign logo on the screen, insert the card, and fill in their order information. A consumer can buy nine adult or ten children's masks each time.⁵³ They could then take the printed invoice for payment at the store counter. When ready for collection, consumers can pick their masks from the same store.⁵⁴

The long lines before the pharmacies finally disappeared as it became convenient to order facemasks from kiosk machines. However, despite the relatively stable supply of facemasks, the timeline for lifting the export ban or ending the monopoly scheme remained uncertain. The government announced its original July schedule in mid-May.⁵⁵ The schedule was then moved to 1 June 2020.⁵⁶ Table 1 illustrates the evolution of the facemask monopoly scheme in Taiwan.

<<https://www.taipetimes.com/News/editorials/archive/s/2020/04/16/2003734692>> accessed 15 October 2021.

⁴⁶ A Wang, 'People wait in a long line to buy face masks in order to protect themselves from the coronavirus disease (COVID-19), outside a pharmacy in Taipei, Taiwan' (*The Star*, 17 March 2020) <<https://www.thestar.com.my/news/world/2020/03/24/taiwan039s-coronavirus-cases-top-200-for-first-time>> accessed 15 October 2021.

⁴⁷ United Daily News, 2020 'No worries about 300 pharmacies opting out' (*UpMedia*, 19 April 2020) <https://www.upmedia.mg/news_info.php?SerialNo=85674> accessed 15 October 2021.

⁴⁸ TOPick, 'Increasing mask supply Declining mask price: Price dropped 50% for 50-mask in-box' (*TOPick*, 20 February 2020) <<https://topick.hket.com/article/2570064/>> accessed 15 October 2021.

⁴⁹ Nextmagazine, HKTVMall. 'Oxyair Mask Hong-Kong made mask pre-sell' (*Nextmagazine*, *HKTVMall*, 9 April 2020) <https://hk.nextmgz.com/article/2_72391_1_0> accessed 15 October 2021.

⁵⁰ CNA, 'The light and thickness of mask Command Center: General medical ones are also available', (*CNA*, 1 March 2020) <<https://www.cna.com.tw/news/firstnews/202003010153.aspx>> accessed 15 October 2021.

⁵¹ C Zhou, 'South China Morning Post. Coronavirus: wheels come off China's mask-making gravy train, as low-end manufacturers count their losses' (*SCMP*, 12

June 2020) <<https://www.scmp.com/economy/china-economy/article/3088810/coronavirus-wheels-come-china-as-mask-making-gravy-train-low>> accessed 15 October 2021.

⁵² Global News for New Immigrants, 'Masks can be ordered at Taiwan convenience stores starting today' (*Immigration.gov*, 23 April 2020) <<https://news.immigration.gov.tw/PH/NewsPost.aspx?NEWSGUID=5911aeca-3b55-4269-8c0e-7fc48db1b0de>> accessed 15 October 2021.

⁵³ Keoni Everington, 'Masks can be ordered at Taiwan convenience stores starting today' (*Taiwan News*, 22 April 2020) <<https://www.taiwannews.com.tw/en/news/3920951>> accessed 15 October 2021.

⁵⁴ National Chiao Tung University, 'Name Based Mask Distribution System 3.0' (*National Chiao Tung University*, 8 May 2020) <<https://www.nctu.edu.tw/article/covid/7475>> accessed 15 October 2021.

⁵⁵ Sanlih E-Television. 'Loosening mask restriction? Chen: The fastest time to open to selling and export will be before the end of July' (*Sanlih E-Television*, 16 May 2020) <<https://www.setn.com/News.aspx?NewsID=743845>> accessed 15 October 2021.

⁵⁶ Broadcasting Corporation of China. 'Lifting ban on mask export on June 1st Name-Based System continues' (*BCC*, 26 May 2020) <<http://www.bcc.com.tw/newsView.4216875>> accessed 15 October 2021.

Table 1: Evolution of facemask monopoly scheme in Taiwan

	Version 1	Version 2	Version 3
Start date	2 February	12 March	22 April – 31 May
Channels added to buy	Pharmacies, drugstores, district health centers	Pharmacies, drugstores, district health centers	Pharmacies, drugstores, district health centers
		eMask, NHI App	eMask, NHI App Convenience stores (insert NHI card)
Purchase date regulation	Yes	Yes, until 30 March	No
Pre-Order	No	Yes	Yes
Quota	2 masks / 7 days	3 masks / 7 days	9 masks / 14 days
Additional fee	None	NTD 7 each time	NTD 7 each time
Price per mask	NTD 8 → NTD 5	NTD 5	NTD 5

Note: Text in bold indicates the main selling channels.

2.6. End of Facemask Monopoly System on 1 June and Version 3.1 of Facemasks Distribution: a Monopoly and Free-market System Combination

With the pandemic coming under control in Taiwan, the government announced that eight million masks a

day would be expropriated starting on 1 June and ending on 30 December 2020.⁵⁷ The remaining masks can be sold domestically or exported.⁵⁸ Those who want to purchase masks at a controlled price will still be able to do so at participating convenience stores, pharmacies, and supermarkets countrywide, using their NHI cards. The government will continue providing nine masks (per person) every two weeks at five NTDs.⁵⁹ After fulfilling the government's requisition quota, mask producers can export facemasks, and citizens can ship masks overseas.⁶⁰

Although the government announced the parallel system on 26 May—less than one week before lifting the official ban on 1 June several sales channels, such as Costco, immediately launched the online pre-order on 26 May.⁶¹ The remaining sales channels, including convenience stores, e-commerce platforms, and pharmacy chains, participated in the competition.⁶² All sales channels were prepared well for ban-lifting. It is uncertain whether they manufactured/imported stockpiles before or after 1 June. However, from the perspective of facilitating market supply, lifting the ban boosted supply in the market.

Moreover, the market price for facemasks is competitive. Originally, the public was concerned that lifting rationing and open market sales might prompt retailers to increase prices.⁶³ Nevertheless, all channels have launched special offers.⁶⁴ There seem to be no concerns regarding the increased prices.

The average price of facemasks sold by all selling channels is above 5 NTD. Although the prices of meltblown have fallen,⁶⁵ sellers have priced masks slightly higher than 5 NTD under the name-based scheme.⁶⁶ When compared with the original prices before Facemask V.1, convenience stores sold them at 2 NTD per piece, or 40 NTD per box of ten pieces.⁶⁷ Pharmacy chains sold 50-piece and 100-piece boxes for 150 NTD

⁵⁷ Yuqing Cheng, 'Command Center decided to extend mask quota recruiting until the end of the year' (CNYes, 30 June 2020). <<https://news.cnyes.com/news/id/4500761>> accessed 15 October 2021.

⁵⁸ Eric Chang, 'Taiwan mask export ban to be lifted on 6/1' (Taiwan News, 6 May 2020). <<https://www.taiwannews.com.tw/en/news/3940506>> accessed 15 October 2021.

⁵⁹ Taiwan Today, 'Ban on surgical mask exports, domestic retail sales lifted June 1 in Taiwan' (Taiwan Today, 28 May 2020). <<https://taiwantoday.tw/news.php?unit=2,6,10,15,18&post=178316>> accessed 15 October 2021.

⁶⁰ Pan Pacific Agency, 'Mask exports cleared for June, real-name system still in effect in Taiwan' (Pan Pacific Agency, 28 May 2020). <<https://panpacificagency.com/news/china/05/28/mask-exports-cleared-for-june-real-name-system-still-in-effect-in-taiwan/>> accessed 15 October 2021.

⁶¹ China Times, 'Costco goes first to sell mask. The price for one reveals' (China Times, 6 May 2020). <<https://www.chinatimes.com/realtimenews/20200526004191-260405?chdtv>> accessed 15 October 2021.

⁶² Yahoo News. (2020), 'Ban on mask selling has lifted See when, where and the cost of mask purchase at once', 1 June 2020. <https://tw.news.yahoo.com/>.

⁶³ Chang (n 58).

⁶⁴ SC Yang and YC Chiang 'Convenience stores in Taiwan begin selling unrationed surgical masks' (Focus Taiwan, 1 June 2020) <<https://focustaiwan.tw/society/202006010014>> accessed 15 October 2021.

⁶⁵ Argus Media, 'China's melt-blown PP prices fall on lower mask demand' (Argus Media, 5 June 2020) <<https://www.argusmedia.com/en/news/2111781-chinas-meltblown-pp-prices-fall-on-lower-mask-demand>> accessed 15 October 2021.

⁶⁶ Keoni Everington, 'Taiwan's FamilyMart to start selling face masks on Tuesday' (Taiwan News, 1 June 2020) <<https://www.taiwannews.com.tw/en/news/3942739>> accessed 15 October 2021.

⁶⁷ Mimi HHS, 'Face mask price drops as government weighs in, factories return to work' (The China Post, 31

and 199 NTD, respectively. This was approximately twice the price before the restrictions. The price under the monopoly scheme became the *price floor* for all selling channels. However, as buying in boxes is more convenient, few consumers have complained about it. Additionally, there have been few discussions about the potential concerted action and anti-competitive behaviours under the Fair Trade Law of Taiwan. However, as Taiwan's facemask monopoly scheme was considered a great success in combating COVID-19 on the governmental website, the competition authority has remained silent about this issue thus far. With market oversupply, the facemask price in Taiwan returned to normal before January 2020 (2021). This problem is fixed to the market.

3. Concerns over the facemask monopoly system in Taiwan

3.1. Is it sufficient economic rationale?

Legal monopolies are companies that run as monopolies under government mandates. The government creates legal monopolies to offer a specific product or service to consumers at a regulated price. The main economic rationale for such a legal monopoly scheme lies in either tax purposes or social benefits.⁶⁸ Most legal monopolies are utilities and produce socially beneficial products that are necessary for everyday life. Consequently, the government allows producers to become regulated monopolies to ensure that consumers receive an appropriate amount of these products. Additionally, legal monopolies are often subject to economies of scale; therefore, it makes sense to allow only one provider.⁶⁹

The current facemask monopoly differs from a legal monopoly for many reasons. First, unlike a public administration or a company in charge of a utility, alcohol, or tobacco business, no single facemask production company exists. The government expropriated the facemasks manufactured by 66 companies. The government simply played the role of a 'single

buyer/wholesaler' and allowed retail transactions only through government-approved channels. Second, despite using the national budget to buy additional production equipment for private manufacturers, the government did not nationalise private manufacturers. Third, unlike the legal monopoly of alcohol or tobacco-allowing imports, such a facemask monopoly did not allow import competition for four months. Fourth, the coexistence of a partial monopoly and free competition scheme after 1 June 2020 also makes this scheme unique. Finally, such a monopoly failed to secure sufficient facemasks for several months.

What is the main economic rationale for returning to a facemask monopoly? To answer this question, it is necessary to examine the decision-making background. On 29 January 2020 Taiwan's Premier announced that the government was taking action to guarantee the domestic supply of facemasks and urged the public not to hoard masks.⁷⁰ The next day, the government began purchasing four million facemasks per day, with the monopoly scheme scheduled to begin on 6 February 2020.⁷¹ However, such strong government action raised public concerns over supply, resulting in panic buying, despite the government's announcement of a sufficient supply.⁷²

However, despite panic buying, the supply situation remained relatively stable. For instance, a convenience store chain promoted facemasks between 20 January and 11 February. One 50 pcs box cost only 220 NTD (7 USD), with a buy-one-get-another box for only one NTD offer.⁷³ The prices did not increase, and they fell.

Was there sufficient justification for moving from a free market, particularly in such a short period? The government merely announced its need to guarantee a domestic supply. However, this was insufficient to introduce a legal monopoly. The government's justification was clear. It expected the pandemic to worsen, and thus, it was necessary to take 'certain' measures to control medical necessities as early as possible.⁷⁴ Why then did the government's confident statement about supply security on 22 January change within

January 2020) <<https://chinapost.nownews.com/20200131-944889>> accessed 15 October 2021.

⁶⁸ Robin Room, 'The evolution of alcohol monopolies and their relevance for public health' (1993) 20 CDP 169; Anna Gilmore, Jeff Collin, and Joy Townsend, 'Transnational tobacco company influence on tax policy during privatization of a state monopoly: British American tobacco and Uzbekistan', (2007) 97 AJPH 2001.

⁶⁹ Eamma Hutchinson, 'Principles of Microeconomics, Topic 8: Imperfect Competition, 8.3 Why Monopolies Persist' (Pressbooks, 2017) <<https://pressbooks.bccampus.ca/uvicecon103/chapter/why-monopolies-persist/>> accessed 15 October 2021.

⁷⁰ S-P Yeh, M-H Chang, and M Mazzetta, 'Government taking steps to guarantee surgical face mask supply: Premier' (Focus Taiwan, 29 January 2020) <<https://focustaiwan.tw/society/202001290006>> accessed 15 October 2021.

⁷¹ Mien-Chieh Yang and Jake Chung, 'Virus fears: Government to purchase 4 million masks per day' (Taipei Times, 1 January 2020) <<http://www.taipetimes.com/News/front/archives/2020/01/31/2003730099>> accessed 15 October 2021.

⁷² Y-Y Liao and M Mazzetta, 'Face mask supply stable amid Wuhan coronavirus fears: MOEA' (Focus Taiwan, 22 January 2020) <<https://focustaiwan.tw/society/202001220020>> accessed 15 October 2021; Wave-base.com, 'Hi-Life Original medical mask price' (Wave-base, 22 January 2020) <<https://tw.discount.wave-base.com/sale/VDLd0/>> accessed 15 October 2021.

⁷³ Taiwan Today, 'Taiwan ramps up coronavirus-fighting efforts' (Taiwan Today, 30 January 2020) <<https://taiwan-today.tw/news.php?unit=2,6,10,15,18&post=170123>> accessed 15 October 2021.

⁷⁴ Everington (n 32).

one week? It was also unclear if there would be any thoughtful deliberation over such a decision, particularly during the important Lunar New Year holiday for the Taiwanese.

In Taiwan's experience, every time the government announces that a product is not in short supply, consumers panic-buy these products the next day, resulting in a supply shortage. For instance, soon after the 'sufficient facemasks' announcement, the government declared a sufficient stock of toilet paper, but the panic buying of toilet paper began in February.⁷⁵ Historically, such panic buying would not last long, and the market would soon return to normal. Therefore, it seems that ironically, the official announcement causes panic buying, providing an economic justification for the government to take 'certain' actions. This is *the first time in Taiwan's history* that panic buying led to a monopolistic buying/export ban system. Are there more lenient approaches than rigid regimes?

Despite possessing the world's third-largest facemask manufacturing capacity, Taiwan's local product capacity—only four million masks a day—was low. Thus, the government scheduled an increase to 10 million masks daily by the end of January.⁷⁶ Simply relying on MIT facemasks would be insufficient to tackle supply shortages. Citizens were exempt from special import permits to import 1,000 facemasks for self-use.⁷⁷ Originally, under the Pharmaceutical Affairs Act, those wanting to bring masks into the country must apply for a special import permit before doing so, regardless of the quantity.⁷⁸ However, arranging transportation and shipments are difficult for everyone.

Besides the lack of economic rationale, such schemes do not help alleviate panic buying or fulfil market needs. The reliance on 'physical' pickups from 6,280 pharmacies has resulted in long queues since February.⁷⁹ The launch of Facemask V. 3 ended these long queues in mid-April.⁸⁰ Such a monopoly system could combine the following 'original' channels to increase supply, including:

- The government could allow franchised pharmacies under a monopoly scheme to increase imports and sell non-MIT facemasks.
- The government could urge and allow, instead of closing, the original main selling channels (cosmeceuticals, convenience stores, online e-commerce platforms) to increase imports.
- The government could urge and allow the remaining non-original selling channels to sell non-MIT facemasks.

As the primary purpose is to increase the supply, it would be meaningless to discriminate between MIT and non-MIT facemasks. Consumers can buy MIT facemasks at pharmacies; however, why can they import only non-MIT facemasks from unreliable foreign e-commerce platforms? Why has the government temporarily prohibited the original selling channels from importing facemasks? This leads to concerns regarding distribution efficiency issues.

3.2. Low distribution efficiency

To buy the quota under Facemask V.1, consumers have to queue and present their NHI cards in person.⁸¹ Owing to the quantity quota for each pharmacy, there is no guarantee of availability. Despite the real-time facemask inventory apps, the long lines continued.

Taiwan's compulsory facemask scheme came quite later than the facemask rationing scheme. In early April 2020 (two months after the launch of the facemask rationing scheme), the local government launched a compulsory facemask wearing scheme.⁸² However, citizens' distrust of official claims and the monopoly system led to concerns about supply shortages and continuous queues. Despite introducing online purchases and convenience store/supermarket collection schemes under Facemask V.2, consumers remained stuck with the pharmacy channel until mid-April.

⁷⁵ Y-Y Liao and F Huang, 'MOEA plans new lines to roll out 10 million surgical masks a day' (Focus Taiwan, 31 January 2020). <<https://focustaiwan.tw/society/202001310024>> accessed 15 October 2021.

⁷⁶ Customs Administration, Ministry of Finance, 'COVID-19 Custom Regulations' (Customs Administration, Ministry of Finance, 4 June 2020) <<https://web.customs.gov.tw/cp.aspx?n=8FBE0EFF7E281849&s=C60A755346B658C5>> accessed 15 October 2021.

⁷⁷ T-Y Pan and Y-C Chiang, 'Taiwan loosens restrictions on surgical mask imports' (Focus Taiwan, 3 February 2020) <<https://focustaiwan.tw/society/202002030004>> accessed 15 October 2021.

⁷⁸ Taipei Times, 'Long lines to buy face masks, hospital visits down 10 percent' (Taipei Times, 3 February 2020) <<https://www.taipetimes.com/News/lang/archives/2020/02/03/2003730240>> accessed 15 October 2021.

⁷⁹ United Daily News, 'The line for mask-purchasing has been gone Pharmacist analyzed' (United Daily News, 21 April 2020) <<https://udn.com/news/story/7266/4508367>> accessed 15 October 2021.

⁸⁰ Everington, K. (2020c), 'Taiwan's FamilyMart to start selling face masks on Tuesday', 1 June 2020 <<https://www.taiwannews.com.tw/en/news/3942739>>.

⁸¹ National Health Insurance Administration, 'Name-based Mask Distribution System (Start from 3/12)' (National Health Insurance Administration, 7 April 2020) <https://www.nhi.gov.tw/english/Content_List.aspx?n=022B9D97EF66C076> accessed 15 October 2021.

⁸² Taiwan News, 'Wearing a face mask to become compulsory on the Taipei MRT from 4 April' (Taiwan News, 4 April 2020) <<https://www.taiwannews.com.tw/en/news/3909701>> accessed 15 October 2021.

However, this distribution system is extremely problematic. At the start of Facemask Version 1, a person could queue for hours for a maximum of four masks (quota was two in seven days per person, with permission to use two NHI cards per person) and pay 20 NTD every seven days.⁸³ Unlike queuing for luxuries, such as iPhones, fancy sneakers, and focusing on its reselling value, the 'life/health' value behind queuing for facemasks is unique.⁸⁴ As online transactions of facemasks require a government license, citizens cannot exchange or sell them freely. The facemasks had no reselling values. Furthermore, the resell premium from these facemasks is relatively low, not to mention the opportunity cost of queuing. Despite the increase to three pcs by the end of March and nine pcs in two weeks in April, the problem remained.

Interestingly, the online registration and buying system began in mid-March, but consumers seemed to prefer physical queuing. After promotion for weeks, only a small proportion of residents (796,000) ordered facemasks online in early April.⁸⁵ Fortunately, such queuing ended after the partial withdrawal of the pharmacies selling facemasks under Facemask V.3. Besides the productivity/opportunity cost/time cost,⁸⁶ queuing created crowd-gathering concerns, particularly during the months of acute infection in Taiwan. At different pharmacies, queues would be at least ten people, often 30 or 40, and more in some places. Although the government had already announced social distancing measures, such rules seldom applied to facemask queues for the fear of public outcry.⁸⁷

Ironically, it remains unclear why the government allowed crowds to gather dangerously to buy life-saving facemasks. Furthermore, why did it take over two months to curb these long queues?

Possibly, the *over-reliance on old-fashioned/communism-style physical purchases/collection channels* could be the source of the problem. In the era of information and communications technology (ICT), there are numerous e-commerce transactions and various

ways of delivering goods. Why was the government continuing physical purchases and collection, even under Facemask V 3.0? Why did they not follow the e-commerce model, wherein a consumer can buy the facemask quota online and is free to choose a delivery option? *Why are buying and collecting different?* The shortage of MIT facemasks did not mean having to collect on their own. Similarly, if there is a shortage of water supply, the water company may decide to ration water through random water outages.⁸⁸ However, there is no need to wait and collect water from reservoirs. Why did the government not allow pre-ordering online, randomly choose the consumer for the quota, and then distribute it by post? We believe that most individuals would prefer to pay for door options rather than queuing dangerously for hours. However, such a highly developed business-to-customer (B2C) model has no place in Taiwan's facemask monopoly system. Despite the greater convenience of collection from convenience stores, physical collection remains the norm. Consumers can buy facemasks online, without quantity limits, with delivery to the destination of their choice, from China's Taobao,⁸⁹ the US Amazon, or Taiwan's Yahoo (before February 2020). Such a B2C model seems to be more efficient and safer for facemask distribution.

3.3. Cost effectiveness

3.3.1. Quality concerns

Countries such as North Korea adopt a monopoly system that supplies daily necessities.⁹⁰ Such systems usually have concerns regarding sufficiency and quality. Besides long queuing, what is quality control?

Some medical staff complained about the weight and thickness of the facemasks.⁹¹ As the bacteria filter rate of 95% is qualified, fewer filtration materials are used.⁹² According to a study of the facemask factory MASgicK, one tone filter material can produce only 1.11 million facemasks with a 25 gsm filter layer, and 1.68

⁸³ Linda Lisa Maria Turunen, Marie-Cecile Cervellon, and Lindsey Drylie Carey, 'Selling second-hand luxury: Empowerment and enactment of social roles' (2019) 116 JBR 474.

⁸⁴ Lux Moritz and Peter Bug, 'Sole value—the sneaker resale market: an explorative analysis of the sneaker resale market', (2020) Reutlingen University; Shelly Yang, '796,000 Taiwan residents ordered face masks online: CECC', (China Post, 9 April 2020). <<https://chinapost.nownews.com/20200409-1138158>> accessed 15 October 2021.

⁸⁵ MM Kembe, ES Onah, and S Iorkegh, 'A study of waiting and service costs of a multi-server queuing model in a specialist hospital' (2012) 8 IJSTR 19.

⁸⁶ Roy Ngerng, 'Taiwan's digital response to COVID-19: impressive, but is privacy respected?' (The News Lens, 27 March 2020) <<https://international.thenewslens.com/article/133095>> accessed 15 October 2021.

⁸⁷ Taiwan Centers for Disease Control, 'CECC announces social distancing measures for COVID-19', (Taiwan Centers for Disease Control, 1 April 2020) <https://www.cdc.gov.tw/En/Bulletin/Detail/IHbdHSeA0j_P4rtnJcgT2g?typeid=158> accessed 15 October 2021.

⁸⁸ R K Amit and P Ramachandran, 'A fair contract for managing water scarcity' (2010) 24 WRM 1195.

⁸⁹ Taobao, 'Supreme Face Mask' (Taobao) <<https://item.taobao.com/auction/noitem.htm?itemid=553184082465&catid=0>> accessed 15 October 2021.

⁹⁰ Youn Suk Kim, 'Current North Korean economy: overview and prospects for change', 2008 NKR 16.

⁹¹ CNA, 2020b

⁹² Food and Drug Administration, 'Medical mask factors quality management guidelines' (Food and Drug Administration, 20 June 2020) <<https://www.fda.gov.tw/tc/includes/GetFile.ashx?id=f636973161683844034>> accessed 15 October 2021.

million with a 16.5 gsm layer. Thus, it is legal to make the facemasks thinner, but this also slightly reduces the filter function.⁹³ Recently, the study also identified that the filter rate of the Made in China (MIC) facemasks was much better than that of the MIT monopoly. Recently, two scandals involving Made in China masks were labelled as MIT, have occurred. However, one violator has a certificate that proves that the filter function of MIC masks is 99%, which is much better than that of MIT masks (95%).⁹⁴ Such evidence also proves the economic thoughts on the quality concerns of legal monopoly schemes.

Today, facemask factories produce facemasks without indicating their brand name on the product or package and do not need to show the related certificate. This causes moral risks in manufacturing low-quality facemasks. For instance, the government distributed 0.32 million facemasks with very short earlines to customers, resulting in many complaints and eventual recall.⁹⁵ In early October 2020, the eighth month of the name-based scheme, the MIT-labeled facemasks were found to have no pivotal layer of melt-blown nonwoven.⁹⁶ Furthermore, as the facemasks have only the MIT logo in a standardised paper envelope, it is difficult to determine whether they meet the related standards of the Federal Drug Administration or CE marking. Finally, antibacterial activity was an antibacterial function. Owing to the shortage of facemask packers, the fractional pack process was mainly conducted at over 6,000 pharmacies by hand, diluting the sterilisation process at the manufacturing level.

3.3.2. High costs of government-run e-commerce platforms

The Taiwanese government has spent significant sums of money to develop apps and e-commerce platforms to sell facemasks. Why did it not use well-established e-commerce platforms? There are several advantages to existing e-commerce platforms. First, consumers were in the habit of purchasing facemasks and related products before the coronavirus outbreak. Combining the private logistics of these e-commerce platforms with public posts could significantly reduce the need for physical collection, and thereby, queuing and crowds. Second, it would be cost-ineffective for the

government to develop its facemask e-commerce platform to sell *only one* product during this pandemic. The performance of the incumbent platform exceeds that of the government. The incumbents are already experienced in tackling over-purchasing and crash problems. Furthermore, citizens can stay at home and buy everything they need, with a few clicks. E-commerce 'shopping' platforms could play an important role in controlling the quality of facemasks and related products. This was the daily routine of the Taiwanese in past years; however, the government implicitly terminated the facemask sales of 'shopping' platforms for four months.

It may also be *free* to use existing platforms. Similar to the willingness of convenience stores to participate in facemask collection and distribution to facilitate customer visits, it is clear that e-commerce platforms are eager to participate. Adding one government-expropriated facemask item would not be a problem for existing platforms. It is unclear why the government decided to only 'expropriate' the pharmacies and convenience stores and rely on the relatively poor efficiency of the physical collection.

3.4. Unique essential necessities in Taiwan's history

The Executive Yuan declared facemasks as 'essential necessities' under the Criminal Act at the end of January 2020.⁹⁷ According to Article 251 of the Criminal Act, a person who stocks up on any such items and refrains from selling on the market, without justification and intending to raise the transaction price, shall be sentenced to imprisonment for no more than three years—short-term imprisonment or a fine of no more than 300,000 NTD may be imposed.⁹⁸ Originally, this clause was primarily applied to utilities such as basic provisions, agricultural products, or other food and drink consumer essentials; however, now, it also applies to facemasks. It seems the justification for creating such a facemask monopoly is associated with the 'utility' function.

However, it should be noted that before the COVID-19 pandemic, no one had committed this offence under Art. 251 of the Criminal Act since its promulgation on 1 September 1928. The reason for this is uncertain.

⁹³ China Times, 'Huang sarcasm about masks getting thinner, Netizens laugh' (China Times, 6 April 2020). <<https://www.chinatimes.com/realtimenews/20200406004171-260407?chdtv>> accessed 15 October 2021.

⁹⁴ Keoni Everington, 'Taiwan company caught importing Chinese masks for ration program' (Taiwan News, 4 September 2020) <<https://www.taiwannews.com.tw/en/news/4001668>> accessed 18 February 2021.

⁹⁵ New Talk, 'Yilan 0.32 million short-earline mask been thrown away' (New Talk, 29 April 2020). <[https://](https://newtalk.tw/news/view/2020-04-29/398834)

newtalk.tw/news/view/2020-04-29/398834> accessed 15 October 2021.

⁹⁶ TVBS News, 'Taiwan facemask national team screw up again! Facemasks without Meltblown Nonwoven found' (TVBS News, 8 October 2020). <<https://news.tvbs.com.tw/life/1397378>> accessed 15 October 2021.

⁹⁷ Ministry of Justice, 'Hoarding or jacking up prices of facemasks will face penalty' (*Ministry of Justice*, 31 January 2020) <<https://www.moj.gov.tw/cp-21-126293-814cb-001.html>> accessed 15 October 2021.

⁹⁸ Criminal Code of the Republic of China 2020, s #.

Yet, perhaps it is better to deal with such an issue under the competition law, that is, the Fair Trade Act.⁹⁹ In addition, the open designation clause of 3, 'Essential necessities, other than those described in the preceding two paragraphs, as announced by the Executive Yuan, was introduced under the background of panic buying toilet paper in 2018.¹⁰⁰ There was panic buying toilet paper in Taiwan in February 2021.¹⁰¹ Yet, the first and only items designated by the Executive Yuan so far are facemasks.

As for essential necessity, the first issue is price setting. The justification for a legal monopoly is cheaper, such as cheap water and electricity. However, the facemask price, 8 and 5 NTD, under the monopoly scheme, remained higher than prices before February (NTD 1–3 per piece). The government has never justified the rise in transaction prices for five NTDs.

Under the aforementioned clause, 'stocking up on any such items and refraining from selling on the market' should be avoided. The government prosecuted several factories and suppliers to compel them to release facemasks on the market also allowing a slightly higher price than that of the government. For instance, one pharmacy-sold 0.21 million facemasks at 10 NTD per piece purchased at 6 NTD.¹⁰² However, the government allowed sale at tax-free stores at the airport at the price of three masks for 50 NTDs.¹⁰³ Such prosecution resulted in *chilling effects* that the stockpile would not be openly released into the market, as suppliers were uncertain of the pricing acceptable to the government. The government did not set a standardised price, only chased cases, and prosecuted them, going against the

priority of increasing supply. The non-release of the stockpile could also explain why millions of facemasks began appearing in sales channels after the partial abolition of the monopoly scheme at the end of May.

The black market existed for these underground stockpiles, as in all monopoly systems.¹⁰⁴ The black market serves those that escape government prosecution.¹⁰⁵ Additionally, as the government allows individuals to import 1,000 facemasks, sales of over-imported ones are more likely. Owing to Taiwan's many small industrial areas mixed with residential areas, it is difficult to identify and follow the manufacturing and sales of facemasks. In addition, a unique transaction system emerged on e-commerce platforms. To bypass government scrutiny, online stores began displaying surgical facemasks as non-surgical facemasks while shipping the former to buyers.

Furthermore, the government began stockpiling such items and refrained from selling on the market. With the global facemask shortage, the monopoly system in Taiwan began stockpiling facemasks for 'diplomatic' purposes.¹⁰⁶ Despite the queues, the government donated 10 million facemasks to the US,¹⁰⁷ 1.3 million to eight EU states in mid-April,¹⁰⁸ and 0.5 million to Canada at the end of April.¹⁰⁹

These donations are highlighted as 'Mask diplomacy'.¹¹⁰ Could this be an *unprecedented* governmental action for essential necessities? However, as this relates to Taiwan's global status, the government used this opportunity to win support for WHO or World

⁹⁹ Fair Trade Act 2017, s #.

¹⁰⁰ Revision of Criminal Act 2019.

¹⁰¹ Taipei Times, 'Virus Outbreak: Women sparked panic buying of toilet paper: Officials' (*Taipei Times*, 12 February 2020) <<http://www.taipetimes.com/News/taiwan/archive/s/2020/02/12/2003730827>> accessed 15 October 2021.

¹⁰² China Times, 'Selling 10 NT with 6 NT buying Kaohsiung pharmacy were illegal selling 0.21 million masks' (*China Times*, 16 March 2020) <<https://www.chinatimes.com/realtimenews/20200316004077-260402?chdtv>> accessed 15 October 2021.

¹⁰³ Taiwan Centers for Disease Control, '50 NTD for Three Facemasks at the airport' (*Taiwan Centers for Disease Control*, 20 March 2020) <https://www.cdc.gov.tw/Bulletin/Detail/_1hVJCbMAV_JQ4CkiZolQ?typeid=9> accessed 15 October 2021.

¹⁰⁴ SY Oh, 'Shortage in the North Korean economy: characteristics, sources, and prospects' (1995) KJNU.

¹⁰⁵ Liberty Times Net, 'Mask black market selling Police asked not to make money from disaster' (*Liberty Times*, 11 March 2020) <<https://news.ltn.com.tw/news/life/paper/1357896>> accessed 15 October 2021.

¹⁰⁶ Ministry of Foreign Affairs, 'MOFA announces donation of 10 million face masks to the US, Europe, diplomatic allies to extend humanitarian assistance in wake of COVID-19' (*Ministry of Foreign Affairs*, 1 April 2020) <https://www.mofa.gov.tw/en/News_Content.aspx?n=1EA

DDCFD4C6EC567&s=2A434037CB463FEE> accessed 15 October 2021; Ministry of Foreign Affairs, 'Taiwan can help, and Taiwan is helping!' (*Ministry of Foreign Affairs*, 1 April 2020) <<https://www.mofa.gov.tw/cp.aspx?n=3FCC7ED69E5E3E5D>> accessed 15 October 2021.

¹⁰⁷ Ministry of Foreign Affairs, 'MOFA announces donation of 10 million face masks to the US, Europe, diplomatic allies to extend humanitarian assistance in wake of COVID-19' (*Ministry of Foreign Affairs*, 1 April 2020) <https://www.mofa.gov.tw/en/News_Content.aspx?n=1EA DDCF4C6EC567&s=2A434037CB463FEE> accessed 15 October 2021.

¹⁰⁸ C-N Lin, 'Taiwan to donate 1.3 million masks to eight EU states' (*Taipei Times*, 15 April 2020) <<https://www.taipetimes.com/News/taiwan/archives/2020/04/15/2003734654>> accessed 15 October 2021.

¹⁰⁹ K Chan, 'Taiwan donates 500,000 surgical masks to Canada' (*Daily Hive News*, 28 April 2020) <<https://dailyhive.com/vancouver/taiwan-canada-mask-donation>> accessed 15 October 2021.

¹¹⁰ S Chase, 'Mask diplomacy: Taiwan donates half a million masks to Canada with appeal for closer ties' (*The Globe and Mail*, 28 April 2020) <<https://www.theglobeandmail.com/canada/article-mask-diplomacy-taiwan-donates-half-a-million-masks-to-canada-with/>> accessed 15 October 2021.

Health Assembly (WHA) membership under the Chinese (PRC) threat.¹¹¹ Taiwan hopes that its facemask gifts and related COVID-19 essential necessities to help other countries will help it to win approval, especially because these masks are 'MIT-labelled'. However, the WHO did not invite Taiwan to the 71st WHA.¹¹² Such tension could be why the government discouraged retailers from importing MIC facemasks despite Chinese factories boosting production since March.¹¹³ Taiwan's government would rather allow citizens to obtain sufficient supply and let them queue on the streets for diplomatic purposes than import MIC facemasks. Again, facemasks as 'essential necessities' are a unique proposition.

Finally, why did Taiwan not import at the time of shortage and when the world was already importing facemasks from China? Why did it continue its facemask monopoly scheme? The answer lies in the importance of facemasks in *industrial development* policies. The Ministry of Foreign Affairs released a promotional video for the National Team of Mask Production.¹¹⁴ The message was to be proud of Taiwan becoming the second-largest producer of surgical masks.¹¹⁵ To provide stable support for such a national team, a facemask monopoly system refraining from cheap MIC products could be crucial. However, because of the reference price effects of 5 NTD under the monopoly scheme, the MIC facemasks could be sold on the market at a higher price than before.

Thus, Taiwanese citizens may oversubsidize both the MIT and MIC facemasks. Additionally, non-national team facemasks are now sold on the market at a price of over five NTDs. Such a strategy may not be helpful for MIT facemasks to compete with cheap MIC ones in the international market.

Given that such a facemask monopoly scheme is like a utility business, transparency is necessary. It is necessary to emphasise that the real and precise daily production number under such a monopoly system is unclear.

The system lacks transparency. For instance, the MPs asked the government to provide exact numbers; however, government officers denied this request.¹¹⁶ The production capacity has broken new records.¹¹⁷ In early April, one MP found that at least 760 million facemasks were missing.¹¹⁸ Under the utility regulation norm, transparency is important for citizens to supervise such a monopoly system.¹¹⁹ Besides this unprecedented opacity, it is perhaps the *most profitable utility* business in Taiwan's history, as the government purchased all facemasks at 2.4 NTD (before August) and 3.1 (after August) NTD but sold them at 5 NTD. Without public information, the public cannot scrutinise these measures.

Finally, the high price of 5 NTD also creates an incentive for *arbitrage* under current monopoly and free-market coexistence situations. The Carry Mask was apprehended by the national facemask team for import MIC facemasks for the facemask monopoly scheme and sell their MIT facemasks on the free-market.¹²⁰

As the expropriation price is 2.4 NTD (original price for MIT facemasks), selling MIT facemasks at a price higher than 5 NTD (MIC masks are unavailable at this price), Carry Mask could maximise its profit in both markets. Another example is Medtecs, which sold facemasks made in the Philippines under the name-based scheme in September.¹²¹ Such arbitrage features made such 'essential' necessity of facemasks unique once again.

¹¹¹ Keoni Everington, 'Tedros ducks question about Taiwan's membership in WHA' (*Taiwan News*, 7 May 2020) <<https://www.taiwannews.com.tw/en/news/3929535>> accessed 15 October 2021.

¹¹² Ministry of Foreign Affairs, 'MOFA expresses regret at World Health Organization's failure to invite Taiwan to 71st World Health Assembly' (*Ministry of Foreign Affairs*, 8 May 2020) <https://www.mofa.gov.tw/en/News_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D761D34A9A&s=3F3763162BF9EF7B> accessed 15 October 2021.

¹¹³ D Ren, 'China boosts face mask production capacity by 450 per cent in a month, threatening a glut scenario' (*South China Morning Post*, 16 March 2020) <<https://www.scmp.com/business/companies/article/3075289/china-boosts-face-mask-production-capacity-450-cent-month>> accessed 15 October 2021.

¹¹⁴ Ministry of Economic Affairs. (2020), 'National mask production and supply are being ensured so that people can celebrate New Year's without fear or stockpile masks' (Ministry of Economic Affairs, 22 January 2020) <https://www.moea.gov.tw/MNS/populace/news/News.aspx?kind=1&menu_id=40&news_id=88545> accessed 15 October 2021.

¹¹⁵ *Ibidem*.

¹¹⁶ Apple Daily, 'The data of mask were gone for two weeks Members of Legislative Yuan criticized on Administrative Yuan' (*Apple Daily*, 7 April 2020) <https://hk.appledaily.com/member/twdaily/article/1_1728807_1> accessed 15 October 2021.

¹¹⁷ P-W Wu, Y-H Chen, W-T Chen, and K Lin, 'Taiwan could boost daily mask output to 19 million by mid-May' (*Focus Taiwan*, 28 April 2020) <<https://focustaiwan.tw/business/202004280022>> accessed 15 October 2021.

¹¹⁸ Storm Media, 'Where is the production capacity? SARS made factories coming back to Taiwan for expansion COVID-19 period happens masks shortage again' (*Storm Media*, 7 February 2020) <<https://www.storm.mg/article/2260945>> accessed 15 October 2021.

¹¹⁹ Al MM Afghani, 'The transparency agenda in water utilities regulation and the role of freedom of information: England and Jakarta case studies' (2009) 20 *JWL* 129.

¹²⁰ Keoni Everington, 'Taiwan News, Taiwan company caught importing Chinese masks for ration program' (*Taiwan News*, 09 April 2020) <<https://www.taiwannews.com.tw/en/news/4001668>> accessed 15 October 2021.

¹²¹ CNA, 'China mask economy burst over-supply problems remain' (*CAN*, 25 March 2020) <<https://www.cna>>

3.5. Privacy Intrusion

Taiwan introduced a name-based rationing system in February 2020.¹²² To purchase their weekly quotas, citizens must show and insert their NHI cards at pharmacies. Individuals can buy facemasks for others by presenting their NHI cards. Such measures raise concerns about privacy intrusion or violations of personal data protection or related rules.¹²³ According to Article 16 of the National Health Insurance Act, the NHI card may not store any information not used for medical care or those unrelated to the insured receiving insurance medical services. Facemask transaction information is not considered as the medical care information.

Moreover, there could be further problems with purchase convenience. For instance, individuals may give their NHI cards to others for purchase, increasing the risk of fraudulent use. Furthermore, some buyers who are close friends or clients of the pharmacies may leave their cards in the pharmacy, leading to problems of fairness in such a name-based system and concerns of fraudulent use.

Despite such concerns and complaints, the name-based system continues to rely on the NHI card. After Facemask Version 3 in May, convenience stores/supermarket chains took over the role of pharmacies. Citizens can order by inserting their cards into the machines of convenience stores.¹²⁴ This is perhaps the first time Taiwan has had such wide used NHI cards in private non-pharmacy locations. Another concern is card cracking during insertion, stores using personal data for further promotion purposes, and so on.

3.6. Rule of law and proportionate principle

Apart from the controversial designation of facemasks as essential necessities under the Criminal Act, and the wide use of NHI cards under the National Health Insurance Act and related data protection law (Personal Data Protection Act), a more fundamental question is the legal basis of expropriation and the creation of such a rationing regime.

The legal basis of expropriating facemasks lies in Article 54 of the Communicable Disease Control Act

(Communicable Disease Control Act, Laws and Regulations). This indicates that during the period when the central epidemic command centre is in existence, government organisations at various levels, following instructions of the commanding officer, may *expropriate* or requisite private land, products, buildings, devices, facilities, pharmaceuticals, and medical devices for disease control practices, facilities to treat contamination, transportation means, and other designated disease control resources announced by the central competent authority, and adequate compensation shall be made to appropriate parties. Therefore, facemasks were 'products...for disease control', and could be subject to expropriation and compensation.

However, several issues remain. First, although the law allows such expropriation, it does not mean that the government can develop a monopoly supply system. Under the original meaning, facemask manufacturers must provide certain quantities to the government, and the government compensates for them. This serves as mandatory 'emergency procurement' and was the practice during the SARS period as well. As noted before, it focuses on N95 facemasks, but now applies to all surgical facemasks.

However, such a weak expropriation clause became the legal basis of the current facemask monopoly scheme and went even further. Compared with the ordinary legal monopoly scheme, which allowed the sale of imported products, the government restricted business freedom under its legal monopoly scheme until the end of May. Notably, this is the first time that the government has expropriated private property and does not distribute products in Taiwan.

Compared with the former monopoly system in Taiwan, the rule of law in the facemask monopoly remains weak. As a Japanese colony, the Monopoly Bureau of the Taiwan Governor's Office was responsible for all liquor and tobacco products in Taiwan, including opium, salt, and camphor.¹²⁵ In 1945, after World War II beer production was assigned to the Taiwan Provincial Monopoly Bureau. The following year, Taiwanese beer and tobacco production was assigned to the Taiwan Tobacco and Wine Monopoly Bureau.¹²⁶ Owing to colonial rule and martial law since the forties,

com.tw/news/acn/202003250215.aspx> accessed 15 October 2021, <<https://focustaiwan.tw/society/202003230019>> accessed 15 October 2021.

¹²²Everington K. (2020e), 'Taiwan's new mask-rationing system kicks in on Thursday' (*Taiwan News*, 4 February 2020) <<https://www.taiwannews.com.tw/en/news/3870428>> accessed 15 October 2021.

¹²³ Cite Media Holding Group, 'From name-based system to personal data protection: The line between technology and privacy is debatable' (*NetAdmin*, 2020) <<http://www.netadmin.com.tw/netadmin/zhtw/viewpoint/390168BA249B45E7947BF13F5BC6E2EE>> accessed 15 October 2021.

netadmin.com.tw/netadmin/zhtw/viewpoint/390168BA249B45E7947BF13F5BC6E2EE> accessed 15 October 2021.

¹²⁴ *Ibidem*.

¹²⁵ Taiwan Tobacco & Liquor Corporation, 'History' <https://www.ttl.com.tw/en/about/about_06.aspx> accessed 15 October 2021.

¹²⁶ Taiwan Today, 'The Taiwan Tobacco and Wine Monopoly Bureau' (*Taiwan Today*, 1 July 1956) <<https://taiwantoday.tw/news.php?unit=8,8,29,29,32,32,45&post=14072>> accessed 15 October 2021.

there was no need for laws to implement such a monopoly system. Although the establishment of a monopoly bureau signifies compliance with the rule of law, the legal basis of a comprehensive law is necessary for the legal monopoly in the utility sector, such as the electricity and water sectors (Laws and Regulations Database of the Republic of China).

In February 2020, the inability to predict the future development of facemask supplies due to a lack of information could justify an expropriation scheme. To fulfil the proportionality principle, it is necessary to observe the market development of facemasks. As the world's largest producer and exporter of facemasks, China began to mass-produce facemasks in March. Therefore, the justification for such a monopoly system has already diminished. Furthermore, such a monopoly scheme could not prevent long queues, as relying on MIT facemasks could not alleviate problems. Simultaneously, the market supply of facemasks in neighbouring countries stabilised (e.g. Singapore, South Korea, Japan, and Hong Kong), with no facemask monopoly schemes. Thus, it seemed less *proportionate* to continue such a scheme after mid-March. Perhaps the primary reason why the monopoly scheme partially ended in May is not so much about fulfilling the needs of citizens, but national protectionism under the industry policy. The Taiwanese government appeared to worry about price competition from MIC facemasks. However, this worry proved to be unfounded after 1 June as all facemask prices were above the government price of 5 NTD, and citizens preferred buying MIT facemasks, despite such masks not having a better filter function.

Recently, to avoid the surrender of all facemasks and to maximise profits, the second large facemask manufacturer was caught illegally selling 22 product lines without permission and fined in September.¹²⁷ This shows that even the second-largest manufacturer of facemasks in Taiwan would risk its reputation to sell more facemasks on the free market at a much higher price (over 5 NTD).

4. Conclusion

Basic economic knowledge on increasing supply to tackle shortages dictates the following: (1) increase imports and local production as much as possible, (2) release stockpiles, and (3) ban exports of certain products. In Taiwan, the facemask monopoly focuses only on increasing local supply and banning exports, while most countries focus on all three aspects. The rigid monopoly system in Taiwan forced the stockpile into the black market or only released it after 1 June, while

the implicit 'import ban' on the original facemask selling channels relied on limited MIT facemasks to tackle the sudden increase in demand. The facemask monopoly scheme failed to provide sufficient supply for several months.

During a pandemic, it is necessary to consider both supply sufficiency and efficient and safe distribution methods. Unfortunately, the Taiwanese had to rely on the physical collection of facemasks and long queues for two months, increasing fear of COVID-19 transmission. By 7 April 2021 only 498,329 cases were tested.¹²⁸ The government could not know the number of infected people, including those infected while waiting in long queues for facemasks. However, lessons from other countries are also helpful. E-commerce platforms (Amazon in the US, T-mall, or Taobao in mainland China) already provide daily necessities and medical products, reflected in their stock market prices or windfall revenues. Moreover, take-away food platforms have experienced significant profits. Irreplaceable door-to-door logistics services are essential for preventing crowds and reducing physical contact. However, the Taiwanese government excluded such important e-commerce platforms from providing government-expropriated facemasks and slowly developed its single-product e-commerce platform.

Taiwan is perhaps the only country to introduce such *extreme* measures to create a legal monopoly scheme for facemasks during the coronavirus outbreak. When compared with other legal monopolies, such as tobacco, alcohol, and utilities, it seems to be the first of its kind in Taiwan's history. Certain rationing measures, such as emergency expropriation by the government, price ceiling, and purchase quotas, are sufficient to tackle the supply crisis, considering Taiwan's SARS experience or that of neighbouring countries, such as South Korea, Hong Kong, and Singapore. Moreover, from the experience of the tobacco or alcohol monopoly scheme, sudden factual freezing of the import license of the already-established selling channels of facemasks would be contrary to increasing the supply in the market.

Even an unprecedented humanitarian crisis, such as the COVID-19 pandemic, seems unable to justify the creation of a legal monopoly scheme. Countries without such schemes and relying on a combination of free markets and certain rationing measures faced only short-term supply shortages and price hikes. However, ironically, the shortage in Taiwan, as the world's second-largest exporter of facemasks, lasted longer than countries relying on imports. Therefore, a legal monopoly may not be very helpful in providing the right price signal to the market. The government's interven-

¹²⁷ UDN News, 'Kaohsiung municipal health bureau fined Jingxin 2 million NTD for illegally setting up twenty-two production lines' (*UDN News*, 25 September 2020)

<<https://udn.com/news/story/121646/4887501>> accessed 18 February 2021.

¹²⁸ Taiwan Centers for Disease Control (n 8).

tion in the free market leads to longer supply shortages than in neighbouring countries. The scheme also suffers from the main disadvantages of a monopoly, such as higher prices of 8–5 NTD and high costs of creating an e-commerce platform, poor quality and service, potential limitations to innovation, and consumer exploitation and bullying, despite high outputs from government investment machines.

The pandemic persists, and a second or third wave is highly likely. Despite Taiwan's significant experience in fighting COVID-19, this study does not recommend that the rest of the world follow Taiwan's legal monopoly scheme for facemasks. Perhaps a lighter rationing intervention, such as the Taiwanese government's emergency procurement of facemasks and distributing them to needy sectors during the SARS outbreak is sufficient for handling any shortage risks. A legal monopoly creation is costly, has poor efficiency, and is prone to government abuse as a diplomacy machine, not to mention the precondition of being the second-largest producer of facemasks worldwide.

Summary Report Concerning Responses to COVID-19 in the USA

E. Donald Elliott

Abstract. This article concludes that the U.S. response to COVID-19 was hampered by politics; the decentralization of the U.S. political system and the “fee for service” approach of the U.S. healthcare system. However, the technological prowess of U.S.-based pharmaceutical companies resulted in the development of effective mRNA vaccines in record time.

Keywords: *COVID-19, Vaccine Mandates, Travel Bans, Federalism, Decentralization*

1. Introduction

With almost 600,000 deaths and over 33 million confirmed cases of COVID-19 in the U.S.¹ (and estimates of actual cases as high as 83 million²), no fair-minded person would judge the U.S.’s initial response to the pandemic as satisfactory. On the other hand, today - roughly sixteen months into the pandemic - half of adults in the U.S. have been fully vaccinated and infection rates are declining sharply.³ However, vaccination was voluntary in the U.S. at the time this was written and substantial resistance to taking the vaccines has arisen among certain groups.⁴ This reluctance has spawned numerous schemes, including a \$1 million lottery in Colorado,⁵ to try to incentivize reluctant people to consent to take the vaccine. In addition, some private employers are beginning to require vaccination as a condition of allowing employees to return to work in person.⁶ As of this writing, it is not clear whether the current system of voluntary vaccinations plus private employer requirements will result in sufficient immunizations to achieve

herd immunity. (Subsequently vaccine mandates were promulgated for large companies at the national level and in some localities, but have been challenged with mixed results in the courts.⁷)

The thesis of this paper is that the initial response to COVID-19 in the U.S. was hampered by structural weaknesses in the U.S. political and healthcare systems that caused them to be ill-adapted to deal decisively with a pandemic on the scale of COVID-19 but presumably have numerous advantages and offsetting benefits in other areas.⁸ These structural features did not inevitably doom the U.S. to respond as it did; individual actors in politics, the administrative state, and the media all could have behaved differently. Rather, those features constituted weaknesses that created incentives for the counter-productive but predictable behaviors that we describe.

In the long run, however, the U.S.’s technological and administrative ability to develop and deploy an effective vaccine may eventually overcome some of the U.S.’s initial administrative problems and missteps, but not until after we suffered a large number

¹ <<https://www.nytimes.com/interactive/2021/us/covid-cases.html>> accessed 5 July 2021.

² <<https://www.wsj.com/articles/the-virus-lessons-were-getting-wrong-11612562285>> accessed 5 July 2021.

³ <<https://www.npr.org/sections/coronavirus-live-updates/2021/05/25/1000171685/half-of-all-u-s-adults-will-be-fully-vaccinated-against-covid-19-as-of-tuesday>> accessed 5 July 2021.

⁴ <<https://www.scientificamerican.com/article/7-ways-to-reduce-reluctance-to-take-covid-vaccines/>> accessed 5 July 2021 (“Vaccine reluctance looms large among certain subgroups: 42 percent of Republicans, 35 percent of Black adults and 33 percent of essential workers, for varying reasons”).

⁵ <<https://www.denverpost.com/2021/06/04/colorado-covid-vaccine-lottery-winner/>> accessed 5 July 2021.

⁶ <[https://www.npr.org/2021/05/28/1001116485/for-employers-the-law-is-mostly-on-their-side-when-it-comes-to-vaccines#:~:text=Etics,Eploers%20Can%20\(Mostly\)%20Require%20Vaccines%20For%20Workers%20Returning%20To%20The,But%20woers%20can%20clim%20exceptions](https://www.npr.org/2021/05/28/1001116485/for-employers-the-law-is-mostly-on-their-side-when-it-comes-to-vaccines#:~:text=Etics,Eploers%20Can%20(Mostly)%20Require%20Vaccines%20For%20Workers%20Returning%20To%20The,But%20woers%20can%20clim%20exceptions)> accessed 5 July 2021.

⁷ For a summary of cases, see <<https://www.networkforphl.org/wp-content/uploads/2021/10/Western-Region-Memo-COVID-Vaccine-Mandate-Cases-1.pdf>> accessed 5 July 2021.

⁸ For more detail on these points, please see the PowerPoint slides that accompanied my oral presentation with a co-author on March 5, 2021 <https://www.globalpandemicnetwork.org/news_events/webinar-5th-march-2021/> accessed 5 July 2021.

of deaths and illnesses, some of which might have been avoided by better planning and preparation. This pattern is not atypical of other responses by the U.S. to crises, which has been compared to that of a “sleeping giant” that is slow to awaken but can deploy strong measures once it does.⁹

2. Lesson One: Don’t Hold a Presidential Election in the Midst of a Pandemic

One over-riding lesson to be learned from the U.S. response to the COVID-19 pandemic is “*Don’t try to hold a U.S. presidential election while trying to contain a pandemic.*” The on-going presidential election made it very difficult to coordinate a unified national response. In the U.S., two competing political parties are evenly divided in terms of popular support, and each of them has allies in the media and in control of state governments. In addition, in the U.S. governmental structure, our states possess the primary authority to respond to a public health crisis in the absence of an executive or legislative declaration vesting emergency powers in the national government. The Trump Administration decided not to take control nationally on an emergency basis, but instead to provide non-binding “guidance” and recommendations at the national level, but to leave most implementation to the governors of our fifty states. This approach has not changed substantially since President Biden took office in January, 2021.

The states responded in different ways, with some imposing more stringent mandatory controls than others. Again, this was not an inevitable response, but it is typical of U.S. political culture that often favors a diversity of responses on a decentralized basis. Our decentralized approach that divides government power among many power centers has its strengths and weaknesses. On the positive side, it protects our liberties and like diversified strategies in other areas of life, it is never entirely right or wrong, but allows room for experimentation and learning.¹⁰ In this instance, we learned from experimentation at the state level that those states with more lenient policies toward wearing masks and shutting down businesses appear to have done roughly as well at preventing the spread of the virus as those with more

aggressive government controls which were implemented at substantial economic cost but ended up having little if any public health benefit¹¹ (and some even argue had adverse effects on public health via increase rates of depression and drug use¹²). However, our states differ widely in terms of a number of factors relevant to the spread of an infectious disease such as population density and political culture regarding centralized government control. Consequently, it would have been undesirable to try to impose a single national approach – at least, according to the conservative republicans who formed part of President Trump’s base.

3. Examples of the Pandemic as a Political Issue

The politicization of mask wearing became symbolic of competing philosophies between our two political parties. For example, then-candidate Joe Biden showed up for the second debate with then-President Trump twirling a face mask around his finger for no reason other than to remind 60 million T.V. viewers that Biden assiduously wore a mask, while President Trump was less diligent in doing so. The press repeatedly noted the lack of mask wearing at Trump rallies -- and of course, Trump contracted the virus and was rushed to Walter Reed Hospital for emergency treatment.

Another example of the politicization of responses to the virus was Vice Presidential candidate, Kamala Harris, the first woman of color to run for that position on a major party ticket, stating on national television that she would not take a vaccine if it were recommended by then-President Trump.¹³ However, politicization of scientific issues was not limited to one political party. As the crisis continued, a number of conservative Republican governors, perhaps typified by Florida’s Ron DeSantis, became leaders in opposing policies recommended by some scientific “experts” from the permanent administrative government, such as Dr. Anthony Fauci, head of the National Institute for Allergy and Infectious Disease at our National Institutes of Health. The governors focused particularly on topics such as reopening schools and wearing face masks in public places. The credibility of experts

⁹ <https://en.wikipedia.org/wiki/Isoroku_Yamamoto%27s_sleeping_giant_quote> accessed 5 July 2021.

¹⁰ See E. Donald Elliott, *Why the United States Does Not Have a Renewable Energy Policy*, 43 Environmental Law Reporter 10095 (Feb. 2013) <https://digitalcommons.la.w.yale.edu/cgi/viewcontent.cgi?article=6123&context=ss_papers> accessed 5 July 2021.

¹¹ <<https://www.americanexperiment.org/states-that-stayed-open-fared-much-better-than-states-that-shut-down/>> accessed 5 July 2021.

¹² <<https://www.kff.org/coronavirus-covid-19/issue-brief/mental-health-and-substance-use-considerations-among-children-during-the-covid-19-pandemic/>> accessed 5 July 2021.

¹³ <<https://www.masslive.com/politics/2020/10/covid-vaccine-amid-growing-distrust-kamala-harris-says-she-wont-take-it-if-it-has-presidenttrumps-support.html>> accessed 5 July 2021.

such as Dr. Fauci with the public was undermined, because their advice kept changing as we learned more about the virus.¹⁴ On the other hand, Democrat governors such as New York's Andrew Cuomo presented a contrast to President Trump leadership – or lack thereof – depending upon one's political affiliations and sources of news.

More importantly, very few states restricted travel from other states, and the few that did generally only required testing or quarantine periods rather than prohibiting travel entirely. Although we do have a constitutional right to travel from one state to another,¹⁵ it would not necessarily have been illegal to limit the right of citizens to travel to other states on an emergency basis; however, if a travel ban had been adopted and were challenged in court, the government would have had to persuade an independent judiciary that the risk of COVID transmission from interstate travel was sufficient to justify such extreme measures and that less intrusive measures were insufficient. But it would have been very difficult politically and contrary to our traditions to restrict travel within the U.S., and none of our governors or the national government even tried to make that argument. We contrast that feature of U.S. political culture with the decision by China to lock down 50 million people, which is credited by some analysts with halting the spread of the virus in China,¹⁶ but discounted by others as merely delaying the spread by only a few days.¹⁷ We mention China not to endorse its more “authoritarian” approach,¹⁸ but merely to show the contrast between our two different political cultures, such that some public health measures acceptable in other countries were not acceptable politically in the U.S.

4. Lesson Two: The U.S. Healthcare System is Not Optimized for Pandemics.

The structure of the U.S. healthcare system is largely still based on private, for-profit healthcare

providers and a fee-for-service model. Healthcare in the U.S. is a \$16 trillion-a-year business, roughly the size of the economy of Italy. This system has proved effective at providing high quality, technologically advanced healthcare to those who can afford it. However, there are still strong disparities in the quality of care received based on economic and ethnic status. These disparities resulted in COVID-19 hitting some disadvantaged and under-served groups in the U.S. harder than the population generally. As stated by our Centers for Disease Control,

“There is increasing evidence that some racial and ethnic minority groups are being disproportionately affected by COVID-19. Inequities in the social determinants of health, such as poverty and healthcare access, affecting these groups are interrelated and influence a wide range of health and quality-of-life outcomes and risks.”¹⁹

The charts below (in the next page) show death rates by ethnicity.

A second criticism of the U.S. healthcare system is that the Food and Drug Administration's protocols for approving vaccines are designed for normal times and place a higher value on preventing side effects to individuals than on public health.²⁰ While the U.S. did eventually develop highly effective vaccines using innovative technology relying on genetically-engineered messenger RNA rather than the traditional approach of exposure to a deactivated pathogen, and deployed them in record time under an “emergency use authorization,” still the U.S. was slower than its international competitors including both China and Russia to deploy vaccines. Skeptics have noted that the FDA and the companies involved delayed announcing that their vaccines were effective until a week *after* the U.S. presidential election, although they undoubtedly knew that preliminary data from on-going trials were showing encouraging results.²¹ More charitable observers attribute the delay to a

¹⁴ <<https://news.yahoo.com/lawmakers-call-fauci-resignation-firing-195751511.html>> accessed 5 July 2021 (52% of Americans no longer trust recommendation from the Centers for Disease Control regarding the virus).

¹⁵ <<https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-right-to-travel>> accessed 5 July 2021.

¹⁶ <<https://ldi.upenn.edu/healthpolicysense/wuhan-lockdown-halted-spread-coronavirus-across-china>> accessed 5 July 2021.

¹⁷ <<https://science.sciencemag.org/content/368/6489/395>> accessed 5 July 2021.

¹⁸ <<https://theconversation.com/china-beat-the-coronavirus-with-science-and-strong-public-health-measures-not-just-with-authoritarianism-150126>> accessed 5 July 2021.

¹⁹ <<https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>> accessed 5 July 2021.

²⁰ Under the law, FDA generally must determine that a drug is “safe and effective” before approving its use. <<https://www.fda.gov/drugs/information-consumers-and-patients-drugs/fdas-drug-review-process-ensuring-drugs-are-safe-and-effective>> accessed 5 July 2021. However, the agency has authority to issue “emergency use authorizations” when necessary to address public health emergencies <<https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization>> accessed 5 July 2021.

²¹ <<https://spectator.org/2020-election-voting-co-vid-19/>> accessed 5 July 2021.

“miscalculation” that following standard vaccine approval protocols designed for ordinary times would increase public confidence and willingness to take the vaccine.²² However, as noted above, the hoped-for acceptance has not materialized and roughly 30% of the U.S. population states that they will not receive the vaccine voluntarily, but some employers are starting to require vaccination (subject to religious and other objections) for those returning on on-site work.

Moreover, the search for effective therapeutic agents has been slower than anticipated. Some contend that the delay is due to the uncoordinated, decentralized approach to research in the U.S.

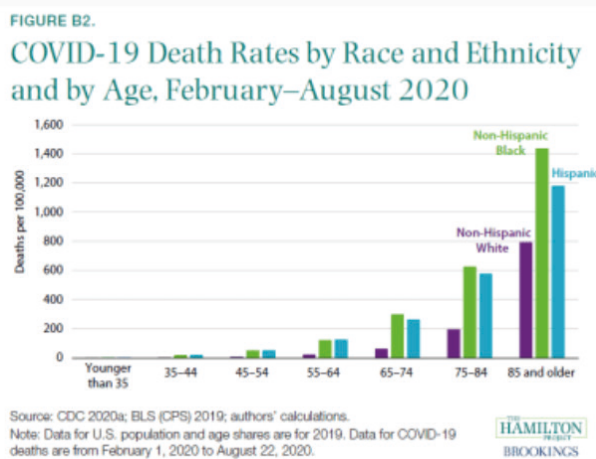
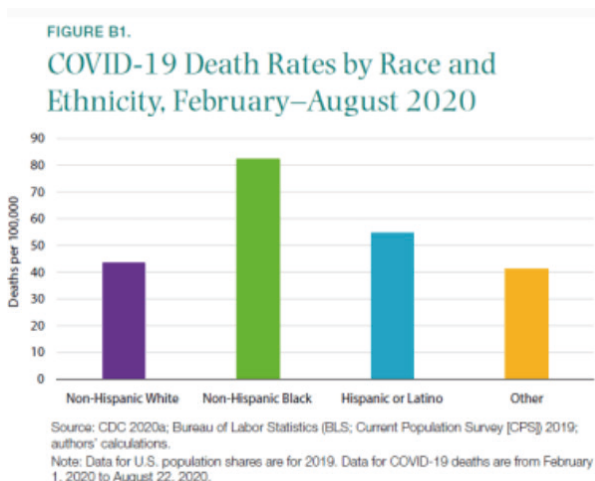
“Much of the blame for limited progress in this area lies with the lack of collaborative, centralized research programs able to identify and collect valid data on existing and new therapies. Instead, hundreds of researchers and clinicians have launched multiple trials of available drugs, most without adequate controls and size needed to yield useful evidence. ...”²³

On the other hand, our hospital system was not over-whelmed as some had feared might occur at the outset.

5. Conclusion

A perceptive comparison of U.S. and Chinese responses to the pandemic by Elanah Uretsky, Associate Professor of International and Global Studies at Brandeis University, concludes that China’s response was more effective not only because of “draconian public health policies that can be instituted only by an authoritarian government” but also because China learned from “the experience of living through a similar epidemic” of SARS in 2002-2003.²⁴ According to Professor Uretsky, “Following SARS, the [Chinese] government improved training of public health professionals and developed one of the most sophisticated disease surveillance systems in the world. While caught off guard for this next big coronavirus outbreak in December 2019, the country quickly mobilized its resources to bring the epidemic almost to a halt inside its borders within three months.”²⁵

It remains to be seen whether the U.S. will learn similar lessons from the problems it encountered in dealing with COVID-19 and thereby be better prepared to respond the next time a similar public health crisis.



²² <<https://www.wsj.com/articles/the-virus-lessons-were-getting-wrong-11612562285>> accessed 5 July 2021.

²³ <<https://www.biopharminternational.com/view/where-are-the-therapeutics-to-combat-covid-19->> accessed 5 July 2021.

²⁴ <<https://theconversation.com/china-beat-the-coronavirus-with-science-and-strong-public-health-measures-not-just-with-authoritarianism-150126>> accessed 5 July 2021.

²⁵ *Ibidem.*

SECTION III – REPORTS

Environmental Protection and Human Rights in the Pandemic

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*Natalia Urzola***

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Abstract. The Covid-19 outbreak in 2020 took the world by surprise. The virus spread quickly around the globe and death tolls were constantly on the rise at early stages of the pandemic. Although vaccine rollouts have helped halt the number of deaths, inequality in accessing vaccines and effective treatments is still a major issue. From the onset, Covid-19 negatively impacted global well-being and myriad human rights. The present report examines how environmental protection and related human rights have been affected by the Covid-19 pandemic.

Based on link between environmental and human health, this report focuses on ecological human rights. The report aims to assess the negative effects of Covid-19 on the enjoyment and realization of particular rights, including the right to a healthy environment, the right to food, the right to water, the right to life and the right to health. It discusses how the pandemic interplays with the Sustainable Development Goals and Agenda 2030. The report also highlights how the pandemic in and of itself, as well as governmental response measures to it, have played a role in exacerbating pre-existing social and economic inequalities. The report places a special focus on the impact of response measures on marginalized groups, namely Indigenous communities, Afro-descendant communities and environmental defenders.

The world is now facing the challenge of building back better. With this in mind, the report provides specific recommendations on how to move forward in a way that ensures human and environmental health are protected. These recommendations are mainly directed at international organizations and States in their decision-making processes. As they continue to face the devastating effects of the pandemic, States and international organizations need to guarantee that inequalities are not furthered and that the rights of marginalized groups are particularly protected.

Keywords: *Covid-19, Human Rights, Ecological Rights, Right to a Healthy Environment, Building Back Better, Inequalities*

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** Secretary to the Working Group

*** Working Group Members

1. Introduction

Infectious diseases and pandemics¹ have been an endemic part of human history, including the Spanish Flu in 1918 (with a death toll of about 40 million),² the Asian Flu from 1956-58 (with a death toll of about two million),³ the Flu Pandemic in 1961 (with a death toll of about one million),⁴ the HIV/AIDS Pandemic from 2005-12 (with a death toll of about 36 million),⁵ and the H1N1 Pandemic from 2009-10 (with a death toll of about 500,000).⁶ At the end of 2019, the world faced what would become another pandemic. Covid-19 is caused by infection with a new coronavirus (called SARS-CoV-2) and quickly spread around the globe only weeks after its initial detection. On December 31, 2019, the WHO's Country Office in China was informed of cases of 'viral pneumonia' of unknown cause in Wuhan City, Hubei province, China. Affected patients were thought to have visited Wuhan's Huanan Seafood Wholesale Market, a wholesale fish and live animal market, more commonly referred to as a 'wet market'. The market was closed the next day.

On January 2, 2020, the WHO informed its Global Outbreak Alert and Response Network partners about the cluster of pneumonia cases reported in China. The first recorded case outside of China was reported in Thailand on January 13, 2020, followed by another case in Japan on January 16; both patients had recently traveled to Wuhan. Although

initial investigations by the Chinese authorities found "no clear evidence of human-to-human transmission," the WHO first found evidence of "limited human-to-human transmission" on January 19.⁷ By the end of January, 98 cases were reported in 18 countries outside China, including four countries having evidence of human-to-human transmission (Germany, Japan, the United States of America, and Vietnam).

On January 30, 2020, the WHO declared the outbreak of novel coronavirus a 'public health emergency of international concern' under the International Health Regulations (IHR) protocol. On February 22, 2020, Italian authorities reported clusters of cases in several regions, quickly followed by reports of cases from other European countries.

The first cases in Africa were reported by the end of February in Egypt and then in Algeria.⁸ On March 11, 2020, the WHO officially declared Covid-19 a global pandemic.

In May 2020, the WHO issued a 'Covid-19 Report' concerning the sources and transmission routes of the virus.⁹ The Report highlights the crisis' negative impact on global well-being and underlines governmental response responsibilities. The Report recalls global solidarity, acknowledging that the pandemic has had a disproportionate impact on the poor and the most vulnerable. It further notes that these impacts could hamper the achievement of the Sustainable Development Goals (SDGs). The WHO Report stresses the importance of

¹ So far, the WHO has never provided a clear definition of 'pandemic' although reference is often made to the 'pandemic phase' of infectious diseases. In the 2015 International Health Regulation (IHR) there is only a definition of public health risk which is "a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger" (IHR at art. 1) and of a 'public health emergency of international concern' to be declared by the Director General of the WHO taking into consideration "(a) information provided by the State Party; (b) the decision instrument contained in Annex 2; (c) the advice of the Emergency Committee; (d) scientific principles as well as the available scientific evidence and other relevant information; and (e) an assessment of the risk to human health, of the risk of international spread of disease and of the risk of interference with international traffic' (IHR at art. 12). For the purposes of this report, pandemic is 'the worldwide spread of a new disease which has a significant impact on the affected societies'.

² The 1918 influenza pandemic was the most severe pandemic in recent history. It was caused by an H1N1 virus with genes of avian origin. Andrea de Guttry, 'Is the International Community Ready for the Next Pandemic Wave? A Legal Analysis of the Preparedness Rules Codified in Universal Instruments and of Their Impact in the Light of the Covid-19 Experience', [In English] 20(3) Global Jurist

<<https://doi.org/10.1515/gj-2020-0038>> accessed 1 October 2020.

³ A pandemic outbreak of Influenza A of the H2N2 subtype that originated in China.

⁴ Caused by the H3N2 strain of the Influenza A virus. Although it has been characterized by a comparatively low mortality rate, it caused more than one million deaths, mostly in Hong-Kong.

⁵ First identified in the Democratic Republic of the Congo in 1976, HIV/AIDS has truly proven itself as a global pandemic.

⁶ A (H1N1) was a new strain of influenza of swine origin. In the first year of the pandemic between 151,000 and 475,000 deaths worldwide have been attributed to this influenza.

⁷ Helen Branswell, 'WHO raises possibility of 'sustained' human-to-human transmission of new virus in China', *STATnews* (21 January 2020) <<https://www.statnews.com/2020/01/21/who-raises-possibility-of-sustained-human-to-human-transmission-of-new-virus-in-china/>> accessed 23 December 2020.

⁸ World Health Organization, Africa, *A second COVID-19 case is confirmed in Africa* (25 February 2020) <<https://www.afro.who.int/news/second-covid-19-case-confirmed-africa>> accessed 8 December 2021.

⁹ World Health Organization, *COVID-19 response* (WHA73.1, May 19, 2020) <https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf> accessed 8 December 2021.

working collaboratively to provide accurate information and to develop treatments and a vaccine, while protecting personal data.

As of December 7, 2021, the worldwide death toll stands at 5.26 million and counting,¹⁰ while 266.46 million cumulative Covid-19 cases have been confirmed.¹¹ Some regions are more acutely affected than others. The United States has reported more than 789,900 deaths. In Europe, the death toll stands at approximately 1.44 million, while Latin America and the Caribbean reported nearly 1.18 million deaths. The numbers for Asia and Africa stand at more than 1.23 million and 223,000, respectively.¹²

The impacts of the Covid-19 pandemic - including on human rights and environmental protection - are projected to be profound and protracted across the geopolitical spectrum, and in ways that are likely to diminish well-being and dignity for billions of people.¹³

2. About this Report

The present report examines how environmental protection and related human rights have been affected by the Covid-19 pandemic. Based on the idea that environmental and human health are closely linked, this report focuses on ecological human rights. This short introductory note places these issues, and the report's conclusions, within the larger context of the pandemic, explaining the rationale between the chosen sections.

Chapter 1 focuses on substantial environmental problems exacerbated by the pandemic. It begins with the right to a healthy environment as the foundation of all ecological challenges delineated here. It then includes several examples of these challenges, such as the role of zoonotic diseases, the rollback of environmental regulations that spread in several countries, the protection of wildlife, waste management, deforestation and overpopulation.

While the examples included here do not cover all environmental challenges that were exacerbated by the pandemic, it provides notable ones that are cross-cutting and at the core of some underlying issues discussed throughout this report. Finally, the last section addresses how to build back better. Each chapter ends with a summary and recommendations for key stakeholders.

Chapter 2 focuses on the Sustainable Development Goals (SDGs), specifically how the

right to health relates with Agenda 2030. Chapter 3 addresses the exacerbation of inequalities that were brought to light by the pandemic, through discriminatory practices against vulnerable communities and minorities. Chapter 4 looks at the right to water as another ecological right especially affected by the Covid-19 pandemic. With hand hygiene highlighted as one of the main ways to avoid spreading the virus, access to water and sanitation is at the core of pandemic response. Chapter 5 addresses the right to food, which has been highlighted by human rights bodies as a core human right to respect in light of Covid-19. Food insecurity has grown significantly during the pandemic, exacerbated by the inequalities highlighted in Chapter 3.

Chapter 6 looks closely at some of the groups most affected by the pandemic: Indigenous communities, Afro-descendant communities and environmental defenders. It highlights the ways in which these were disproportionately affected, especially considering their relationship with the natural environment.

Chapter 7 briefly looks at the rights to life and health.

While other reports from the GPN have focused more specifically on those as the main human rights infringed by the pandemic, this chapter addresses these as they pertain to the topics highlighted here.

¹⁰ 'Coronavirus (COVID-19) Deaths' *Our World in Data* <<https://ourworldindata.org/covid-deaths>> accessed 7 December 2021.

¹¹ 'Coronavirus (COVID-19) Cases' *Our World in Data* <<https://ourworldindata.org/covid-cases>> accessed 7 December 2021.

¹² 'Coronavirus (COVID-19) Deaths' *Our World in Data* <<https://ourworldindata.org/covid-deaths>> accessed 7 December 2021.

¹³ See generally, James R. May and Erin Daly, 'Dignity Rights for a Pandemic' (2020) 17(2) *Law Culture, and the Humanities*.

3. Summary of Recommendations

3.1. Environmental Protection

Based on our analysis, the Working Group recommends that international organizations:

- Integrate “One Health” into all International Natural Habitat Conservation agreements and strengthen National Implementation mechanisms for these agreements;
- Expand protected wetlands designations and secure wetland integrity nationally, regionally and internationally;
- Expand Listings of designed species for protection, particularly through the CITES and IUCN regimes, suspend non-compliance, and combat illegal wildlife trade;
- Fund and assist in the expansion of national measures to combat desertification and climate change associated impacts;
- Expand and enhance EU Protected Areas, Natura 2000, and the European Convention on Conservation of European Wildlife and Natural Habitats.

As a general matter, the Working Group recommends that States:

- Address the economic and cultural factors that drive deforestation;
- Support knowledge exchange so ecologists are able to interact with infectious-disease researchers, public-health workers, and medics to track environmental change, assess the risk of pathogens crossing over, and monitor and control new virus outbreaks from wildlife and livestock.

With regard to environmental protection law and policy, the Working Group recommends that States:

- Ensure the strengthening and enforcement of environmental regulations to reduce human encroachment into wildlife habitats;
- Start to reimagine our relationship with nature as a matter of legal and policy practice, including addressing issues related to climate change and urbanization.

3.2. Sustainable Development Goals

Based on our analysis, the Working Group recommends that international organizations:

- Ensure that there are mechanisms for State Parties to the SDGs to meet more frequently than the standard HLPF when required in order to address the implementation of the SDGs during times of crisis;
- Create methodologies for collaboration, resource sharing and knowledge sharing in the face of multi-faceted crises such as the Covid-19 pandemic.

As a general matter, the Working Group recommends that States:

- Incorporate the SDGs into their Covid-19 pandemic responses and post-pandemic building back better strategies, taking into account the full range of policy measures included in the SDGs;
- Fulfill their stated plans and obligations as set out in their most current VNRs.

With regard to SDGs law and policy, the Working Group recommends that States:

- Ensure that responses to the pandemic are sufficient to ensure that all populations, especially vulnerable populations, receive proper medical care at the same time that funding and resource allocations continue for other health concerns;
- Ensure that plans for funding future health responses focus on all aspects of health concerns, communicable and noncommunicable diseases alike;
- Ensure that their responses are responsive to gender and educational priorities set out in the SDGs, as well as advancing SDG 2’s requirements for advancing food security and combating hunger, issues that are exacerbated by the pandemic and associated economic downturn.

4. Exacerbation of Inequalities

Based on our analysis, the Working Group recommends that international organizations:

- Take into consideration pre-existing inequalities when dealing with solutions for building back better in the post-pandemic climate and in designing solutions for meeting legal and policy

changes while the pandemic remains active;

- Apply a general intersectional and inclusive lens to all efforts made towards addressing the pandemic and preventing new ones, including working together to address the needs and concerns of overlapping constituencies.

As a general matter, the Working Group recommends that States:

- Actively pursue expanded access to internet connectivity for all members of the public;
- Implement stronger employment policies and institutions, such as unemployment insurance, working time reduction programs, and income subsidies, to respond to pandemic-related economic and societal stresses;
- Establish a comprehensive social protection system that combines contributory and non-contributory schemes to guarantee some level of social protection for all;
- Use an inclusive and intersectional lens to cope with pre-existing inequalities and vulnerable groups when designing programs for social protection and building back better. This should include the use of appropriate language when spreading and sharing information among constituencies, such as children and the elderly;
- Incorporate impairments that may hinder communication, as well as language barriers, when it comes to migrants and refugees communities during times of emergency.

5. Right to Water

Based on our analysis, the Working Group recommends that international organizations:

- Help in increasing financial flows to provide adequate infrastructure, notably for peri-urban and rural zones in Latin America and the Caribbean;
- Support States in implementing elements of the human right to water in their national legal systems and ensuring that there are adequate protections for the right during times of national and international crisis.

As a general matter, the Working Group recommends that States:

- Expand necessary infrastructure to ensure access to drinking water and sanitation, while avoiding interruption of the exercise of the human right to water, particularly during times of pandemic or other crisis;
- Incorporate the elements of the human right to water as a matter of law and policy, including through regulatory means;
- Consider controlled and organized growth of cities that allows expanded access to drinking water and sanitation services to the most vulnerable peoples and strengthens resilience, sustainability and efficiency of cities;
- Improve coordination and enhanced alignment of national, subnational, and local policies with international agendas relating to water and sanitation.

With regard to water law and policy, the Working Group recommends that States:

- Ensure the right to access water and sanitation, as well as non-interference with this right, and the collective right to have a network for the provision of water and sanitation services, which enables joint action between public-private actors.

6. Right to Food

Based on our analysis, the Working Group recommends that international organizations:

- Support States and regions with less resources coping with lockdown measures, such as economic and public health-related issues relating to food and food security;
- Consider humanitarian activities, such as the distribution of food and cash as essential services, in conjunction with States and other international actors.

As a general matter, the Working Group recommends that States:

- Implement broad and inclusive social protection programs that can protect families and individuals against hunger, food insecurity and malnutrition;
- Ensure that national authorities cooperate with NGOs active in these fields without creating restriction and impediment.

With regard to food law and policy, the Working Group recommends that States:

- Adopt laws and measures that help implement different food activities, such as the inspection of food business operations, certifying exports, control of imported foods, monitoring and surveillance of the safety of the food supply chain, analysis of food quality, managing food incidents, and providing advice on food safety and regulations for the industry.

7. Rights of Indigenous Groups

Based on our analysis, the Working Group recommends that international organizations:

- Remain mindful of traditional Indigenous knowledge and modes of living in their decision-making practices;
- Support the protection of environmental and human rights defenders internationally, regionally, and nationally;
- Support the entry into force and implementation of the Escazú Agreement in Latin America.

As a general matter, the Working Group recommends that States:

- Recognize and respect Indigenous protocols and customary laws, and Indigenous leaders and authorities as communities' legitimate institutions, and include them in decision-making processes concerning Covid-19 and related health measures;
- Recognize the Indigenous peoples' right to self-determination, including their right to stay uncontacted and voluntarily isolated;
- Respect the Indigenous right to free, prior and informed consent for the prevention, development, application and monitoring of measures aimed at preventing the spreading of the Covid-19 virus and future health events;
- Consider the establishment of a fund for the recovery of Indigenous communities that have been affected by the pandemic and commit specific public funds to the re-establishment of Indigenous livelihoods and customary economic system at a level at least comparable to the pre-pandemic period.

With regard to rights of Indigenous groups in law and policy, the Working Group recommends that States:

- Comply with international obligations to guarantee the protection of Indigenous communities, as well as environmental and human rights defenders working to assist them.

8. Right to Life and Health

Based on our analysis, the Working Group recommends that international organizations:

- Coordinate surveillance protocols involving more than two regions, i.e., Southern Europe and the main airports in the Nordic region, to facilitate safe and efficient transfers of peoples and goods;
- Deepen cooperation between regions to support the accomplishment of the right to life and the right to health as universal rights.

As a general matter, the Working Group recommends that States:

- Connect the production of data at ports of entry with local clinics, laboratories and hospitals since symptoms matching certain dangerous pathogens can be rapidly confirmed;
- Provide or facilitate technical cooperation and logistical support among administrative and sub-national entities;
- Strengthen primary health care systems to address pandemics and infectious disease and create robust common funds with the purpose of financing the municipal system of surveillance health oversight;
- Design models of governance from a bottom-up perspective by forging a multi-layered strategy between local, regional and national levels.

With regard to the right to life and health law and policy, the Working Group recommends that States:

- Implement Annex I of the IHRs, which explicitly refers to the core capacity for surveillance and response through local authorities and primary health care;
- Invest local actors with power to detect events involving disease or death above expected levels for the particular time and place in all areas within the territory of the State Party.

Chapter 1: Covid-19 and Environmental Protection

1. Introduction

There exists a strong link between the health of the environment and human health. In its 2016 report, 'Preventing disease through healthy environments: a global assessment of the burden of disease from environmental risks',¹⁴ the WHO estimated that premature deaths and diseases can be prevented to a significant degree through healthier environments.

The WHO found that, in 2016, 24% of all global deaths (approximately 13.7 million deaths a year) were linked to the environment, including 4.1 million deaths in the South-East Asian region, 3.6 million in the Western Pacific region, 2.5 million in the African region, 1.4 million in the European region, 1.1 million in the Region of the Americas and 984,000 in the Eastern Mediterranean region. Environmental impacts on health are uneven across age, disproportionately affecting children under age five and adults between 50 and 75 years old. It also significantly impacts the poor, with the WHO finding that low and middle-income States share the largest environment-related disease burden.

A healthy environment is essential for human health, as it provides basic needs such as clean air, water and fertile land. Environmental risk factors such as chemical exposure and air, water and soil pollution, as well as climate change impacts, can significantly affect human health through distribution and transmission of disease pathogens, vectors, and hosts. More specifically, climatic conditions affect the spread of vectors such as mosquitoes and ticks, environmental contamination, dampening of host immunity, as well as disruption of health systems due to

disasters such as hurricanes. In addition, an unhealthy environment is a threat multiplier for infectious diseases such as Covid-19 since such diseases can be transmitted through airborne particles (e.g. influenza), food and water (e.g. cholera), and vectors (e.g. malaria, dengue), and may involve non-human reservoir species (e.g. zoonotic pathogens).¹⁵ As highlighted by the WHO, healthy environments contribute to the 17 Sustainable Development Goals (SDGs) and environmental health interventions could make 'a valuable and sustainable contribution towards reducing the global disease burden and improving the well-being of people everywhere'.¹⁶

1.1. Right to a Healthy Environment

Human rights and environmental protection are inextricably intertwined. The right to a healthy environment embodies both the negative right to be free from exposure to toxic substances and the positive right to clean air, safe water, and healthy ecosystems.¹⁷

As the Covid-19 pandemic reminds, however, it is impractical if not impossible to afford and advance core civil and political rights (e.g., freedom of speech, voting rights, and other avenues of public participation) or socio-economic and cultural rights (e.g., to education, family, reproduction, food, and shelter) in a degraded or unstable environment.¹⁸

Yet, for the most part, global human rights instruments ranging from the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948) to the twin covenants on human rights (1966) did not recognize a right to a healthy environment.

There is growing recognition of the right to a healthy environment at the national, regional and international levels.¹⁹ It arguably began at the

¹⁴ Annette Prüss-Ustün et al., 'Preventing disease through healthy environments: a global assessment of the burden of disease from environmental risks' (11 May 2020) World Health Organization <https://www.who.int/quantifying_ehimpacts/publications/preventing-disease/en/> accessed 30 September 2021.

¹⁵ Jessica E. Metcalf et al., 'Identifying climate drivers of infectious disease dynamics: recent advances and challenges ahead' (16 August 2017) Proc. R. Soc. B.28420170901 <<https://royalsocietypublishing.org/doi/10.1098/rspb.2017.0901>> accessed September 27, 2020.

¹⁶ WHO Commentary, *Environments should improve not harm our health* (15 March 2016) <<https://apps.who.int/mediacentre/commentaries/environments-should-improve-our-health/en/index.html>> accessed 30 September 2021.

¹⁷ David R. Boyd, *The Environmental Rights Revolution, A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 24; James R. May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge

University Press 2014) 19-31; Timothy Hayward, *Constitutional Environmental Rights* (OUP 2005).

¹⁸ See generally, James R. May, 'Making Sense of Environmental Human Rights and Global Environmental Constitutionalism,' in Erika Techera, Jade Lindley, Karen Scott and Anastasia Telesetsky (eds.), *The Routledge Encyclopedia of International Environmental Law* (2020).

¹⁹ James R. May and Erin Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity, and Geography, Part of Encyclopedia of Environmental Law* (Edward Elgar 2019); James R. May and Erin Daly, 'New Dimensions in Human Rights and the Environment' in May and Daly, *Human Rights and the Environment*, *ibid.*; Naysa Ahuja, Carl Bruch, Arnold Kreilbuber et al., 'Advancing Human Rights Through Environmental Rule of Law' in May and Daly, *Human Rights and the Environment*, *ibid.*; John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018); Jan Hancock, *Environmental Human Rights: Power, Ethics and Law* (Ashgate 2003).

subnational constitutional level in the United States.

In 1970, the State of Illinois in the United States became the first government to provide such a right under law by granting it constitutional protection, followed by Pennsylvania in 1971, by Montana and Massachusetts in 1972, and by Hawai'i in 1978.²⁰

The right also has a long pedigree in international law. The 1972 Stockholm Declaration acknowledged the 'fundamental right to ... adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.²¹ Both the 1989 Hague Declaration and the 1992 Rio Declaration recognize such a right, as do the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the African (Banjul) Charter on Human and Peoples' Rights, the Arab Charter on Human Rights, the Association of South East Asian Nations (ASEAN) Human Rights Declaration, and both the Aarhus Convention and Escazú Agreement on rights to information, participation and access to justice. In addition, nearly 100 countries have recognized a right to a healthy environment expressly through constitutional incorporation or implicitly by judicial interpretation of other rights, including to life, dignity and health.²² The Special Rapporteur on a Right to a Safe, Clean, Healthy and Sustainable Environment (appointed by the UN Human Rights Council) reports that 'in total, more than 80 per cent of States Members of the United Nations (156 out of 193) legally recognize the right to a safe, clean, healthy and sustainable environment'.²³

There is also growing support for international recognition of a right to a healthy environment. The

Special Rapporteur has issued 'Framework Principles on a Right to a Safe, Clean, Healthy and Sustainable Environment,' supported a 'Global Pact for the Environment,' and appealed to the UN General Assembly and the UN Human Rights Council to adopt a resolution recognizing a right to a healthy environment.²⁴ In October 2021, the Human Rights Council officially recognized access to a healthy environment as a fundamental human right.

Moreover, the United Nations Environment Programme (UNEP) recently launched an Environmental Rights Initiative.²⁵

Thus, billions of people around the globe enjoy a right to a healthy environment (and related human rights to life, dignity, health, food, and water) by virtue of international law, domestic law, regional agreement, or juridical pronouncement.

Unfortunately, however, the pandemic has been used as an excuse to weaken environmental human rights by 'lowering environmental standards, suspending environmental monitoring requirements, reducing environmental enforcement, and restricting public participation'. The UN Special Rapporteur on Human Rights and the Environment and the Special Rapporteur for Economic, Social, Cultural and Environmental Rights from the Organization of American States (OAS) issued a joint statement to highlight challenges related to the Covid-19 pandemic and the global environmental crisis, concluding: '[T]he growing risk of emerging infectious diseases is caused by a 'perfect storm' of human actions that damage ecosystems and biodiversity, such as deforestation, land clearing and conversion for agriculture, the wildlife trade, expanding human population, settlements and infrastructure, intensified livestock production, and climate

²⁰ James R. May and William Romanowicz, 'Environmental Rights in State Constitutions' in James R. May (ed), *Principles of Constitutional Environmental Law* (305 ABA Section of Environment, Energy, and Resources, ABA/ELI Press 2011); Art English and John J. Carroll, 'State Constitutions and Environmental Bill of Rights' *The Book of States* (Council of State Government 2015) 18.

²¹ *Stockholm Declaration, (Declaration of the United Nations Conference on the Human Environment)*, 1972, UN Doc. A/Conf.48/14/Rev.1.

²² Ben Boer, 'International Environmental Law' in Simon Chesterman, Hisashi Owada and Ben Saul (eds), *Oxford Handbook of International Law in the Asia Pacific* (Oxford 2020) 170, 200–202; *United Nations Environmental Rule of Law First Global Report* (UNEP & Environmental Law Institute 2019) 161; Sumudu Atapattu and Andrea Schapper, *Human Rights and the Environment: Key Issues* (Routledge 2019) 122.

²³ David Boyd, 'Right to a healthy environment: good practices: Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe,

clean, healthy and sustainable environment' (2020) UN Doc. A/HRC/43/53 paras 3–13, available at <<https://undocs.org/A/HRC/43/53>> accessed 15 June 2020.

²⁴ John H. Knox, 'The United Nations Mandate on Human Rights and the Environment' in James R. May and Erin Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar 2019) 34; John H. Knox, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Framework Principles' (24 January 2018) UN Doc. A/HRC/37/59. See UN Doc. A/HRC/43/54, para 72(a) <www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Annualreports.aspx> accessed 23 December 2020. See also UN Secretary General, *Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment* (2019).

²⁵ See <<https://www.unep.org/explore-tropics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights>> accessed 3 June 2020.

change.” In the Americas, as well as in the rest of the world, human health is inextricably tied to ecosystem health, and putting all efforts towards the protection and the restoration of nature is an outstanding long-term investment’.²⁶

While many people expect environmental protection to be at the heart of Covid-19 recovery plans, governments around the world instead have used the distraction of the pandemic to suspend, delay, or cancel environmental regulations, as section 2.4 below explores.

1.2. Ecology and Zoonotic Diseases

At the third United Nations Environment Assembly (UNEA-3) of the UNEP, held in 2017, the Resolution on Environment and Health was adopted.²⁷ It recognizes that biodiversity loss is a health risk multiplier, that human, animal, plant, and ecosystem health are interdependent, and emphasizes the value of the One Health Approach – an integrated approach that fosters cooperation between environmental conservation and human, animal, and plant health. It further encouraged Member States and invited organizations to mainstream the conservation surrounding sustainable use of biodiversity to enhance ecosystem resilience, as an important safeguard for current and future health and human well-being. Specifically, the Resolution requested UNEP’s Executive Director to include human health factors in its projects on ecosystem valuation and accounting, subject to the availability of resources.

Ecology studies can help different fields understand how human impacts on the environment have affected other species brought into close contact with humans. This interaction has been considered the source of most infectious

diseases with the potential to cause future pandemics.²⁸ The impacts of human development, though sometimes sustainable, have negatively affected large portions of land and habitats to the point of degradation, thus causing the probability of disease transmission or ‘spillover’ to increase.²⁹ Hence, a large portion of the One Health Approach is dedicated to the transformation of food systems,³⁰ as addressed in a seminal biodiversity report issued by the UN Convention on Biodiversity (CBD).³¹

The link between habitat destruction and disease calls for the environment to be better protected and managed. Scientists estimate that approximately 1.7 million undiscovered diseases exist in mammals and birds, half of which may have the potential to be passed on to humans and cause illness.³² Of the 1,407 pathogens already known to affect humans, 58% are of animal origin, a quarter of which can be a possible source for an epidemic or pandemic. In addition, 75% of emerging infectious diseases are of animal origin.³³

In November 2019, scientists were already sounding the alarm on increasing deforestation as a possible avenue to disease outbreaks, due to deforestation.³⁴ Deforestation can act as an intensifier of infection possibilities, as it drives animals to other places when looking for shelter, which can ultimately direct them toward urban and otherwise populated areas.

Disease outbreaks are also highly connected to cattle ranching, as cattle can act as an intermediary carrier of the disease to humans.³⁵ Global warming is also considered a driver of vector-borne diseases.³⁶ For example, the tiger mosquito of Asian origin (*Aedes albopictus*) – vector of diseases such as Zika, dengue, and chikungunya - or the sand fly (*phlebotominae*) – native to the Mediterranean

²⁶ OAS, *The Americas: Governments should strengthen, not weaken, environmental protection during COVID-19 pandemic* (13 August 2020) <http://www.oas.org/en/iachr/media_center/PReleases/2020/198.asp> accessed 23 December 2020.

²⁷ United Nations Environment, Assembly Third Session, *Resolution on Environment and Health* (UNEP/EA.3/Res.4, 30 January 2018) <https://wedocs.unep.org/bitstream/handle/20.500.11822/30795/UNEA3_4EN.pdf?sequence=1&isAllowed=y> accessed 23 December 2020.

²⁸ Gabrielle Lipton, ‘Biodiversity’s role in One Health approach has been minimal – until now’ (29 October 2020) *Landscape Now* <<https://news.globallandscapesforum.org/48043/biodiversitys-role-in-one-health-approach-has-been-minimal-until-now/>> accessed 23 December 2020.

²⁹ *Ibidem*.

³⁰ *Ibidem*.

³¹ Gabrielle Lipton and Sandra Cordon, ‘Variety of life on Earth is being lost at ‘unprecedented’ pace’ (15 September 2020) *Landscape Now* <<https://news.globallandscapesfo>

rum.org/46865/variety-of-life-on-earth-is-being-lost-at-unprecedented-pace/> accessed 23 December 2020.

³² Sarah Gibbens, ‘Protecting land and animals will mitigate future pandemics, report says’ (29 October 2020) *National Geographic* <https://www.nationalgeographic.com/environment/2020/10/protecting-land-animals-will-mitigate-future-pandemics-report-says/?cmpid=org=ngp::mc=crmemail::src=ngp::cmp=editorial::add=SpecialEdition_20201030&rid=BB3192A42DA2949024ADDA6B9261012C> accessed 23 December 2020.

³³ Eric Muraille and Jacques Godfroid, ‘The ‘One Health’ Concept Must Prevail to Allow Us to Prevent Pandemics’ (19 October 2020) *Global BioDefense* <<https://globalbiodefense.com/2020/10/19/the-one-health-concept-must-prevail-to-allow-us-to-prevent-pandemics/>> accessed 30 September 2021.

³⁴ Gibbens, ‘Protecting,’ (n 32).

³⁵ *Ibidem*.

³⁶ Muraille and Godfroid, ‘The ‘One Health’ Concept,’ (n 33).

basin and North Africa and transmitter of leishmaniasis - have now established themselves in southern Europe.³⁷

The One Health Approach can provide important insights for developing a comprehensive and holistic response to Covid-19. However, several things need to be considered to successfully implement this approach. Issues of priority need to be uniformly addressed, especially when it comes to zoonoses, food security, and antimicrobial resistance.³⁸ Institutional capacity, such as good veterinary laboratories and epidemiological research centers, must also be strengthened. As a community problem, ownership must further be considered, taking into account local needs and pre-existing inequalities.³⁹

Traditional environmental knowledge of ethnic communities is crucial to understanding how human health and the environment can coexist, and to informing the much-needed paradigm shift away from an anthropocentric worldview. The CBD recognizes the contribution of local and Indigenous communities in the conservation and sustainable utilization of biodiversity, according to traditional knowledge with the same status as other approved types of knowledge, especially scientific.⁴⁰

Finally, sustainable development is key, especially when it comes to food security and safety.

Agricultural practices need to be aligned with sustainability principles, as a way of ensuring that both human and environmental health are preserved and protected. Sustainable agriculture will not only help achieve food security for the population as a whole, but also limit deforestation, environmental degradation and climate change. However, to be successful, this approach needs to be truly sustainable for current and future generations.

Political commitment is crucial in promoting a One Health Approach for responding to and managing zoonotic diseases, and thus should be supported by policy decisions as well as legal frameworks.⁴¹

1.3. Rollback of Environmental Regulations

States have used the pandemic as an excuse to weaken environmental rules for public health reasons and to address economic challenges faced by companies. These environmental deregulations include the weakening or cancelling of restrictions protecting lands and waters, endangered species, or Indigenous peoples' rights. In addition, many projects – such as those in the oil and gas sectors – have been approved before any environmental impact assessment (EIA) or public consultation could occur, taking advantage of the public's limited ability to participate in these decisions. This section will first focus on the environmental deregulation occurring in the United States, before providing a brief panorama of the deregulation happening around the world.

§1. Rollback of Environmental Regulations in the United States

The pandemic provided an opportunity for the Trump Administration to accelerate rollbacks of environmental programs in the United States, including laws that protect air, water, rare animals public health, and the climate.⁴²

Rollbacks during the pandemic commenced initially in three ways. First, the US Environmental Protection Agency (EPA) announced that it would not enforce environmental regulations against manufacturing plants, power plants, and oil and gas refineries⁴³ where 'the EPA agrees that Covid-19

³⁷ *Ibidem*.

³⁸ Gongal G., 'One Health Approach in the South East Asia Region: Opportunities and Challenges', in Mackenzie J., Jeggo M., Daszak P., Richt J. (eds), *One Health: The Human-Animal-Environment Interfaces in Emerging Infectious Diseases. Current Topics in Microbiology and Immunology* (vol 366, Springer, Berlin, Heidelberg, 2012) <https://link.springer.com/chapter/10.1007/82_2012_242>-accessed-30-September 2021.

³⁹ *Ibidem*.

⁴⁰ Paul Gepts, 'Who Owns Biodiversity, and How Should the Owners Be Compensated?' (2004) *Plant Physiology* 134, no. 4, 1295.

⁴¹ Gongal, "One Health," (n 38).

⁴² Various entities have documented these rollbacks, including Brookings Institute <<https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/>> accessed 30 September 2021; Harvard Environmental and Energy Law Program <<https://eelp.law.harvard.edu/>

[regulatory-rollback-tracker/](#)> accessed 30 September 2021> accessed 30 September 2021; The Environmental Integrity Project <<https://environmentalintegrity.org/trump-watch-epa/regulatory-rollbacks/>> accessed 30 September 2021; Washington Post <<https://www.washingtonpost.com/graphics/2020/climate-environment/trump-climate-environment-protections/>> accessed 30 September 2021; New York Times <<https://www.nytimes.com/interactive/2020/climate/trumpenvironment-rollbacks-list.html>> accessed 30 September 2021; the New York University School of Law State Energy and Environmental Impact Center <<https://www.law.nyu.edu/sites/default/files/climate-and-health-showdown-in-the-courts.pdf>> accessed 30 September 2021.

⁴³ Lisa Friedman, 'E.P.A., Citing Coronavirus, Drastically Relaxes Rules for Polluter', *New York Times* (14 April 2020) <<https://www.nytimes.com/2020/03/26/climate/epa-coronavirus-pollution-rules.html>> accessed 14 December 2020.

was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request'.⁴⁴ Second, the EPA announced that it would weaken 'clean gasoline' requirements due to the pandemic.⁴⁵ And third, it finalized its rollback of Obama-era clean car standards that intended to both make vehicles more fuel-efficient and reduce pollution from tailpipes.⁴⁶

In April 2020, the EPA announced that it would not tighten air pollution standards recommended by its staff.⁴⁷ Specifically, the EPA declined to lower the national standard for particulate matter emitted by fossil-fuel burning power plants, cars, and factories.⁴⁸

Additionally, the EPA finalized rollbacks to controls on mercury pollution from coal-fired power plants by downplaying health benefits and exaggerating economic burdens.⁴⁹ Finally, the Administration waived *all* federal environmental laws otherwise applicable to the construction of barriers and roads in Texas designed to deter immigration.⁵⁰

With Covid-19-attributed deaths approaching 100,000 in May 2020, environmental rollbacks

continued. President Trump signed an executive order instructing federal agencies to 'address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery'.⁵¹ The order directed federal agencies to suspend rules deemed to deter economic recovery, including to waive National Environmental Policy Act (NEPA) rules for pipeline projects.⁵² In addition, the EPA issued an emergency rule to delay federal acid deposition and interstate pollution testing and reporting protocols under the Clean Air Act (CAA), citing the impact of 'travel, plant access, or other safety restrictions implemented to address the current Covid-19 national emergency'.⁵³

The EPA finalized a rule that makes it more difficult for states, tribes, and the public to object to federal permits for pipeline, hydroelectric, dams and other environmentally destructive projects⁵⁴ by significantly shortening deadlines for and limiting the scope of state and tribal water quality certification under the federal Clean Water Act (CWA). In June 2020,⁵⁵ the EPA also accelerated the construction of fossil-fuel related energy projects

⁴⁴ United States Environmental Protection Agency, Memorandum on *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program* (26 March 2020) <<https://www.epa.gov/sites/production/files/2020/03/documents/oecamemooncovid19implications.pdf>> accessed 23 December 2020.

⁴⁵ United States Environmental Protection Agency, *EPA Announces Steps to Protect the Availability of Gasoline during COVID-19 Pandemic* (27 March 2020) <<https://www.epa.gov/newsreleases/epa-announces-steps-protect-availability-gasoline-during-covid-19-pandemic>> accessed 23 December 2020.

⁴⁶ Emily Holden, 'Trump to roll back Obama-era clean car rules in huge blow to climate fight' *The Guardian* (31 March 2020) <<https://www.theguardian.com/environment/2020/mar/31/trump-epa-obama-clean-car-rules-climate-change>> accessed 14 December 2020.

⁴⁷ Juliet Eilperin, Dino Grandoni and Brady Dennis, 'Trump officials reject stricter air quality standards, despite link between air pollution, coronavirus risks' *Washington Post* (14 April 2020) <<https://www.washingtonpost.com/health/2020/04/14/epa-pollution-coronavirus/>> accessed December 14, 2020.

⁴⁸ United States Environmental Protection Agency, 'Particulate Matter (PM) Basics' <<https://www.epa.gov/pm-pollution/particulate-matter-pm-basics>> accessed 14 December 2020.

⁴⁹ Lisa Friedman and Coral Davenport, 'E.P.A. Weakens Controls on Mercury' *New York Times* (16 April 2020) <<https://www.nytimes.com/2020/04/16/climate/epa-mercury-coal.html>> accessed 14 December 2020.

⁵⁰ Amy Westervelt and Emily Gertz, 'The Climate Rules Being Rolled Back During the COVID-19 Pandemic' *Drilled News* (6 April 2020) <<https://www.drillednews.com/post/the-climate-covid-19-policy-tracker>> accessed 30

September 2021, citing *Office of the Secretary, Department of Homeland Security, Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended* (15 April 2020) <<https://www.federalregister.gov/documents/2020/04/15/2020-07981/determination-pursuant-to-section-102-of-the-illegal-immigration-reform-and-immigrant-responsibility>> accessed 14 December 2020.

⁵¹ *Ibidem*. Amy Westervelt and Emily Gertz, 'Climate Rules Being Rolled Back' *Drilled News*, citing U.S. White House, *Executive Order on Regulatory Relief to Support Economic Recovery* (19 May 2020) <<https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/>> accessed 14 December 2020.

⁵² *Ibidem*. Amy Westervelt and Emily Gertz, 'Climate Rules Being Rolled Back' *Drilled News*. (n 50).

⁵³ *Ibidem* citing Environmental Protection Agency, *Continuous Emission Monitoring; Quality-Assurance Requirements During the COVID-19 National Emergency* (22 April 2020) <https://www.federalregister.gov/documents/2020/04/22/2020-08581/continuous-emission-monitoring-quality-assurance-requirements-during-the-covid-19-national-emergency?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list> accessed 14 December 2020.

⁵⁴ Juliet Eilperin and Brady Dennis, 'EPA limits states and tribes' ability to protest pipelines and other energy projects' *Washington Post* (1 June 2020) <<https://www.washingtonpost.com/climate-environment/2020/06/01/epa-limits-states-tribes-ability-protest-pipelines-other-energy-projects/>> accessed 14 December 2020.

⁵⁵ Environmental Protection Agency, *Clean Water Act Section 401 Certification Rule* (40 CFR Part 121, EPA-HQ-OW-2019-0405; FRL-10009-80-OW, RIN 2040-AF86, 1 June

and weakened federal authority to issue clean air and climate change rules.⁵⁶ And, citing the necessity of an ‘economic recovery from the national emergency’, President Trump issued an executive order to suspend the Endangered Species Act (ESA) and NEPA for mines, highways, pipelines, oil and gas projects, and large infrastructure efforts, eliminating consideration of climate change and lessening public participation.⁵⁷

The summer and waning fall months saw more rollbacks. For example, the Bureau of Land Management continued to sell or lease public lands for hydraulic fracturing⁵⁸ and the EPA rolled back additional clean air standards for airplanes, cars, trucks, and ships. Further, the US Fish & Wildlife Service relaxed protections for endangered species, including the Grey Wolf.

The long-term health effects of these rollbacks are likely to be significant. For example, the relaxation of air pollution rules is expected to result in 18,500 premature deaths and \$190 billion in associated health-related costs.⁵⁹ Such rollbacks are particularly concerning for vulnerable and marginalized communities. These communities tend to disproportionately live near these kinds of polluting facilities and suffer from the cumulative effects of pollution over months, years, or decades; they are also hardest hit by Covid-19.⁶⁰ Rollbacks to regulation of greenhouse gases (GHG) are especially crushing.⁶¹

A Rhodium Group analysis compared national emissions projections with the environmental rollbacks in place to projections with the original Obama-era regulations.⁶² This analysis found that the Trump Administration’s climate policy rollbacks have the potential to add 1.8 gigatons of CO₂ -equivalent to the atmosphere by 2035, which is equal to nearly one-third of all US emissions in 2019.⁶³

President Trump’s loss in the 2020 election only accelerated the environmental rollbacks, including efforts to: expand oil and gas drilling in the Arctic National Wildlife Refuge; permit mining on previously protected federal land throughout the country – deep into the Alaska wilderness and on thousands of square miles of public land around New Mexico’s Chaco Canyon National Historical Park; afford immunity from criminal prosecution to heads of oil and gas companies who have authorized the killing of migratory birds; remove habitat protection for threatened and endangered species; and relax health-based air pollution standards for millions of Americans.⁶⁴

President Biden fulfilled his campaign pledge to rejoin the Paris Climate Accord in 2021⁶⁵ and to prioritize reversal of Trump-era environmental rollbacks,⁶⁶ although this process is far from complete.

2020) <https://www.epa.gov/sites/production/files/2020-06/documents/prepublication_version_of_the_clean_water_act_section_401_certification_rule_508.pdf> accessed 14 December 2020.

⁵⁶ *Ibidem*.

⁵⁷ Amy Westervelt and Emily Gertz, ‘The Climate Rules’ *Drilled News* (n 50) <<https://drillednews.com/climate-covid-19-tracker/>> citing Juliet Eilperin and Jeff Stein, ‘Trump signs order to waive environmental reviews for key projects’ *Washington Post* (4 June 2020) <<https://www.washingtonpost.com/climate-environment/2020/06/04/trump-sign-order-waive-environmental-reviews-key-projects/>> accessed 14 December 2020.

⁵⁸ ‘Guardians Calls on U.S. Bureau of Land Management to Respond to COVID-19 Crisis’ *WildEarth Guardians* (18 March 2020) <<https://wildearthguardians.org/press-releases/guardians-calls-on-u-s-bureau-of-land-management-to-respond-to-covid-19-crisis/>> accessed 14 December 2020.

⁵⁹ Sally Hardin, ‘4 Ways the Trump Administration Has Made Our Air Dirtier During the COVID-19 Pandemic’ *Center for American Progress* (1 May 2020) <<https://www.americanprogress.org/issues/green/news/2020/05/01/484380/4-ways-trump-administration-made-air-dirtier-covid-19-pandemic/>> accessed 14 December 2020.

⁶⁰ Emily Holden and Nina Lakhani, ‘Polluted US areas are among worst-hit by coronavirus – putting people of color even more at risk’ *The Guardian* (14 April 2020) <<https://www.theguardian.com/world/2020/apr/14/pollution-hotspots-hit-hardest-by-coronavirus-us>> accessed 23 December 2020.

⁶¹ Hannah Pitt, Kate Larsen, and Maggie Young, ‘The Undoing of US Climate Policy: The Emissions Impact of Trump-Era Rollbacks’ *Rhodium Group* (17 September 2020) <<https://rhg.com/research/the-rollback-of-us-climate-policy/>> accessed 23 December 2020.

⁶² *Ibidem*.

⁶³ *Ibidem*.

⁶⁴ Matthew Brown and Ellen Knickmeyer, ‘Trump Pushes New Environmental Rollbacks on Way out the Door’ *AP News* (18 November 2020) <<https://apnews.com/article/joe-biden-donald-trump-public-health-climate-birds-a947e76f1023b739121692096322da24>> accessed 30 September 2021.

⁶⁵ *Ibidem*.

⁶⁶ For a list of rollbacks and potential means of reversing them, see, e.g., Center for Law, Energy & the Environment at Berkeley Law, *Reversing Environmental Rollbacks* (December 2020) <<https://www.law.berkeley.edu/research/clee/reversing-environmental-rollbacks/>> accessed 23 December 2020.

§2. Environmental Rollbacks in Other States

Other national governments have used the pandemic to suspend, delay, or cancel environmental regulations. These rollbacks illustrate how governments have used Covid-19 restrictions to weaken environmental protections, contributing to pollution and biodiversity loss and having long-term effects on the health of the environment and local communities.

Africa

In Africa, the Cameroonian government approved a logging concession for the Ebo Forest, allowing more than 169,000 acres of trees to be harvested.⁶⁷

Meanwhile, the Kenyan government allowed the construction of a road that cuts through the Nairobi National Park, despite the fact that a similar project previously drew opposition due to the loss of biodiversity it would cause.⁶⁸

Asia

In May 2020, the Indonesian Parliament took advantage of the physical distancing restrictions inhibiting meetings and public debates to pass a bill removing the limit on the size of mining operations under a single permit and allowing automatic permit extensions for up to twenty years.⁶⁹ This same bill failed in 2019 due to massive street protests calling attention to deforestation.⁷⁰ The Indonesian government passed a deregulation law that amends 75 existing laws affecting the

plantation industry and allowing farmers to burn small plots of land.⁷¹

Furthermore, India's Minister of the Environment stated in a letter that railway projects, small-scale development works involving construction over less than 215,278 square feet (20,000 square meters), and hydropower plants under-25 MW capacity will no longer require approval from the National Board for Wildlife, even when located within eco-sensitive zones of national parks or wildlife sanctuaries.⁷² The Minister also unlocked many protected areas, including an elephant reserve and wildlife sanctuaries, for development projects – such as coal mining, hydrocarbon drilling, and power lines projects – during the Covid-19 lockdown.⁷³

Europe

In Greece, the government passed a law overhauling environmental regulations on land use, environmental licensing, and management of protected areas, stating that it would help accelerate the country's economic recovery post-coronavirus. This law passed while debate and public consultation were curtailed by lockdown measures.⁷⁴ The Slovenian government enacted amendments to the Act on Intervention Measures to Contain the Covid-19 Epidemic, to introduce measures that restrict the ability of NGOs to defend the environment in administrative and court proceedings.⁷⁵ In Russia, a new law was passed that allows deforestation and construction in protected

⁶⁷ *Ibidem*. Conservation International, citing Elizabeth C. Alberts, 'For tool-wielding chimps of Ebo Forest, logging plan is a 'death sentence'', *Mongabay series* (30 July 2020) <<https://news.mongabay.com/2020/07/for-tool-wielding-chimps-of-ebo-forest-logging-plan-is-a-death-sentence/>> accessed 23 December 2020.

⁶⁸ *Ibidem*. Conservation International, citing Gilbert Koech, 'Road works underway through Nairobi National Park' *The Star* (12 March 2020) <<https://www.the-star.co.ke/counties/nairobi/2020-03-12-road-works-under-way-through-nairobi-national-park/>> accessed 15 December 2020.

⁶⁹ *Ibidem*. Conservation International, citing Hans Nicholas Jong, 'With new law, Indonesia gives miners more power and fewer obligations', *Mongabay* (13 May 2020) <<https://news.mongabay.com/2020/05/indonesia-mining-law-minerba-environment-pollution-coal/>> accessed 30 September 2021.

⁷⁰ *Ibidem*.

⁷¹ Hans Nicholas Jong, 'Which version? Confusion over environmental fallout of Indonesia deregulation law', *Mongabay* (13 October 2020) <<https://news.mongabay.com/2020/10/which-version-confusion-over-environmental-fallout-of-indonesia-deregulation-law/>> accessed December 15, 2020.

⁷² *Ibidem*. Conservation International, citing Jayashree Nandi, 'Wildlife nod not required for railway projects: Ministry' *Hindustan Times* (4 August 2020) <<https://www.hindustantimes.com/india-news/wildlife-nod-not-required-for-rly-projects-ministry/story-lk4i56MXDMxeQD0q5JQhIK.html>> accessed 30 September 2021.

⁷³ *Ibidem*. Conservation International, citing Mayank Aggarwal and Sahana Ghosh, 'Environment ministry unlocked many protected areas during the lockdown' *Mongabay* (12 June 2020) <<https://india.mongabay.com/2020/06/environment-ministry-unlocked-many-protected-areas-during-the-lockdown/>> accessed 30 September 2021; Ratnadip Choudhury, 'Row Over 2 Environment Clearances In Protected Wildlife Areas In Assam' *NDTV* (21 May 2020) <<https://www.ndtv.com/india-news/row-over-2-environment-clearances-in-protected-wildlife-areas-in-assam-2232444>> accessed 14 December 2020.

⁷⁴ *Ibidem*. Conservation International, Helena Smith, 'Backlash grows over Greek energy deregulation law' *The Guardian* (11 June 2020) <<https://www.theguardian.com/world/2020/jun/11/backlash-grows-over-greek-energy-deregulation-law>> accessed 23 December 2020.

⁷⁵ *Ibidem*. Conservation International citing Justice and Environment', 'Alarming developments in Slovenia'

natural areas near the shores of Siberia's Lake Baikal, a UNESCO World Heritage site, and suspends requirements for environmental impact evaluations of transport construction and modernization projects.⁷⁶

Latin America

In Brazil, the Bolsonaro Administration dismantled rules shielding protected reserves in the Amazon rainforest.⁷⁷ Brazil's government also reduced efforts to combat environmental crimes in the country, alleging that many of the field monitoring staff at the environmental agency, Ibama – which has suffered additional budget cuts in the Bolsonaro administration – were at increased risk of severe illness from Covid-19.⁷⁸ In Chile, the Environmental Assessment Service approved a mining project, taking advantage of a period during which, due to pandemic curfews and movement restrictions, people could not express their opinions.⁷⁹ And, in Ecuador, construction commenced on a new road through Yasuni National Park, located in the heart of the Ecuadorian Amazon. This construction brings oil development even closer to the 'Zona Intangible', a reserve created to protect the territory of Indigenous people in voluntary isolation.⁸⁰

<http://www.justiceandenvironment.org/news/?no_cache=1&tx_ttnews%5Btt_news%5D=465&cHash=51f5f5d304c5b06a7796759c6b0d12a7> accessed 23 December 2020.

⁷⁶ *Ibidem.* Conservation International citing 'Russia Sparks Backlash for Allowing Deforestation, Construction Along Lake Baikal' *The Moscow Times* (3 August 2020) <<https://www.themoscowtimes.com/2020/08/03/russia-sparks-backlash-for-allowing-deforestation-construction-along-lake-baikal-a71048>> accessed 23 December 2020.

⁷⁷ *Ibidem.* Conservation International citing Dom Phillips, 'Brazil Using Coronavirus to Cover up Assaults On Amazon, Warn Act' *The Guardian* (6 May 2020) <<https://www.theguardian.com/world/2020/may/06/brazil-using-coronavirus-to-cover-up-assaults-on-amazon-warn-activists?fbclid=IwAR3bPjsVjoOZSLOciOzQp0Uf05FoHRvmQuWCj9iLo9RvZkyP6mXB7SiUUZ0>> accessed 23 December 2020.

⁷⁸ *Ibidem.* Conservation International citing Reuters in Brasilia, 'Brazil Scales Back Environmental Enforcement Amid Coronavirus Outbreak' *The Guardian* (27 March 2020) <<https://www.theguardian.com/world/2020/mar/27/brazil-scales-back-environmental-enforcement-coronavirus-outbreak-deforestation>> accessed 15 December 2020.

⁷⁹ *Ibidem.* Conservation International citing Francisca Albiña, 'SEA Approves Start Of Mining Project in Putaendo Threatening Glacier Area' *Fundación Glaciares Chilenos* (27 April 2020) <<https://www.glaciareschilenos.org/news/sea-approves-start-of-mining-project-in-putaendo-threatening-glacier-area/?lang=en>> accessed 23 December 2020.

Oceania

In Australia, the government attempted to amend national environmental laws before receiving a once-in-a-decade report from a formal review, citing the necessity of economic recovery from the coronavirus crisis.⁸¹ Prime Minister Morrison pushed to deregulate the environmental approval process for major developments, announcing that a significantly shorter approval time was necessary for major projects.⁸² The federal government also decided to stop assessing major threats to species under national environment laws, thus endangering the survival of native wildlife.⁸³

§3. Environmental Rollbacks in EIAs

Environmental impact assessments (EIAs) serve many roles across law and ecology. They are governed by sub-national and national laws and procedures, as well as transboundary, regional, and international treaties and agreements – all of which have at their core the goal of sharing information with individuals and communities affected by projects, as well as between States and sub-national actors.

Typically, EIAs use systems in which a project proponent is required to file information on the project. That information is then used to determine

⁸⁰ *Ibidem.* Conservation International citing Finer M., Mamani N., 'New Oil Road Deeper Into Yasuni National Park (Ecuador) Toward Uncontacted Indigenous Reserves' *Amazon Conservation* (17 May 2020) <<https://www.amazonconservation.org/2020-itt-yasuni/>> accessed 23 December 2020.

⁸¹ Lisa Cox, 'Coalition Is aiming to Change Australia's Environment Laws Before Review Is Finished' *The Guardian* (23 April 2020) <https://www.theguardian.com/australia-news/2020/apr/23/coalition-is-aiming-to-change-australia-environment-laws-before-review-is-finished?CMP=share_btn_tw> accessed 23 December 2020. See also Adam Morton, 'Review of federal environmental laws will cut "green tape" and speed up approvals' *The Guardian* (29 October 2019) <<https://www.theguardian.com/environment/2019/oct/29/review-of-federal-environment-laws-will-cut-green-tape-and-speed-up-approvals>> accessed 23 December 2020.

⁸² 'Scientists Fear Push to Deregulate Environmental Approvals Will Lead to Extinction Crisis' *The Guardian* (15 June 2020) <<https://www.theguardian.com/environment/2020/jun/16/scientists-fear-push-to-deregulate-environmental-approvals-will-lead-to-extinction-crisis>> accessed 23 December 2020.

⁸³ 'Australian Government Stops Listing Major Threats To Species Under environmental Laws' *The Guardian* (7 May 2020) <<https://www.theguardian.com/environment/2020/may/08/australian-government-stops-listing-major-threats-to-species-under-environment-laws>> accessed 23 December 2020.

the level of potential environmental impact and the amount of background information which must be provided. The information is then shared with the public, which has the opportunity to review it, comment in-person and in writing and, where appropriate, lodge legal challenges if this process is not properly followed. After the public comment and information-gathering phases are concluded, the State or other decision-making entity issues a determination on whether to approve the project based on the EIA.

The pandemic and associated legal responses have, in many instances, proved challenging for the promotion – or even preservation – of the EIA systems existing in States across the globe. Indeed, several groups around the world have asserted that the Covid-19 pandemic has been used to undermine existing laws and rules regarding EIA processes, proceedings, and evidentiary requirements.⁸⁴

Responding to concerns regarding the safety of governmental employees as well as of the general public, administrative departments and agencies across the globe have issued orders and amended laws to allow for online consultation processes during the pandemic. While this does not seem problematic, given the transition of much of the world to online work and education, it results in the silencing of Indigenous and marginalized communities which have issues accessing reliable internet connections.⁸⁵

This also means that information relating to proposed projects is increasingly difficult for the public to access should there be questions of connectivity and the ability to view these documents virtually.

Relatedly, a number of States and sub-national actors have enacted laws and rules to amend EIAs and related procedures to shorten their timeframe and provide for new procedures.⁸⁶ For instance, in Australia, New Zealand, and Canada, new laws ostensibly seeking to streamline EIA processes, especially where more than one layer of government is involved, have been adopted over strenuous protests alleging that this will lead to insufficient information sharing, public comment time, and incorporation of public concerns in the decision-making process.⁸⁷

In many instances, these laws had been proposed and rejected within the past several years due to the same concerns and protests. For example, in Canada, the Minister of Environment and Climate Change authorized a derogation from the Impact Assessment Act to allow exploratory, offshore oil-and-gas drilling that was pending a consultation process, as well as to allow exploratory drilling activities up to 2030 for which the requirement to write an environmental impact assessment report has been waived.⁸⁸ The Province of Alberta also suspended monitoring and reporting requirements under several environmental acts.

⁸⁴ OECD, *Biodiversity and the Economic Response to COVID-19: Ensuring a Green and Resilient Recovery* (September 2020).

⁸⁵ The Firelight Group, *Environmental Impact Assessment and Indigenous Rights Should not Be Sacrificed for the Sake of Rapid post COVID-19 Economic Recovery* <<https://firelight.ca/2020/07/29/environmental-impact-assessments-and-indigenous-rights-should-not-be-sacrificed-for-the-sake-of-rapid-post-covid-19-economic-recovery/>> accessed 23 December 2020; Antonio Jose Paz Cardona, 'Colombia: Audiencias Virtuales y El Temor a Un Retroceso Ambiental durante El COVID-19' *Mongabay LATAM* <<https://es.mongabay.com/2020/05/colombia-audiencias-publicas-virtuales-aspersion-aerea-glifosato/>> accessed 19 May 2020.

⁸⁶ UNECE, 'Environmental Democracy in Times of COVID-19' *News* (5 June 2020) <<https://unece.org/general-unece/news/environmental-democracy-times-covid-19>> accessed 23 December 2020; Nektaria Stamouli, 'Greece Tries to Green Its Coronavirus Recovery' *Politico* (5 May 2020) <<https://www.politico.eu/article/greek-environment-bill-aims-at-coronavirus-recovery/>> accessed 23 December 2020; The National Archives, UK Statutory Instruments, *Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020* (2020 No. 5, 12 May 2020) <<https://www.legislation.gov.uk/ukxi/2020/505/introduc>

<tion/made>> accessed 23 December 2020; Asters, *Amendments to the Law of Ukraine "On Environmental Impact Assessment" and Peculiarities of Its Use During Quarantine* <https://www.asterslaw.com/press_center/legal_alerts/amendments_to_the_law_of_ukraine_on_environmental_impact_assessment_and_peculiarities_of_its_use_during_quarantine/> accessed 7 August 2020.

⁸⁷ Government of Ontario, 'An Act to Amend Various Statutes in Response to COVID-19 and to Enact, Amend and Repeal Various Statutes' *COVID-19 Economic Recovery Act*, (2020, S.O. 2020, c. 18 - Bill 197, 21 July 2020) Chapter 18; Government of Ontario, 'Environmental Assessment Act (EAA) Amendments in the COVID 19- Economic Recovery Act' *Environmental Assessment Act* (R.S.O. 1990, 8 July 2020); Parliamentary of New Zealand, 'Urban Development Act 2020' *Parliamentary Counsel Office* (6 August 2020); Parliament of Australia, 'Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals' *Bill 2020*; Mike Foley, 'Morrison Government Resurrects Abbot's 'One-Stop' Environmental Laws' *Sydney Morning Herald* (27 August 2020); Vaishnavi Chandrashekhkar, 'India's Push to Relax Environmental Assessment Rules Amid Pandemic Draws Criticism' *Science* (7 May 2020).

⁸⁸ Conservation International, *Global Conservation Rollbacks Tracker*, <<https://www.conservation.org/projects/global-conservation-rollbacks-tracker>> accessed 23 December 2020.

Meanwhile, the Province of Ontario⁸⁹ suspended the EIA and other key environmental protection oversight rules that required the government to notify and consult with the public about any environment-related changes, declaring such rules to be disruptive of measures to respond to the Covid-19 pandemic.⁹⁰ Further, Ontario weakened the provincial Environmental Assessment Act and other environmental laws without consulting the public.⁹¹

Additionally, the Quebec legislature attempted to pass Bill 61, which would have had a similar result; however, it was temporarily removed from consideration in August 2020.⁹²

At the same time, in States such as Brazil and Austria, there have been significant executive and legislative efforts to allow projects to go forward without thorough or public EIA process or filings.⁹³

Austria commenced construction of a controversial hydroelectric dam while legal complaints calling attention to the preservation of the biodiversity in the region impacted were still pending.⁹⁴

1.4. Procedural Environmental Rights: Public Participation

The pandemic has also demonstrated internet access inequality. Relocating governmental and

legal procedures from the physical to the virtual environment has cut many people off from public participation in the political process.⁹⁵ For example, public comments on environmental and agricultural laws in the United States⁹⁶ have moved online and thus excluded those without reliable internet access from providing comments and oversight in this process.⁹⁷

Despite the potential for abuse of digital information, some countries have harnessed technology to disseminate legitimate health and safety information. In September 2020, the Inter-American Commission on Human Rights (IACHR) issued a sweeping statement calling for Member States to provide expanded internet access to its citizens.⁹⁸ For example, the Brazilian Supreme Court created a special web page listing all judicial actions related to Covid-19.⁹⁹ It includes all cases related to the pandemic to better inform the community, while also giving preference to judgments of requests related to Covid-19. The measure ensures decisions are timely and transparent, with an efficient jurisdictional response to combating the pandemic.

Additionally, the Brazilian government announced plans for a new connectivity measure to distribute over 750,000 cell phone chips to better connect teachers and students.¹⁰⁰ The government has allocated R\$ 75 million (USD 13 million)

⁸⁹ James E. Paterson, Brynn Devine and Gideon Mordecai, 'Rolling back Canadian Environmental Regulations During Coronavirus is Short-Sighted' *The Conversation* (2020) <<https://theconversation.com/rolling-back-canadian-environmental-regulations-during-coronavirus-is-short-sighted-139636>> accessed 23 December 2020.

⁹⁰ Emma McIntosh, 'Ontario Suspends Environmental Oversight Rules, Citing COVID-19' *Canada's National Observer* (8 April 2020) <<https://www.nationalobserver.com/2020/04/08/news/ontario-suspends-environmental-oversight-rules-citing-covid-19>> accessed 23 December 2020.

⁹¹ Katie Krelove, Ian Miron and Priyanka Vittal, 'Groups Sue Ford Government for Unlawful Failure to Consult Public on Bill 197' *Wilderness Committee* (10 August 2020) <<https://www.wildernesscommittee.org/news/groups-sue-ford-government-unlawful-failure-consult-public-bill-197>> accessed 23 December 2020.

⁹² Philip Authier, 'Bill 61 Is Dead; CAQ Says It Will Table New Infrastructure This Fall' *Montreal Gazette* (19 August 2020) <<https://montrealgazette.com/news/quebec/bill-61-is-dead-caq-says-it-will-table-new-infrastructure-bill-this-fall>> accessed 23 December 2020.

⁹³ Jenny Gonzalez, 'Brazil Dismantles Environmental Laws via Huge Surge in Executive Acts Study' *Mongabay* (5 August 2020) <<https://news.mongabay.com/2020/08/brazil-end-runs-environmental-laws-via-huge-surge-in-executive-acts-study/>> accessed 23 December 2020.

⁹⁴ WWF, *Stop the Tumpen-Habichen Hydropower Station!* <https://wwf.panda.org/wwf_news/?362336/stop-Tumpen-Habichen> accessed 23 December 2020.

⁹⁵ Stephanie Oehler, 'Public Participation at a Distance: Engaging in Gulf Restoration Processes During the Pandemic' *Environmental Law Institute* <<http://eli-ocean.org/blog/public-participation-at-a-distance-engaging-in-gulf-restoration-processes-during-the-pandemic/>> accessed 14 July 2020.

⁹⁶ The part of the administrative rulemaking process allowing the public to provide comments and input on proposed regulations.

⁹⁷ *Ibidem*.

⁹⁸ OAS, *States of the Region Must Accelerate Universal Internet Access Policies during the COVID-19 Pandemic and Adopt Differentiated Measures to Incorporate Groups in Vulnerable Situations* (press release R206/20, 31 August 2020).

⁹⁹ STF, 'Painel de Ações COVID-19' *Transparência* <<https://transparencia.stf.jus.br/single/?appid=615fc495-804d-409f-9b08-fb436a455451&sheet=260e1cae-f9aa-44bb-bbc4-9d8b9f2244d5&theme=simplicity&opt=currsel%2Cctxmenu&select=clearall>> accessed 18 December 2020.

¹⁰⁰ Xinhua, 'Brazil's Sao Paulo to Hand Out 750,000 Phone Chips to Keep Students, Teachers Connected' *XinhuaNet* (15 October 2020) <http://www.xinhuanet.com/english/2020-10/15/c_139440751.htm> accessed 23 December 2020.

toward this effort.¹⁰¹ These efforts are increasingly important in emerging markets where internet access is nowhere near universal and may be cost prohibitive. According to data from Zero-D, 49% of internet searches in Brazil queried variations of “internet gratis” or ‘free internet’.¹⁰² As the pandemic rages on, and our lifestyle and work adapts to digital environments, such access needs will likely continue to increase.

1.5. Protection of Wildlife

Wildlife conservation is facing its most serious challenge in decades. The Covid-19 health crisis has highlighted the extreme fragility of the ecosystem and the massive impact human activity has had on the health of ecosystems, as ecosystems and wildlife populations near tipping points. The anthropogenic interference is leading to a complete disruption of flora and fauna, increasing the risks of extinction.

Human activity, directly and indirectly, is now the primary cause of ecological disruption. The loss of diverse ecological interactions is detrimental for other species, including humans. Animals are crucial for human survival since they maintain an ecological balance by playing an essential role in nutrient recycling. Man-made interference with the ecosystem has created perfect conditions for the so-called ‘zoonotic spillovers’. These entail harmful pathogens like viruses, bacteria, parasites, and fungi crossing the boundary from their natural reservoir (animals) to start circulating among humans. Environmental preservation is crucial in the fight against pandemic outbreaks. Scientists warn that deforestation, industrial agriculture, illegal wildlife trade, and other types of environmental degradation increase the risk of future pandemics as a consequence of the forced proximity between humans and animals.¹⁰³ Scientific evidence shows that it is likely Covid-19 originated in bats and then jumped to humans via an intermediary, probably pangolins. Severe acute

respiratory syndrome coronavirus 2 (SARS-CoV-2) is the virus that causes Covid-19, which is genetically related to the SARS-associated coronavirus.¹⁰⁴

‘Coronavirus’ is a generic term that includes a large family of viruses. Scientists are still looking for similar coronaviruses in other animals to reveal the animals to which it might have adapted. This can be done by testing tissue samples from wild mammals or by examining the SARS-CoV-2. Over time, viruses often start encoding their proteins using similar patterns of nucleotides to those of their host, which helps viruses adapt to their new environment.¹⁰⁵

Around 75% of emerging infectious diseases, such as Ebola, SARS, and MERS, are zoonoses. For example, the Ebola virus disease, which has a mortality rate of up to 90%,¹⁰⁶ was first transmitted after an individual ate an infected animal. Scientists identified members of a wild chimpanzee found dead in the Taï National Park, Côte d’Ivoire as the source of one of the first outbreaks, which happened in 1976. Retrospective epidemiologic and ecologic investigations were compatible with a point-source epidemic and the presence of Ebola virus was confirmed by laboratory tests.¹⁰⁷ Humans have exacerbated the threat Ebola poses to wild apes and chimpanzees through deforestation, urban sprawl, tourism, and other means. The largest outbreak of Ebola in humans was declared in 2014, after a pregnant woman living in Congo had butchered a monkey of an unknown arboreal species found dead by her husband.¹⁰⁸

Transmission during this outbreak shows another example of anthropogenic interference in untouched ecosystems.¹⁰⁹ Animals’ health thus also depends on humans’ activities since humans structure their environments, intentionally or unintentionally.

The international wildlife trade is one of the main human-animal interactions, where animals are introduced to new environments, along with the pathogens they might carry. Amongst these, the so-

¹⁰¹ *Ibidem*.

¹⁰² Upstream, ‘Demand for Free Mobile Internet Access in Emerging Markets Reaches New High in Q2 during Pandemic’ *News* (5 October 2020) <<https://www.upstreamsystems.com/demand-for-free-mobile-internet-access-in-emerging-markets-reaches-new-high-in-q2-during-pandemic/>> accessed 23 December 2020.

¹⁰³ Josef Settele et al., *COVID-19 Stimulus Measures Must Save Lives, Protect Livelihoods, and Safeguard Nature to Reduce the Risk of Future Pandemics* (Bonn: IPBES, 2020).

¹⁰⁴ “Coronavirus” is a generic term that includes a large family of viruses.

¹⁰⁵ Smriti Mallapaty, ‘Animal Source of the Coronavirus Continues to Elude Scientists’ *Nature News* (18 May 2020) <<https://www.nature.com/articles/d41586-020-01449-9>> accessed 23 December 2020.

¹⁰⁶ WHO, ‘Ebola Virus Disease’ *Newsroom* (10 February 2020) <<https://www.who.int/news-room/fact-sheets/detail/ebola-virus-disease>> accessed 23 December 2020.

¹⁰⁷ Pierre Formenty et al., ‘Ebola Virus Outbreak among Wild Chimpanzees Living in a Rain Forest of Côte d’Ivoire’ *The Journal of Infectious Diseases* (179, no. 1, February 1999) <https://academic.oup.com/jid/article/179/Supplement_1/S120/880079> accessed 30 September 2021.

¹⁰⁸ Gaël D. Maganga et al., ‘Ebola Virus Disease in the Democratic Republic of Congo’ *New England Journal of Medicine* (371, November 2014) <<https://www.nejm.org/doi/full/10.1056/nejmoa1411099>> accessed 23 December 2020.

¹⁰⁹ Stanford University, ‘Ebola Zaire Outbreaks’ *Tara’s Ebola Site* <<https://web.stanford.edu/group/virus/filo/ebola.html>> accessed 23 December 2020.

called ‘wet markets’¹¹⁰ offer the perfect platform where unregulated and illegal wildlife trade flows.¹¹¹

Despite having some international legal frameworks for the protection of wildlife, overall, there is very poor law enforcement. The Convention on International Trade in Endangered Species (CITES)¹¹² is the global regulatory instrument for international trade in over 36,000 species of wild animals and plants – of which about 6,000 are animals. While CITES does not cover domesticated species, it does regulate trade in listed species of wild animals that are farmed, ranched, or bred in captivity.¹¹³ It is important to note that CITES, as an international legally binding agreement, regulates cross-border transactions. Public health and veterinary quarantine are mentioned in the Convention as areas where parties may adopt stricter national measures in addition to those required by CITES. Domestic regulation of production and markets is relevant as it affects international trade.

However, with so many products dependent on a global supply chain, the international-domestic distinction may seem blurred.¹¹⁴

Therefore, international cooperation is necessary to fully implement wildlife protection measures. For example, the WHO, the UN Food & Agricultural Organization (FAO), and the World Organization for Animal Health (OIE) jointly issued a ‘Tripartite Guide to Addressing Zoonotic Diseases in Countries’ on the need to protect humans.¹¹⁵ Furthermore, the ‘One Planet, One Health, One Future’ approach proposes reintegrating ecosystems’ health and integrity while also

addressing other pressing issues such as climate change and antimicrobial resistance (see section 1.3 above).¹¹⁶

Future pandemics are likely to happen more frequently unless society provides a holistic response that strengthens environmental protection.¹¹⁷ A longer-term perspective is vital. For instance, safeguarding wild habitats against human encroachment can help tackle a key root cause of emerging zoonotic diseases, lessening future pandemic risks. The current health pandemic is, therefore, at its core, an environmental crisis.¹¹⁸

Understanding the linkages between human and animal behavior is of critical importance as human disturbance has detrimental effects on species persistence and ecosystem dynamics. Becoming aware of these insights would improve human-wildlife coexistence and preserve environmental well-being.

1.6. Waste Management

The pandemic has changed patterns of waste production around the world, posing new challenges for waste management. For instance, in China the healthcare waste treatment capacity increased from 50 tons/day to 106.9 tons/day during the pandemic.¹¹⁹ The increase of single-use products, such as face masks and gloves, and “panic buying” due to isolation measures, have also increased plastic pollution.¹²⁰

Waste management is an essential element of the protection of both the right to a healthy environment (see John Knox’s framework principle n. 11)¹²¹ and

¹¹⁰ Lisa Lim, ‘Why Asia’s wet markets are being unfairly targeted in bad pandemic press’ *South China Morning Post* (25 April 2020) <<https://www.scmp.com/magazines/post-magazine/short-reads/article/3081363/why-asias-wet-markets-are-being-unfairly>> accessed 23 December 2020.

¹¹¹ Peter J. Li, ‘First Sars, now the Wuhan coronavirus. Here’s why China should ban its wildlife trade forever’ *South China Morning Post* (29 January 2020) <<https://www.scmp.com/comment/opinion/article/3047828/first-sars-now-wuhan-coronavirus-heres-why-china-should-ban-its>> accessed 23 December 2020.

¹¹² Convention on International Trade in Endangered Species of Wild Fauna and Flora <<https://cites.org/eng>> accessed 30 September 2021.

¹¹³ *Ibidem*.

¹¹⁴ *Ibidem*.

¹¹⁵ FAO and WHO, *Taking a Multisectoral, One Health Approach: A Tripartite Guide to Addressing Zoonotic Diseases in Countries* (Geneva: WHO Press, 2019).

¹¹⁶ WCS, *The Berlin Principles on One Health 2019* <<https://oneworldonehealth.wcs.org/About-Us/Mission/The-2019-Berlin-Principles-on-One-Health.aspx>> accessed 23 December 2020.

¹¹⁷ Josef Settele *et al.*, ‘COVID-19 Stimulus Measures: Must Save Lives, Protect Livelihoods, and Safeguard Nature to Reduce the Risk of Future Pandemics’ *IPBES* (27 April 2020) <<https://ipbes.net/covid19stimulus>> accessed 23 December 2020.

¹¹⁸ John Vidal, ‘Tip of the iceberg’: is our destruction of nature responsible for Covid-19? *The Guardian* (18 March 2020) <<https://www.theguardian.com/environment/2020/mar/18/tip-of-the-iceberg-is-our-destruction-of-nature-responsible-for-covid-19-aoe>> accessed 23 December 2020.

¹¹⁹ UNEP & IGES, *Waste Management during the COVID-19 Pandemic: From Response to Recovery* (UNEP 2020).

¹²⁰ Samuel Asumadu Sarkodie and Phebe Asantewaa Owusu, ‘Impact of COVID-19 pandemic on waste management’ *Environ Dev Sustain* (2020) <<https://link.springer.com/article/10.1007/s10668-020-00956-y>> accessed 23 December 2020.

¹²¹ Human Rights Council, Thirty-seventh session, 26 February–23 March 2018, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (A/HRC/37/59).

the right to health,¹²² since adequate waste management prevents and minimizes individuals' exposure to hazardous substances, including viruses.

States thus have a duty to undertake measures to ensure appropriate waste management.¹²³ Sudden shifts in healthcare and household waste production during the pandemic require urgent implementation of contingency plans in order to avoid consequences to human health and the environment, especially regarding healthcare waste.¹²⁴

However, not all States were capable of fully implementing contingency plans, especially developing countries struggling with financial and technical limitations.¹²⁵ The pandemic also exposed existing gaps in States' waste management sectors, such as lack of specific legislation on healthcare waste treatment.¹²⁶ Due to these deficiencies, environmental concerns arose regarding the fact that increased amounts of healthcare waste could impact air quality due to open burning and incineration, and improper disposal of waste could affect marine life and wildlife.¹²⁷

Above all, the pandemic has magnified existing challenges in waste management that have been impacting human health and the environment for decades. As warned by the UN Special Rapporteur, this increases annual waste and also has health implications caused by chronic chemicals, pollutants, and other hazardous materials whose effects have been unrecognized or underappreciated.¹²⁸ As recommended by the UN, post-Covid-19 recovery focus should not only be on improving global waste management practices, but also on redesigning consumption patterns to reduce stress on natural habitats, minimizing the risk of the emergence of future zoonoses and reducing the risk of death from pollution.¹²⁹

1.7. Deforestation

Deforestation has increased human exposure to new animal-borne illnesses. The links between loss

of biodiversity and habitat and the emergence and transmission of infectious diseases are well documented.¹³⁰ As forest habitats shrink, humans come in close contact with exotic wildlife harboring viruses and pathogens that lead to new diseases in humans such as Ebola, HIV, and dengue.¹³¹ Tropical forests are home to unique environments. They are essential to the global hydrological cycle, as they help regulate climate patterns while keeping surface temperatures lower. Through the photosynthesis process, they function as sinks by removing CO₂ from the atmosphere. When they are burnt, they become sources of CO₂. Trees intercept rainfall as water clings to leaves and branches, slowing its journey across the landscape. This reduces the overall volume of surface runoff, curtails soil erosion, and increases groundwater recharge.

There is an increasing body of evidence to suggest that land clearing has led to a circulation of viruses.

Firstly, when ancient ecosystems are disrupted and ecological rules are broken down, animals that have never previously met can come into contact with each other while increasing the pool of pathogen transmission. Secondly, these "disturbed" new environments created by deforestation pave the way for increased contact between humans and tropical animals.

Even before Covid-19 wreaked havoc, scientists were warning of the risks posed by land clearing. In 2018, a group of European scientists cautioned that 'the probability of occurrence of the risk of pandemics is increasing owing to environmental change and higher environmental pressure'.¹³²

Deforestation and habitat fragmentation have increased the pool of pathogens that can spread from animals to humans. While some species are going extinct, those that tend to survive and thrive — rats and bats, for instance — are more likely to host potentially dangerous pathogens that could jump from animals to humans.¹³³ An analysis done by the Intergovernmental Science-Policy Platform

¹²² CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12) (CESCR/E/C.12/2000/4, 11 August 2000).

¹²³ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, *Duty to prevent exposure to the COVID-19 virus* (13 October 2020, A/HRC/45/12).

¹²⁴ UNEP & IGES, *Waste Management* (n 119).

¹²⁵ *Duty to prevent exposure to the COVID-19 virus* (n 123).

¹²⁶ UNEP & IGES, *Waste Management* (n 119).

¹²⁷ Sarkodie and Owusu, 'Impact of COVID-19 pandemic on waste management'.

¹²⁸ *Duty to prevent exposure to the COVID-19 virus* (n 123).

¹²⁹ *Ibidem*.

¹³⁰ Felicia Keesing et al., 'Impacts of biodiversity on the emergence and transmission of infectious diseases' *Nature* 468 (2010) 647-652. Alessandra Nava et al., 'The Impact of Global Environmental Changes on Infectious Disease Emergence with a Focus on Risks for Brazil' *ILAR Journal* (58, 2017) 393-400.

¹³¹ Vidal, *Tip of the iceberg* (n 118).

¹³² Aneta Afelt et al., 'Bats, Coronaviruses, and Deforestation: Toward the Emergence of Novel Infectious Diseases?' *Frontiers in Microbiology* (11 April 2018) <<https://www.frontiersin.org/articles/10.3389/fmicb.2018.00702/full>> accessed 23 December 2020.

¹³³ Peter Daszak et al., 'Emerging Infectious Diseases of Wildlife - Threats to Biodiversity and Human Health' *Science* (287, no. 5452, 2000) 443-449, accessed 23 December 2020.

on Biodiversity and Ecosystem Services (IPBES) has also connected trends in human development and biodiversity loss to disease outbreak. The IPBES report highlights how Covid-19 has helped to clarify the need to investigate biodiversity's role in pathogen transmission as people move into undeveloped areas while increasing human exposure to parasites: 'Rampant deforestation, uncontrolled expansion of agriculture, intensive farming, mining and infrastructure development, as well as the exploitation of wild species have created a perfect storm for the spillover of diseases from wildlife to people'.¹³⁴

1.8. Overpopulation

Overpopulation has further contributed to the current global pandemic and the spread of disease.

From 1900 to 2020, the world population has risen from 1.6 billion to 7.8 billion.¹³⁵ The international regulation of population control has been viewed through the lens of human rights and has often been frowned upon. Additionally, a sustainability argument asserts the rights of not only current but also future generations.¹³⁶ This proves to be a difficult argument in many countries – and it seems the problem of population growth and its accompanying ills will not be alleviated in our new pandemic reality.

Dense population centers not only create a hospitable environment for a disease's spread – they also wreak havoc on the environment and corresponding environmental rights.¹³⁷ Greater resource scarcity drives over-consumption of natural resources, forced human migration, and habitat destruction, thus leading to catastrophic environmental impacts, such as deforestation.

Population growth has been steadily increasing each year, and with this rise, environmental and public health problems will proliferate. A larger

population creates greater consumption and demand for natural resources; thus, it can create resource scarcity.¹³⁸ Additionally, climate change has been driving population mobility. As coastal areas become less hospitable for humans, and changing temperatures alter farming practices or crop output, involuntary migration becomes more prevalent.¹³⁹

Many migrants seek stability in urban areas, which drives up population levels in many metro areas and creates the perfect storm for the spread of transmissible diseases.¹⁴⁰ Future pandemic plans, whether through more affordable and sustainable housing or relaxed zoning regulations, will have to account for these additional hurdles to containment caused by population growth from climate refugees.¹⁴¹

In countries that already struggle with overpopulation, Covid-19 and future pandemics make this issue even more unmanageable. As seen throughout this report, environmental protection and individual rights have become secondary to stopping the spread of disease, as well as to alleviating conditions that result from dense populations. For lasting benefits, pandemic containment plans and environmental protection should operate jointly.

Some urban areas are considering zoning plans that involve increasing population density to concentrate environmental impacts in fewer discrete locations. Other metro areas seek to relax zoning to allow for more equitable spread of the population, thus making social distancing more feasible, or to create more affordable and green housing options.¹⁴²

The current global pandemic also highlights economic disparities related to overpopulation.

Poverty is the common denominator between living in densely populated urban areas and the lack

¹³⁴ Josef Settele *et al.*, 'COVID-19 Stimulus Measures: Must Save Lives, Protect Livelihoods, and Safeguard Nature to Reduce the Risk of Future Pandemics' *IPBES* (27 April 2020).

¹³⁵ United Nations Environment Programme and International Livestock Research Institute, *Preventing the Next Pandemic: Zoonotic Diseases and How to Break the Chain of Transmission* (UNEP 2020).

¹³⁶ Victoria Mikesell Mather, 'Population Law and Policy: From Control and Contraception to Equity and Equality' *Saint Mary's Law Journal* (50, no. 3, 2019), 917-950.

¹³⁷ Sachin Minhas, 'Short Communication: Could India Be the Origin of the Next COVID-19 Like Epidemic?' *Science of the Total Environment* (728, no. 1, 2020), 138918.

¹³⁸ Paul R. Erlich of Stanford University's Institute for Conservation Biology lists demonstrable signs of resource scarcity including, "hundreds of millions hungry, . . . billions of people malnourished . . . the dramatic decline in energy returned on energy invested in the scramble for oil, the

heating planet and increasing extreme weather, the escalating refugee crisis, the scramble after remaining high-grade resources . . . , and the automatic decline (with population growth) of democratic government as each individual voter's say is diluted." Paul R. Ehrlich, 'Without Policy Changes, a Global Crash is Inevitable' *The Environmental Forum* (March/April 2017) <<https://www.eli.org/sites/default/files/tef/thedebate/population%20debate.pdf>> accessed 23 December 2020.

¹³⁹ Saber Salem and Armin Rosencranz, 'Climate Refugees in the Pacific' *Environmental Law Reporter* (50, no. 7, 2020) 10540.

¹⁴⁰ *Ibidem.*

¹⁴¹ *Ibidem.*

¹⁴² Maryke van Staden, 'What now for cities?', *Sustainable Dev. Goals: New Understanding* (39, October 2020) <<https://www.sustainablegoals.org.uk/wp-content/uploads/2020/10/039-041-SDGs-VAN-STADEN.pdf>> accessed 23 December 2020.

of geographic mobility.¹⁴³ Both of these factors intensify the effect and spread of Covid-19.

Furthermore, there are significant populations of refugees and migrants living in similarly dense and financially unstable conditions – with estimates of 80% of refugees living in low-income countries who are unable to mitigate such problems or account for the environmental impact of mass settlements of migrants and refugees.¹⁴⁴

Overpopulation creates more than just a hospitable atmosphere for the spread of infectious diseases like Covid-19; it simultaneously causes intense ecological impacts such as habitat destruction and resource scarcity. To combat the spread of disease and to prevent environmental impacts, pandemic-time international and domestic legislation should include funding allocated specifically toward mitigating the environmental impacts caused by high population density and overconsumption.

Overpopulation, thanks to the current and future pandemic concerns, should be placed at the same level as other human rights – in conjunction with rights to the environment and health.

1.9. Building Back Better

Cooperation at the international and regional levels is crucial to States' efforts to build back better. For example, in May 2020, as part of its effort to build back better post-Covid-19, the European Commission presented a wide-ranging package combining the future Multiannual Financial Framework (MFF) and a specific Recovery effort under Next Generation EU (NGEU).¹⁴⁵ The NGEU is one of the world's greenest recovery packages for the way that it seeks to ensure a sustainable recovery to save its economy from the pandemic.¹⁴⁶ The package includes a new Recovery and Resilience Facility of €560 billion to offer financial support for investments and reforms – notably in the green and digital transition industries.¹⁴⁷ The plan for European recovery seeks public and private investment to set the EU on the path to a 'sustainable and resilient recovery, creating jobs and repairing the immediate damage caused by the

Covid-19 pandemic whilst supporting the Union's green and digital priorities'.¹⁴⁸

Moreover, the European Commission President Ursula von den Leyen wishes to turn the European Green Deal, which sets out how to make Europe the first climate-neutral continent by 2050, into a rescue plan to boost jobs and growth, the resilience of the EU, and the health of the environment.¹⁴⁹ As such, the EU's recovery strategy will include a more circular economy, renovating buildings and infrastructure, rolling out renewable energy projects, kick-starting clean hydrogen economy, and cleaner transport and logistics.¹⁵⁰ EU Member States are required to prepare national recovery and resilience plans setting out their reform and investment agenda for the years 2021-23.¹⁵¹

In addition, in response to Covid-19, the EU created a new Health Programme, EU4Health, to strengthen health security and be prepared for future health crises.¹⁵² EU4Health will provide funding to EU Member States, health organizations and NGOs through a €9.4 billion investment, thus becoming the largest health program in monetary terms.¹⁵³ Other programs will be reinforced as well in order to align the future financial framework with recovery needs.

1.10. Conclusions and Summary of Key Recommendations

Emerging infectious diseases (EID) are a significant threat to global health. The aforementioned evidence shows how they are products of anthropogenic interference. The Covid-19 outbreak has highlighted how crucial it is to protect and preserve untouched habitats to prevent the spread of future pandemics. It is essential that governments address the economic and cultural factors that drive deforestation. On top of that, they must ensure the strengthening and enforcement of environmental regulations to reduce human encroachment into wildlife habitats.

Furthermore, ecologists should be working with infectious-disease researchers, public-health workers, and medics to track environmental change, assess the risk of pathogens crossing over,

¹⁴³ Alice Blukacz, 'COVID-19: Leaving No One Behind in Latin America,' 369 *Lancet* (1070, 10 October 2020).

¹⁴⁴ *Ibidem*.

¹⁴⁵ European Council, Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020), Conclusions, *EUCO* (10/20, 21 July 2020) <<https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>> accessed 28 September 2020.

¹⁴⁶ European Commission press release, *Europe's moment: Repair and prepare for the next generation* (27 May 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_940> accessed 23 December 2020.

¹⁴⁷ *Ibidem*.

¹⁴⁸ European Council conclusions *EUCO* 10/20, (n 145).

¹⁴⁹ European Commission press release (n 146).

¹⁵⁰ *Ibidem*.

¹⁵¹ European Council conclusions *EUCO* 10/20 (n 145).

¹⁵² European Commission, *EU4Health 2021-2027 – a vision for a healthier European Union* <https://ec.europa.eu/health/funding/eu4health_en> accessed 28 September 2020.

¹⁵³ *Ibidem*.

and monitor and control new virus outbreaks from wildlife and livestock. Potential solutions include:

- **Expand Protected Wetlands and Secure Wetland Integrity**

The rapid spread of Covid-19 has made us more conscious of our relationship with other species. As mentioned in the section on the One Health Approach, it is necessary to understand how human actions can fuel the loss of natural habitats, and thus, bring together animals and humans in an exchange that can lead to these types of zoonotic diseases. That is why there is a pressing need to integrate the One Health Approach into existing natural habitat conservation agreements, such as the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat. The Convention directly recognizes the interdependence of humans and their environment, as well as the need to preserve the ecological functions of wetlands as habitats to a whole range of flora and fauna.¹⁵⁴ In the context of the Covid-19 pandemic, the Ramsar Secretariat has continued to work in collaboration with the CBD, providing inputs to processes related to the preparation of the post-2020 Global Biodiversity Framework. The Secretariat has also continued its work towards SDG14 and 6, and has participated in regional meetings, committees and panels.¹⁵⁵

It is this work which has the potential to help in the aftermath of the pandemic, through reinforcing domestic and international legal frameworks to guarantee the protection and preservation of wetlands as significant natural habitats. Ramsar already provides an exchange forum for local, national, and international cooperation, which is what is needed in order to recover from the pandemic. By expanding the protection and securing the integrity of wetlands, the environment will be able to recover from the adverse effects of Covid-19 and prior human activities. It can also prevent future pandemics and zoonosis 'spillovers' by strengthening the protection of wetlands, and

hence, providing species with a place to live and thrive.

The Ramsar Convention, as it is today, provides a set of instructions and guidelines that are helpful for getting the conversation started. However, and as it has been proposed by some scholars, it does not establish an adequate mechanism of sanctions, which could be what is missing for its true implementation.¹⁵⁶ Strengthening the existing legal frameworks could be an avenue for achieving better protection of wetlands, and as a result, further environmental recovery and avoidance of future pandemics.

- **CITES – Expand Listings, Suspend Trade in Non-Compliance, and Combat Illegal Wildlife Trade**

With the spread of the pandemic, one current goal is how to face the aftermath of the virus. This includes new policies, reforms, and actions to be implemented by national authorities, international organizations, and citizens. In this regard, CITES¹⁵⁷ is crucial. It has been viewed as a success among international treaties involving the conservation of wildlife, however, the Covid-19 pandemic has drawn out the need for increased consideration of the Convention's serious inadequacies in regulating wildlife exploitation.

The preamble of the Convention explicitly underlines the need to be 'conscious of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view'.¹⁵⁸ The identification of wild fauna that can pose a public health risk to humans is based on the highest scientific degree. One solution could be to include in Appendix I¹⁵⁹ of the Convention all those animals that carry coronaviruses.¹⁶⁰ This would allow a certain degree of control that may limit the next pandemic. Nevertheless, the CITES Secretariat noted that zoonotic disease matters are outside CITES' competencies; therefore, the organization lifted its focus from intervention regarding animals, human health, and Covid-19.¹⁶¹

¹⁵⁴ Ramsar Convention Secretariat <https://www.ramsar.org/sites/default/files/documents/library/current_convention_text_e.pdf> accessed 23 December 2020.

¹⁵⁵ Ramsar Convention Secretariat <<https://www.ramsar.org/news/continued-work-of-the-secretariat-before-and-during-the-pandemic>> accessed 23 December 2020.

¹⁵⁶ V. Batanjski, et al., 'Critical legal and environmental view on the Ramsar Convention in protection from invasive plant species: an example of the Southern Pannonia region' *Int Environ Agreements* (16, 2016) 833, 848.

¹⁵⁷ The Convention on International Trade in Endangered Species (CITES) is a global environmental agreement that regulates the global trade of the most

threatened species on Earth, See CITES Secretariat, <<https://cites.org/eng>> accessed 23 December 2020.

¹⁵⁸ Convention on International Trade in Endangered Species (1975).

¹⁵⁹ CITES Secretariat, *CITES Appendices* <<https://cites.org/eng/app/index.php>> accessed 23 December 2020.

¹⁶⁰ Adiba Firmansyah, 'CITES reform: Enhanced wildlife trade regime needed to avoid next pandemic' *EJIL Talk* <<https://www.ejiltalk.org/cites-reform-enhanced-wildlife-trade-regime-needed-to-avoid-next-pandemic/>> accessed 23 December 2020.

¹⁶¹ CITES Secretariat <https://cites.org/eng/CITES_Secretariat_statement_in_relation_to_COVID19> accessed 23 December 2020.

Another solution would be to shape a new agreement to address trade in species that pose a threat to human health, such as Covid-19. However, experts have noted that another treaty would be duplicative of CITES, resulting in a redundant regulatory framework. Alternatively, the most practical and realistic solution would be a reform that could enable the Convention to support the regulation of trade in wild animals that affects humans.¹⁶² While CITES has accomplished many successes since its entry into force, what is now needed is a new, broader Convention approach that can face the dangerous link between human health and wildlife species.

- **Fund and Expand National Measures to Combat Desertification**

A specific manifestation of land degradation, desertification is defined as 'land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities'.¹⁶³ International law on desertification is primarily codified in the United Nations Convention to Combat Desertification (UNCCD). Adopted on 14 October 1994, this Convention entered into force on 26 December 1996, and there are currently 197 parties to the Convention.¹⁶⁴ The UNCCD aims to combat desertification through long-term strategies for dryland management, the adoption of sustainable management programs for land and water

resources, and requirements for developed states and states affected by drought and desertification.¹⁶⁵ The UNCCD was seen as innovative because of the way it incorporated both general principles and region-specific measures by way of an implementation annex.¹⁶⁶

As the UN explains, desertification, land degradation, and drought (DLDD) links to zoonosis and the spread of zoonotic diseases such as Covid-19.¹⁶⁷ There are a number of effects that desertification has on human health in general, including higher threats of malnutrition; more water- and food-borne diseases; more respiratory diseases; and the spread of infectious diseases due to migration.¹⁶⁸

Many states have existing national plans to combat desertification, for example, Spain's National Program against Desertification (*Programa de Acción Nacional Contra La Desertificación*),¹⁶⁹ Argentina's National Action Plan to Combat Desertification, Land Degradation and Drought Mitigation (*Plan de Acción Nacional contra la Desertificación, Degradación de Tierras y Mitigación de Sequía*),¹⁷⁰ Iran's National Action Programme to Combat Desertification and Mitigate the Effects of Drought,¹⁷¹ and Georgia's Second National Action Programme to Combat Desertification.¹⁷² However, there remain insufficient measures to combat desertification, including at the EU level.¹⁷³

¹⁶² Malavika Vyawahare, 'As COVID-19 pandemic deepens, global wildlife treaty faces an identity crisis' (15 May 2020) <<https://news.mongabay.com/2020/05/as-covid-19-pandemic-deepens-global-wildlife-treaty-faces-an-identity-crisis/>> accessed 23 December 2020.

¹⁶³ United Nations, Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1992) art 1.

¹⁶⁴ *Ibidem*.

¹⁶⁵ William C. Burns, 'The International Convention to Combat Desertification: Drawing a Line in the Sand?' (1995) 16 Michigan Journal of International Law 3, 832-882.

¹⁶⁶ Kannan Ambalam, 'United Nations Convention to Combat Desertification: Issues and Challenges' *E-International Relations* (April 2014) <<https://www.e-ir.info/2014/04/30/united-nations-convention-to-combat-desertification-issues-and-challenges/>> accessed 23 December 2020.

¹⁶⁷ UNCCD, *UNCCD and the COVID-19 Crisis: Land Based Solutions for Healthy People and a Sustainable Planet* (Bonn: UNCCD, 2020) <<https://library.unccd.int/Details/fullCatalogue/1498>> accessed 23 December 2020.

¹⁶⁸ WHO, *Climate change: Land degradation and desertification* <<https://www.who.int/news-room/q-a-detail/climate-change-land-degradation-and-desertification>> accessed 23 December 2020.

¹⁶⁹ Gobierno de España, *Programa de Acción Nacional Contra La Desertificación* (Madrid: Ministerio de Agricultura, Pesca y Alimentación, 2007) <https://www.mapa.gob.es/es/desarrollo-rural/temas/politica-forestal/desertificacion-restauracion-forestal/lucha-contra-la-desertificacion/lch_pand.aspx> accessed 23 December 2020.

¹⁷⁰ Gobierno de Argentina, *Plan de Acción Nacional de Lucha contra la Desertificación, Degradación de Tierras y Mitigación de Sequía* (Buenos Aires: Ministerio de Ambiente y Desarrollo Sostenible) <<https://www.argentina.gob.ar/ambiente/bosques/programa-accion-nacional>> accessed 23 December 2020.

¹⁷¹ Islamic Republic of Iran, *The National Action Programme to Combat Desertification and Mitigate the Effects of Drought* (Tehran: Forest, Range and Watershed Management Organization, 2004) <<https://knowledge.unccd.int/sites/default/files/naps/2017-08/iran-eng2004.pdf>> accessed 23 December 2020.

¹⁷² Government of Georgia, *Second National Action Program to Combat Desertification* (Kutaisi: Ministry of Environment Protection of Georgia, 2014) <<http://extwprlegs1.fao.org/docs/pdf/geo171446.pdf>> accessed 23 December 2020.

¹⁷³ European Court of Auditors, *Combating desertification in the EU: a growing threat in need of more action* <<https://op.europa.eu/webpub/eca/special-reports/desertification-33-2018/en/>> accessed 23 December 2020.

There are several ways that we can seek to build back better and combat Covid-19 through a holistic approach that includes tackling land degradation.

The UNCCD Secretariat has generated policy documents that describe ways that land degradation, biodiversity, human health, and climate change are compounding challenges that require intervention on multiple levels.¹⁷⁴ The two overarching aspirations that the UNCCD Secretariat address are shaping a social contract for nature and going beyond the business-as-usual approach. Methods through which to expand and fund national measures to combat desertification might include enhancing coherence and synergies and reimagining financial systems.¹⁷⁵

For funding, for example, green bonds are increasingly used in landscape restoration, and larger funds are moving toward decarbonization of their investments.¹⁷⁶ Through understanding how to tackle desertification we can strengthen global resilience against potential future diseases.¹⁷⁷

- **Expand and Enhance EU Protected Areas, Natura 2000, and European Convention on Conservation of European Wildlife and Natural Habitats**

As a result of a growing awareness of environmental challenges such as biodiversity loss at the international and the EU-level, several European Directives and international conventions have been adopted to protect specific areas and species within the EU. The Natura 2000 network and the Emerald Network are both valuable examples of what countries around the world could implement together to build back better post-Covid-19 to cope with deforestation. In addition, the EU could also adopt policies to enhance and expand those protected areas to protect a wider range of species and habitat.

- **WCPA Protected Area Guidelines**

As of the time of writing, world leaders will convene at the UN Conference of Parties (COP) to the Convention on Biological Diversity in Kunming, China in 2022 to develop a roadmap that will guide

nature conservation efforts for the next 10 years – the period during which we must slow global warming, protect our ecosystems, and save species under threat. The COP had been scheduled for 2020, however was itself a victim of the Covid-19 pandemic. Under current conditions, more than 1 million species are at risk of extinction¹⁷⁸ due to human activities, so ambitious but fair targets to conserve the planet's wildlife by protecting nature are critical to preventing a mass extinction.

Research shows that protecting 30% of tropical lands could help cut species extinction risk in half, while slowing climate breakdown.¹⁷⁹ There is a whole suite of possible conservation tools that governments can implement to protect biodiversity while benefiting from the land, including protected areas, national parks, community conservancies, and indigenous-managed conservation areas.

However, establishing these areas is just the beginning, keeping them intact and supporting them is crucial to conserving nature and preventing human-wildlife contact. Another measure that countries must take to protect nature and stem zoonotic disease outbreaks is permanently ending the global wildlife trade. Due to its cultural implications in parts of the world, this will not be easy – but it is absolutely necessary.

Fundamentally, we need to reimagine our relationship with nature. For a long time, nature was robust and resilient, so humans often assumed we could do anything we wanted to it and it would bounce back. Due to population growth and overexploitation, we have reached a point where what we do to nature can permanently impact it.

Nature does a lot to support us and one of the things we must do in exchange for the benefits it provides is to make sure we protect it.

Chapter 2: Sustainable Development Goals

2. Introduction

Since 2015, much of the international political agenda has been characterized by States' common goal to achieve 17 'Sustainable Development

¹⁷⁴ UNCCD, *Supporting the Global Response to the COVID-19 Pandemic: Land-based Solutions for Healthy People and a Healthy Planet* (22 June 2020), <<https://knowledge.unccd.int/publications/supporting-global-response-covid-19-pandemic-land-based-solutions-healthy-people-and>> accessed 23 December 2020.

¹⁷⁵ UNCCD, *Supporting the Global Response to the COVID-19 Pandemic: Land-based Solutions for Healthy People and a Healthy Planet*, 11–12 <https://catalogue.unccd.int/1498_UNCCD_%20Covid_%20layout-low%20res-1.pdf> accessed 23 December 2020.

¹⁷⁶ *Ibidem*.

¹⁷⁷ UNCCD, *Role of land in COVID-19 response* (June 24, 2020) <<https://www.unccd.int/news-events/role-land-covid-19-response>> accessed 23 December 2020.

¹⁷⁸ Olivia DeSmit, 'A new report depicts a failing planet. A new book has solutions' *Conservation.org* (6 May 2019) <<https://www.conservation.org/blog/a-new-report-depicts-a-failing-planet-a-new-book-has-solutions>> accessed 23 December 2020.

¹⁷⁹ Kiley Price, 'Study: Protecting tropics could save half of species on brink' *Conservation.org* (26 February 2020) <<https://www.conservation.org/blog/study-protecting-tropics-could-save-half-of-species-on-brink>> accessed 23 December 2020.

Goals¹⁸⁰ in numerous areas, including poverty and hunger alleviation; improvement of health, education, and well-being; reduction of gender and other inequalities both within and between nation-states; access to clean water, sanitation and affordable renewable energy; maintenance and development of sustainable cities and communities; the fight against climate change and its impacts, conservation and sustainable use of oceans, seas and marine resources, sustainable management of forests, fight against land degradation and biodiversity loss; sustainable industry; decent work and economic growth based on responsible consumption and production approaches; and the promotion of just peaceful and inclusive societies.¹⁸¹ The SDGs are a universal agenda of sustainable development¹⁸² calling on States to pursue policies and strategies that combine economic development, social inclusion, and environmental sustainability. Governments are expected to incorporate these goals at the local, national, and international levels.¹⁸³

Human rights are mentioned in the preamble of Agenda 2030 and integrated into the SDGs. To this extent, the SDGs are holistic, but also aligned with other international human rights recognized in international treaty law. To fully protect human rights, Goal 16 of the SDGs calls for accountability and inclusiveness of institutions, and access to justice for all.¹⁸⁴ This goal underlines the essential role that civil and political rights play in achieving sustainable and equitable development.¹⁸⁵

2.1. The Right to Health and Agenda 2030

Given the importance of health and its crucial role for the enjoyment of the right to life itself, global health has its place throughout the 17 SDGs, especially in SDG 3: 'Ensure healthy lives and

promote well-being for all at all ages'.¹⁸⁶ SDG 3 expands the construct of health including the global prioritization of noncommunicable diseases,¹⁸⁷ the prevention and treatment of substance abuse,¹⁸⁸ and the reduction of global mortality due to road accidents.¹⁸⁹ It also includes universal access to sexual and reproductive healthcare services,¹⁹⁰ the achievement of universal health coverage,¹⁹¹ and poor ecological and environmental health.¹⁹² However, SDG 3 does not contain or reference the right to health originally introduced in the WHO's constitution¹⁹³ and then codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR) in article 12.¹⁹⁴

SDG 3 illustrates how the integration of human rights took place in the Agenda. Starting from the Millennium Development Goals (MDGs), the old version of the right to health aimed to combat HIV/AIDS and other diseases, to improve maternal health, and to reduce child mortality. The 2030 Agenda also underlines that a healthy environment, human health, and human rights are intertwined because governments aim to protect natural resources but also fight poverty and inequalities.

After the international recognition of a global right to health, the international community has borne the collective obligation to realize health-related human rights. This can also happen by scaling up support to reduce public health inequities through global health governance.¹⁹⁵

2.2. SDGs and the Pandemic

The 2020 Voluntary National Review (VNR) reporting cycle for the SDGs clearly illustrates the negative impacts of the Covid-19 pandemic at the global and national levels on States' accomplishment of the SDGs.

¹⁸⁰ United Nations, *Sustainable Development Goals* <<https://sdgs.un.org/goals>> accessed 23 December 2020.

¹⁸¹ United Nations, *Transforming our world: The 2030 Agenda for Sustainable Development* <https://wedocs.unep.org/bitstream/handle/20.500.11822/11125/unep_swio_sm1_inf7_sdg.pdf?sequence=1> accessed 23 December 2020.

¹⁸² Notion established in the "Our Common future" Report published by the Brundtland Commission in 1987.

¹⁸³ Jeffrey Sachs, et al., *Sdg Index & Dashboards: A Global Report* (Sustainable Development Solutions Network, 2016) 8-10. Shom Teoh, Simon Høiberg Olsen, and Simon Gilby, *Early Views of ASEAN's 'Frontrunner Cities' on the Sustainable Development Goals (SDGs) and Local Data Management* (Institute for Global Environmental Strategies 2018) 6-8.

¹⁸⁴ Goal 16: "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all level." SDG 16 <<https://sdgs.un.org/goals/goal16>> accessed 23 December 2020.

¹⁸⁵ Patrícia Galvão Ferreira, *Did the Paris Agreement Fail to Incorporate Human Rights in Operative Provisions?: Not If You Consider the 2016 SDGs* (Hurst 2016) 6-8.

¹⁸⁶ SDG 3 <<https://sdgs.un.org/goals/goal3>> accessed December 23, 2020.

¹⁸⁷ *Ibidem* at Target 3.4.

¹⁸⁸ *Ibidem* at Target 3.5.

¹⁸⁹ *Ibidem* at Target 3.6.

¹⁹⁰ *Ibidem* at Target 3.7.

¹⁹¹ *Ibidem* at Target 3.8.

¹⁹² *Ibidem* at Target 3.9.

¹⁹³ WHO, *The right to the highest attainable standard of health* <https://www.who.int/governance/eb/who_constitution_en.pdf> accessed 23 December 2020.

¹⁹⁴ ICESCR, art. 12.1 <<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>> accessed 23 December 2020.

¹⁹⁵ Lawrence O. Gostin and Benjamin Mason Meier, *Foundations of Global Health & Human Rights* (Oxford University Press, 27 July 2020) 333, 340.

Most States submitting VNRs in 2020 have identified budgetary constraints stemming from economic lockdowns as well as the need to shift funding priority to healthcare systems as severely hindering efforts to implement and achieve anticipated SDG benchmarks.¹⁹⁶

For example, while the projected Armenian budget for 2020 had been structured to include a spending increase of 15% on healthcare over the 2019 budget, the VNR states that the entirety of the budget will be impacted by Covid-19.¹⁹⁷ The Armenian response to Covid-19 in the context of the SDGs has focused largely on providing economic and social support to those impacted by the quarantine and business restrictions.¹⁹⁸ However, there is also an emphasis on ensuring that the healthcare system has the capacity to address the needs of hospitals for ventilators and other equipment, population's need for PPE, and the need to isolate those infected by the virus.¹⁹⁹ With regards to those exposed to Covid-19, Armenia's VNR explains that their health monitoring steps include 'tracing and isolation of persons who have been in contact with Covid-19-positive patients, ensuring proper conditions with respond to human rights for these people by accommodating them in hotels and providing with quality and safe food'.²⁰⁰

In its 2020 VNR, Bangladesh notes that it had made significant steps toward achieving the targets of SDGs prior to the outbreak of the pandemic and thus that it had an advantage in terms of ability to respond to the pandemic within an established healthcare system.²⁰¹ However, Bangladesh explains that while its pandemic response has been successful from a healthcare coordination perspective, there are increasing issues with provision of and access to healthcare services for non-Covid-19 illnesses and conditions.²⁰²

To address health as well as a myriad of other sectors impacted by the pandemic, Costa Rica's VNR notes the importance of its national Resiliency,

Management and Development Plan. This Plan seeks to ensure that, in the post-Covid phase, there is an effort to 'enable vulnerable communities and people who have been left unemployed and who need new forms of dignified and decent employment for well-being and development'.²⁰³ Further, Costa Rica has established a specialized healthcare center that treats only Covid-19 patients in recognition of the complexities of the virus rather than as a method of isolating these patients.²⁰⁴ Costa Rica highlights the necessity to analyze how laws and policies related to the pandemic and the ways in which the SDGs are adopted can occur in a concerted effort for transformation and the preservation of human rights.

India's VNR emphasizes the medical technology it has deployed to fight Covid-19 while also innovating in other areas, particularly with regard to diseases such as malaria and HIV/AIDS, which were issues before the pandemic and are expected to continue well after the pandemic ends.²⁰⁵ The VNR notes that the pandemic has served as a breakthrough moment for the realization of partnerships between sectors in the medical and healthcare fields,²⁰⁶ which itself furthers SDG 17 (Partnerships for the Goals) as well as SDG 3 (Good Health and Well-being).

Nigeria's VNR states that, although the healthcare sector in the country had been underfunded prior to the pandemic, the uptick in funding during the pandemic has been limited to areas related to Covid-19 rather than spread among the sector as a whole.²⁰⁷ This is asserted as negative to the achievement of the SDGs.²⁰⁸ In this context, there is an emphasis that essential medical services, such as healthcare for women and children, are still unachieved and stand to remain critically impacted by Covid-19 and the legacy of funding decisions stemming from it.²⁰⁹

Kenya expects the Covid-19-related health issues to include those not connected to the

¹⁹⁶ See United Nations, Office of the High Commissioner of Human Rights, 'Voluntary National Reviews – Benin,' (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/BENIN.pdf>> accessed 23 December 2020.

¹⁹⁷ United Nations, Office of the High Commissioner of Human Rights, 'Voluntary National Reviews – Armenia' (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/ARMENIA.pdf>> accessed 23 December 2020.

¹⁹⁸ *Ibidem.*

¹⁹⁹ *Ibidem.*

²⁰⁰ *Ibidem.*

²⁰¹ United Nations, Office of the High Commissioner of Human Rights, 'Voluntary National Reviews – Bangladesh' (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/BANGLADESH.pdf>> accessed December 23, 2020.

²⁰² *Ibidem.*

²⁰³ United Nations, Office of the High Commissioner of Human Rights, 'Voluntary National Reviews – Costa Rica' (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/COSTA%20RICA.pdf>> accessed 23 December 2020.

²⁰⁴ *Ibidem.*

²⁰⁵ United Nations, Office of the High Commissioner of Human Rights, 'Voluntary National Reviews – India' (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/INDIA.pdf>> accessed 23 December 2020.

²⁰⁶ *Ibidem.*

²⁰⁷ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Nigeria* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/NIGERIA.pdf>> accessed 23 December 2020.

²⁰⁸ *Ibidem.*

²⁰⁹ *Ibidem.*

pandemic, such as teenage pregnancy and lack of prenatal care, due to the diversion of funds to pandemic infrastructure and lockdown measures.²¹⁰

Mozambique's VNR highlights the likely impact of the pandemic on children and their prospects for health, education, and economic status in the future.²¹¹

North Macedonia's VNR stresses the particular threats children face to their health due to the lockdown, especially in terms of home-based violence.²¹²

Conversely, the Federated States of Micronesia have stated that, although the pandemic has put economic strain on the State and its healthcare infrastructure, it has also empowered societal understandings of the need to have a healthy population in order to reduce the impacts of disease.²¹³

Meanwhile, Samoa's VNR frames the Covid-19 issues in the larger context of its 2019 epidemic of measles in order to note the steps taken by the nation in securing a strong health foundation in this context that will then allow for broader steps toward achieving health-related SDGs and targets.²¹⁴

Trinidad and Tobago's VNR discusses how the nation established a "parallel" healthcare system to specifically address pandemic prevention, testing and treatment while seeking to reduce the burden in the existing healthcare system.²¹⁵

Brunei's VNR emphasizes the importance of its disease response systems generally as fulfilling both the requirements for SDG 3 targets and indicators as well as preparing it for the pandemic.²¹⁶ Despite this progress, Brunei's VNR warns that the State 'needs to continue to enhance

its capacities and preparedness level through a whole of nation approach linking all relevant sectors and players, including finance, health, agriculture, environment, emergency responders, security agencies and others, in working closely together to protect public health'.²¹⁷ The goal of this coordination is to immediately handle the pandemic and draft national laws and policies that implement and respond to the changing needs of the International Health Regulations and associated WHO guidance and policy.²¹⁸

Bulgaria's VNR focuses on its efforts to undertake pre-emptive studies and medical policy guidance to address Covid-19 prior to the first reports of cases in the State.²¹⁹ This included establishing a system to provide medical personnel with information on the virus as well as the known complications associated with it.²²⁰ Additionally, and interrelated with the provisions of SDG 16 relating to transparency and public participation, the Bulgarian response to Covid-19 has included the creation and maintenance of a website with updated data and statistical information, which can be accessed by all members of the public.²²¹

The VNR submitted by the Democratic Republic of Congo emphasizes the devastating impact of Covid-19 throughout the country, including the negative effects due to the development and economic stresses that existed beforehand and are exacerbated by the pandemic.²²² Ecuador's VNR stresses the need to continue the progress made prior to the onset of the pandemic, noting that a decent standard of living, adequate nutrition, health care, education, decent work and protection against calamities are not simply development goals, but

²¹⁰ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Kenya* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/KENYA.pdf>> accessed 23 December 2020.

²¹¹ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Mozambique* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/MOZAMBIQUE.pdf>> accessed 23 December 2020.

²¹² United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – North Macedonia* (2020) <https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/NORTH_MACEDONIA.pdf> accessed 23 December 2020.

²¹³ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Micronesia* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/MICRONESIA.pdf>> accessed 23 December 2020).

²¹⁴ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Samoa* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/SAMOA.pdf>> accessed 23 December 2020.

²¹⁵ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Trinidad & Tobago* (2020) <https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/TRINIDAD_AND_TOBAGO.pdf> accessed 23 December 2020.

²¹⁶ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Brunei* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/BRUNEL.pdf>> accessed 23 December 2020.

²¹⁷ *Ibidem*.

²¹⁸ *Ibidem*.

²¹⁹ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Bulgaria* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/BULGARIA.pdf>> accessed 23 December 2020.

²²⁰ *Ibidem*.

²²¹ *Ibidem*.

²²² United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Democratic Republic of Congo* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/DRC.pdf>> accessed 23 December 2020.

also rights inherent to human dignity and freedom.²²³

Concerns regarding the implementation of health-related SDG provisions such as SDG 3 must be analyzed in conjunction with other SDGs that have a bearing on health. A key example of this comes from SDG 2, relating to hunger and food security.

Bangladesh emphasizes the dimensions of these issues in its VNR and notes that there is a cruel lack of food in many areas and yet a high number of crops, estimated to be at least 6 months' worth, are waiting to be harvested due to the inability of laborers to work.²²⁴ This, combined with similar issues in terms of livestock and fishing, has created issues for the nation.²²⁵ Argentina's VNR notes that there is a joint national and provincial effort to address hunger concerns and the pandemic both distinctly and as joint issues.²²⁶ Brunei's VNR notes that it had taken significant steps toward achieving food security prior to the pandemic outbreak, which allowed it to advance SDG 2 and also maintain market stability for staple food stuffs, such as rice, when there were fears of global shortages at the beginning of the pandemic.²²⁷ Peru's VNR discusses the importance of addressing hunger and food security concerns in its pre-Covid-19 policies and confirms that these concerns have been brought into sharper focus during the pandemic.²²⁸ Samoa's VNR emphasizes the ways in which national responses to Covid-19 have involved an increased emphasis on local and sustainable farming as well as harvesting practices to ensure that food security is advanced both in the short and long-term.²²⁹

The Gambia's VNR stresses the underlying poverty situation that existed before the pandemic and explains that Covid-19 will likely exacerbate poverty rates.²³⁰ Additionally, the impact of the

pandemic on non-Covid-19 related illnesses and healthcare issues have been observed, which impacts SDG 3.²³¹

States also noted that concerns related to health that are addressed by SDGs such as poverty, employment, food access and food security, education and gender inclusion, have been negatively impacted the pandemic.²³² The Gambia stated that it expects gains made across the spectrum of SDGs to be reversed by the pandemic.²³³ Similar concerns have been raised in the Honduran VNR, which explains that there have been reversals in the achievement of nearly every SDG as a result of the pandemic and national, regional and international economic downturns.²³⁴

Georgia's VNR also explains that the pandemic has exposed flaws in many facets of the national response system.²³⁵ Georgia considers "an assessment and revision of the national social protection system that would also include not only the central level, but also social assistance programs provided at the local level," and underlines that there will be a special focus on including persons with disabilities in these programs.²³⁶ For the dissemination of information related to Covid-19, Georgia has established an open-access website in multiple languages and also a specific telephone number that can be used by children who are impacted by the pandemic and associated social issues.²³⁷ Peru's VNR describes an array of health issues that existed before the pandemic and explains that these were intended to be targeted in efforts to achieve the SDGs. It further explains that the pandemic has undermined these efforts and likely exacerbated many of these issues, or at the very least resulted in reductions in their treatment.²³⁸

²²³ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Ecuador* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/Ecuador.pdf>> accessed 23 December 2020.

²²⁴ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Bangladesh* (2020).

²²⁵ *Ibidem*.

²²⁶ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Argentina* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/ARGENTINA.pdf>> accessed 23 December 2020.

²²⁷ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Brunei* (2020).

²²⁸ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Peru* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/PERU.pdf>> accessed 23 December 2020.

²²⁹ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Samoa* (2020).

²³⁰ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Gambia* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/GAMBIA.pdf>> accessed 23 December 2020.

²³¹ *Ibidem*.

²³² *Ibidem*.

²³³ *Ibidem*.

²³⁴ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Honduras* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/HONDURAS.pdf>> accessed 23 December 2020.

²³⁵ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Georgia* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/GEORGIA.pdf>> accessed 23 December 2020.

²³⁶ *Ibidem*.

²³⁷ *Ibidem*.

²³⁸ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Peru* (2020).

It is widely accepted that, although necessary in certain situations linked to the pandemic, declarations of emergency and similar invocation of extraordinary governmental powers pose a threat to human rights standards, including those enshrined in the SDGs. Several States have discussed their use of such measures in their VNRs.²³⁹ For instance, Bulgaria explains that it initially implemented a national state of emergency in March 2020, seeking to balance public health concerns with established human rights laws and constitutional legal systems.²⁴⁰ Following this, the state of emergency was extended several times, each for a short duration, and slowly resulting in a slightly lowered level of control by the end of June 2020.²⁴¹ Similarly, Panama entered into a national state of emergency in March 2020 and has extended it to the end of the pandemic, while taking measures to refine it in order to address the changing needs of the population and public health situation.²⁴² In conjunction with this, Panama has adopted a number of laws and rules to further address the pandemic, including lockdown orders, limitations on travel, bioethical requirements for testing and treatment, economic assistance measures, and the incorporation of technology in fighting the virus.²⁴³

2.3. Conclusions and Summary of Key Recommendations

The SDGs represent the global community's second statement of the issues and priorities facing national and international communities for the short- and long-term. While the SDGs represent a more nuanced statement than the MDGs, when States drafted them in 2015, they did not have a potential pandemic in mind. The Covid-19 pandemic has highlighted areas of challenge in the implementation of the SDGs, although it has also emphasized areas in which states have been able to advance the goals and targets of the SDGs.

At the organizational level, the HLPF is a significant source of assistance for understanding and assessing the parameters of SDG implementation. However, the lack of a more frequently occurring mechanism to review the

VNRs in the face of crisis is a pressing concern. Additionally, just as the SDGs are cross-cutting, international organizational response to the concerns raised by the pandemic in relation to the SDGs must be coordinated across entities and subject areas, for example the continuing work between the WHO and FAO.

Nationally and sub-nationally, States must ensure efficient responses to the pandemic to ensure that (i) all populations, especially the most vulnerable communities, receive appropriate medical care, and that (ii) funding and resource allocations continue for other health concerns. This includes ensuring that plans for funding future health responses focus on all aspects of health concerns, communicable and noncommunicable diseases alike. States must also ensure that their responses are taking into account issues that are exacerbated by the pandemic and associated economic downturn such as gender and educational priorities set out in the SDGs, as well as SDG 2's requirements to advance food security and combat hunger. Additionally, States should ensure that, at the national and international level, there is adherence to public participation and transparency in government decision-making as required in SDG 16.

This is essential to preserve the health of people and the environment and ensure that marginalized communities are able to access these processes despite lockdowns and gathering restrictions.

Chapter 3: Exacerbation of Inequalities

3. Introduction

Covid-19 has brought to light the underlying, pre-existing inequalities that affect marginalized groups throughout the world.²⁴⁴ A common denominator of these groups is a heavy reliance on the informal economy due to several social barriers. This is an aspect of the economy that has been highly impacted by measures adopted worldwide. In times of crisis, government safety nets protect workers operating in the formal economy. The

²³⁹ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Papua New Guinea* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/PapuaNewGuinea.pdf>> accessed 23 December 2020.

²⁴⁰ United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Bulgaria* (2020).

²⁴¹ *Ibidem*.

²⁴² United Nations, Office of the High Commissioner of Human Rights, *Voluntary National Reviews – Panama* (2020) <<https://www.ohchr.org/Documents/Issues/SDGS>

[/2020VNRCountries/PANAMA.pdf](https://www.ohchr.org/Documents/Issues/SDGS/2020VNRCountries/PANAMA.pdf)> accessed 23 December 2020.

²⁴³ *Ibidem*.

²⁴⁴ UN Women and Translators Without Borders, *COVID-19: How to include marginalized and vulnerable people in risk communication and community engagement* (Risk Communication and Community Engagement Working Group on COVID-19 Preparedness and Response in Asia and the Pacific, March 2020) <https://reliefwb.int/sites/reliefwb.int/files/resources/COVID-19_CommunityEngagement_130320.pdf> accessed 23 December 2020.

Covid-19 pandemic has been no different.²⁴⁵ Tax breaks,²⁴⁶ job retention schemes,²⁴⁷ and working time reduction programs²⁴⁸ are measures levied solely in formal economic environments. Despite having pre-existing vulnerabilities - including high risks of poverty, high occupational risks, inferior working conditions, and an absence of adequate risk management instruments²⁴⁹ - and operating in conditions that make them particularly vulnerable to contracting the virus,²⁵⁰ workers in the informal economy are left out of key social and financial protection initiatives and relief programs.²⁵¹ Thus, workers in the informal economy, representing more than 61% of the world's population,²⁵² are bearing the brunt of the health and economic crisis catalyzed by Covid-19.²⁵³ Similarly, most of these groups tend to occupy areas that are prone to natural disasters, and with limited capacities to cope with and adapt to new realities.

In the midst of the pandemic, some countries have engaged in discriminatory practices against vulnerable communities and minorities. A better response is necessary to include priority, differential assistance and active participation in decision-making processes by marginalized communities to generate pandemic-responsive policies that include the needs and perspectives of all.²⁵⁴ The UN High Commissioner for Human Rights, the IACHR, the Inter-American Network on Afro-descendant Population Policies (RIAFRO), and the UN Working Group of Experts on People of

African Descent have each issued statements urging States to actively combat discrimination and to address the disparate impact of the pandemic on racial and ethnic minorities.²⁵⁵

Pre-existing issues such as economic inequality, overcrowded housing, environmental risks, limited availability and access to health services, and bias in provision of care all play a part in the disproportionate impact that the pandemic has on marginalized communities.²⁵⁶ Structural racism and pervasive discrimination are embedded in our societies.²⁵⁷ Hence, Covid-19-related expressions of racism and xenophobia have taken the form of harassment, hate speech, proliferation of discriminatory stereotypes, and conspiracy theories, some perpetuated by nationalist and populist leaders.²⁵⁸

3.1. Environmental Justice

Ecosystems suffer environmental damages that can mirror the environmental damages experienced by the most marginalized human beings across the planet.²⁵⁹ Environmental justice is 'the fair treatment of people regardless of ethnic origin or class in the distribution of negative environmental consequences from development plans and policies, industrial operations, or natural disasters

²⁴⁵ IMF, *Policy Responses to COVID-19: Policy Tracker* <<https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>> accessed 23 December 2020.

²⁴⁶ Max Gallien & Vanessa van den Boogaard, 'To fight COVID-19, only the formal economy is getting tax breaks. The informal economy may be asked to foot the bill' *International Center for Tax and Development* (8 April 2020) <<https://www.ictd.ac/blog/covid-coronavirus-tax-breaks-informal-economy-workers/>> accessed 23 December 2020.

²⁴⁷ Stefano Scarpetta et al., *Job retention schemes during the COVID-19 lockdown and beyond* (OECD August 2020) <<https://www.oecd.org/coronavirus/policy-responses/job-retention-schemes-during-the-covid-19-lockdown-and-beyond-0853ba1d/>> accessed 23 December 2020.

²⁴⁸ Giulia Giupponi and Camille Landais, 'Building effective short-time work schemes for the COVID-19 crisis' *VOX EU CEPR* (1 April 2020) <<https://voxeu.org/article/building-effective-short-time-work-schemes-covid-19-crisis>> accessed 30 September 2021.

²⁴⁹ OECD/ILO, *Tackling Vulnerability in the Informal Economy* (Development Centre Studies OECD Paris 2019).

²⁵⁰ Gallien & van den Boogaard, (n 246).

²⁵¹ 'Relief for Informal Workers: Falling through the Cracks in COVID-19' *CGAP* (August 2020) <<https://www.cgap.org/research/publication/relief-informal-workers-falling-through-cracks-covid-19>> accessed 23 December 2020.

²⁵² 'More than 60 per cent of the world's employed population are in the informal economy' *ILO* (30 April 2018)

<https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang-en/index.htm> accessed 23 December 2020.

²⁵³ International Labour Organization, *COVID-19 crisis and the informal economy: Immediate responses and policy challenges* (ILO, May 2020), <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/briefingnote/wcms_743623.pdf> accessed 23 December 2020.

²⁵⁴ 'COVID-19 Guidance From Supranational Human Rights Bodies' *International Justice Resource Center* <https://ijrcenter.org/covid-19-guidance-from-supranational-human-rights-bodies/#Human_rights_defenders_assembly_and_association> accessed 23 December 2020.

²⁵⁵ 'Disproportionate Impact of COVID-19 on ethnic and racial minorities needs to be urgently addressed - Bachelet' *OHCHR* (2 June 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25916&LangID=E>> accessed 23 December 2020.

²⁵⁶ *Ibidem*.

²⁵⁷ Claudia Wallis, 'Why Racism, Not Race, is a Risk Factor for Dying of COVID-19' *Scientific American* (12 June 2020) <<https://www.scientificamerican.com/article/why-racism-not-race-is-a-risk-factor-for-dying-of-covid-19/>> accessed 23 December 2020.

²⁵⁸ *OHCHR*, 2 June 2020, (n 255).

²⁵⁹ David Naguib Pellow, *What is Critical Environmental Justice?* (Wiley 2017).

and as fair access to natural resources and a clean environment'.²⁶⁰

Environmental injustices and health inequalities are deeply intertwined. Evidence establishes a correlation between inequitable air pollution exposure and human health, especially children's health.²⁶¹ It is now widely recognized that air pollutants affect humans' lungs and can cause significant respiratory issues.²⁶² Because Covid-19 is an infectious disease caused by a respiratory pathogen,²⁶³ there is now evidence of the interrelation between high levels of pollution and an increased risk of death or severe symptoms from Covid-19.²⁶⁴ Communities living near heavily polluted areas indeed have a reduced lung capacity and thus a higher risk of mortality.²⁶⁵ Further, the provision of safe water, sanitation, waste management, and hygienic conditions are essential to prevent the spread of viruses and to protect human health.²⁶⁶ In addition, Indigenous communities around the world experience inadequate access to healthcare, higher rates of communicable diseases, lack of access to essential services, sanitation, as well as preventive tools such as soap or disinfectant.²⁶⁷

In the US, Covid-19 disproportionately affects African Americans, Indigenous Americans and other populations of color compared to Whites.²⁶⁸

As of March 2nd, 2021, 1 in 555 Black Americans and 1 in 390 Indigenous Americans had died compared to 1 in 665 White Americans.²⁶⁹ Environmental injustice in the US also results from historic redlining²⁷⁰ and discriminatory housing practices that still prevent communities of color from safe and affordable housing.²⁷¹ As a result, communities of color disproportionately face injustices such as a lack of access to fresh and healthy food as well as exposure to air and water pollution. These injustices, and especially air pollution, exacerbate the underlying conditions that make these communities particularly at risk from Covid-19.

Research indicates that African-Americans are disproportionately dying due to the virus: they represented up to 72% of fatalities in Chicago, 70% in Louisiana and 41% in Michigan.²⁷² A Harvard study suggests that people infected with Covid-19 who live in US regions with high levels of air pollution are more likely to die from the disease than people who live in less polluted areas.²⁷³ The study explicitly specified that 'an increase of only 1 g/m³ in PM_{2.5} is associated with a 8% increase in the Covid-19 death rate'.²⁷⁴ The study further highlighted the 'importance of continuing to

²⁶⁰ Tamara Steger and Richard Filcak, 'Articulating the Basis for Promoting Environmental Justice in Central and Eastern Europe' *Environmental justice* (1, 1, 2008) 1.

²⁶¹ Spencer Banzhaf, Lala Ma, and Christopher Timmins, 'Environmental Justice : the Economics of Race, Place, and Pollution' *Journal of Economic Perspective* (33, 1, Winter 2019) 193.

²⁶² See e.g. Aaron J. Cohen and C. Arden Pope III, 'Lung Cancer and Air Pollution' *Environmental Health Perspectives* (1995); Talat Islam et al., 'Relationship between air pollution, lung function and asthma in adolescents' *Thorax* (62, 11, 2007) 957, 963.

²⁶³ World Health Organization <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19>> accessed 23 December 2020.

²⁶⁴ See Sacoby Wilson, 'Connecting the Dots Between Environmental Injustice and the Coronavirus', interview by Katherine Bagley' *Yale Environment* 360 (7 May 2020) <<https://e360.yale.edu/features/connecting-the-dots-between-environmental-injustice-and-the-coronavirus>> accessed 23 December 2020.

²⁶⁵ *Ibidem*.

²⁶⁶ WHO and UNICEF, *Water, Sanitation, Hygiene, and Waste Management for SARS-CoV-2, The Virus that Causes COVID-19* (WHO 2020) <<https://www.who.int/publications/i/item/WHO-2019-nCoV-IPC-WASH-2020.4>> accessed 23 December 2020.

²⁶⁷ United Nations Department of Economic and Social Affairs, *COVID-19 and Indigenous Peoples* (2020) <[https://www.un.org/development/desa/indigenouspeoples/covid-19.html#:~:text=The%20coronavirus%20\(COVID%2D19\),Indigenous%20peoples%20around%20the%20world.&text=Some%20indigenous%20communities%20also%20live,especially%20the%20Elders%2C%20at%20risk](https://www.un.org/development/desa/indigenouspeoples/covid-19.html#:~:text=The%20coronavirus%20(COVID%2D19),Indigenous%20peoples%20around%20the%20world.&text=Some%20indigenous%20communities%20also%20live,especially%20the%20Elders%2C%20at%20risk)> accessed 23 December 2020.

²⁶⁸ APM Research Lab, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.* (10 December 2020) <<https://www.apmresearchlab.org/covid/deaths-by-race>> accessed 12 December 2021.

²⁶⁹ *Ibidem*.

²⁷⁰ The term "redlining" comes from the development by the federal government of maps of every metropolitan area in the country. See Terry Gross, 'A 'Forgotten History' of How the U.S. Government Segregated America' *npr KQED* 3 May 2017) <<https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>> accessed 23 December 2020.

²⁷¹ Sam Fulwood III, 'The United States' History of Segregated Housing Continues to Limit Affordable Housing' *Center For American Progress* (15 December 2016) <<https://www.americanprogress.org/issues/race/reports/2016/12/15/294374/the-united-states-history-of-segregated-housing-continues-to-limit-affordable-housing/>> accessed 23 December 2020.

²⁷² John Eligon et al., 'Black Americans Face Alarming Rates of Coronavirus Infections in Some States' *New York Times* (7 April 2020) <<https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>> accessed 23 December 2020.

²⁷³ Xiao Wu et al, 'Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis' *Science advances* (6, 45, 2020) <<https://projects.iq.harvard.edu/covid-pm>> accessed 23 December 2020.

²⁷⁴ *Ibidem*.

enforce existing air pollution regulations to protect human health'.²⁷⁵

Pre-existing health issues due to air pollution thus make these communities more likely to have Covid-19 complications. However, the study did not consider other pollutants these communities are exposed to, thus potentially underestimating the real risk of Covid-19 mortality due to air pollution.²⁷⁶ In addition, the high mortality rate among African Americans is a result of a lack of adequate healthcare, pre-existing medical conditions, and a lack of possibility to work from home and thus to respect social distancing.²⁷⁷

Indigenous communities in the US are also disproportionately affected. The Navajo Nation reached one of the highest per capita rates in the US in May 2020 due to poor healthcare as well as inadequate water and electrical infrastructures resulting from a lack of federal policies to improve their standards of living.²⁷⁸ Similarly, Brazilian Indigenous peoples are among the most vulnerable to the Covid-19 due to air pollution and a lack of clean running water. As of October 13, 2020, the Articulation of Indigenous Peoples in Brazil (APIB)²⁷⁹ reported that there had been 426 deaths amongst Indigenous peoples and 11,385 cases across a total of 124 Indigenous groups located in Brazil.²⁸⁰

²⁷⁵ *Ibidem.*

²⁷⁶ Sacoby Wilson's interview (n 264).

²⁷⁷ Alexandra Sternlicht, 'Higher Coronavirus Mortality Rates for Black Americans and People Exposed to Air Pollution' *Forbes* (7 April 2020) <<https://www.forbes.com/sites/alexandrasternlicht/2020/04/07/higher-coronaviruss-mortality-rates-for-people-exposed-to-air-pollution-black-americans/#63ce94ce362f>> accessed 23 December 2020.

²⁷⁸ Cody Nelson, 'Covid Ravages Navajo Nation as Trump Makes Election Play for Area' *The Guardian* (8 October 2020) <<https://www.theguardian.com/us-news/2020/oct/08/navajo-nation-coronavirus-pandemic>> accessed 23 December 2020.

²⁷⁹ Articulação dos Povos Indígenas do Brasil (APIB) <<https://ifnotusthenwho.me/who/articulacao-dos-povos-indigenas-do-brasil-apib/>> accessed 23 December 2020.

²⁸⁰ Grace Iara Souza, 'Brazil's indigenous peoples face a triple threat from COVID-19, the dismantling of socio-environmental policies, and international inaction' *LSE* (8 July 2020) <<https://blogs.lse.ac.uk/latamcaribbean/2020/07/08/brazils-indigenous-peoples-face-a-triple-threat-from-covid-19-the-dismantling-of-socio-environmental-policies-and-international-inaction/>> accessed 30 September 2021.

²⁸¹ Mauricio Angelo, 'Lack of clean water leaves Brazil indigenous reserve exposed to coronavirus' *Reuters* (21 April 2020) <<https://www.reuters.com/article/us-health-coronavirus-brazil-indigenous/lack-of-clean-water-leaves-brazil-indigenous-reserve-exposed-to-coronavirus-idUSKCN2232H1>> accessed 23 December 2020.

²⁸² *Ibidem.*

For example, the Dourados Indigenous Reserve does not have a constant source of water due to interruption of their water supply, which can happen several times a day or even for days at a time.²⁸¹ In addition, many outsiders kept travelling through the reserve despite the government's stay-at-home order, increasing the risk of spreading the virus within Indigenous communities.²⁸² Thus, Covid-19 is a double threat to these communities since Brazil's government has marginalized and neglected them, violating their rights of protection imposed by international agreements. In addition, these communities lack medical assistance, doctors, basic medications or the most advanced mechanisms needed to limit the Covid-19 outbreak.²⁸³ *Medicines Sans Frontiers* reported that these communities present a high prevalence of diabetes and hypertension cases, which increase the risk of developing severe Covid-19's symptoms that could lead to death.²⁸⁴ Judge Barroso, from the Brazilian Supremo Tribunal Federal (STF), thus stated²⁸⁵ that there is a need to create a crisis response team to protect these communities by preventing outsiders from entering their territories without permission.²⁸⁶

The spread of the coronavirus within communities of color, Indigenous peoples and working-class communities clearly illustrate that Covid-19 is not only a health crisis, but also reflects

²⁸³ Lucas Ferrante & Philip M. Fearnside, 'Protect Indigenous peoples from COVID-19' *Science* (368, 6488, 2020) 251.

²⁸⁴ See CDC statement: 'Having any of the following serious heart conditions increases your risk of severe illness from COVID-19 : heart failure, coronary artery disease, cardiomyopathies, pulmonary hypertension', *Center for Disease Control* (1 December 2020) <<http://cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#:~:text=Having%20%other%20cardiovascular%20or%20cerebrovascular.from%20COVID-19>> accessed 23 December 2020. See also the American Diabetes Association statement: "People with diabetes have much higher rates of serious complications and death than people without diabetes—and generally we believe that the more health conditions someone has (for example, diabetes and heart disease), the higher their chance of getting serious complications from COVID-19", *American Diabetes Association* <<https://www.diabetes.org/coronavirus-covid-19>> accessed 23 December 2020.

²⁸⁵ 'Barroso determina que governo federal adote medidas para conter avanço da Covid-19 entre indígenas' *Supremo Tribunal Federal* (8 July 2020) <<http://stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=447103&caixaBusca=N>> accessed 23 December 2020.

²⁸⁶ Nadia Rubaii and Julio José Araujo Junior, 'Judge Orders Brazil to Protect Indigenous People from ravages of COVID-19' *The Conversation* (9 July 2020) <<https://theconversation.com/judge-orders-brazil-to-protect-indigenous-people-from-ravages-of-covid-19-142356>> accessed 23 December 2020.

an environmental justice crisis. The exacerbation of pre-existing health issues due to environmental injustice in minority communities causes the pandemic to highlight the necessity to advance environmental justice for all and to reduce air and water pollution to face the challenges of future pandemics. This further underlines the link between human health and the natural environment in which people live as well as the quality of food and water they have access to.

3.2. Covid-19 and Vulnerable Groups

Women tend to be a disproportionate part of the health workforce, and are primary caregivers to children, the elderly, and the ill. Women experience increased risks of gender-based violence, including sexual exploitation, and might experience interrupted access to sexual and reproductive health services during lockdowns and movement restrictions associated with Covid-19.²⁸⁷ Concerns over a rise in domestic violence due to lockdown measures were shared among different countries worldwide, and a number of human rights activists issued statements aimed at preventing or addressing domestic violence during the pandemic.²⁸⁸ The main concerns were thus to

address gender-based violence occurring when women were trapped at home with their abusers and to ensure access to justice during the pandemic.

Human rights activities also highlighted that the pandemic could harm women economically and threaten their financial independence.²⁸⁹

Additionally, women are impacted by restrictions on access to reproductive and sexual rights services.²⁹⁰

Women who are part of marginalized groups and suffer from intersectional discriminations, such as women with disabilities, elderly women, and migrant women, are the ones most at risk.²⁹¹

The pandemic also exacerbated the risks of children dropping out from school due to the temporary suspension of most educational institutions, gender-based violence, exploitation, and separation from families.²⁹² The UN Secretary General (UNSG) identified some of the most daunting impacts that children may face, such as (i) poverty as a result of the economic crisis; (ii) exacerbation of the learning crisis due to school closures, (iii) threats to child survival and health due to economic hardship and malnutrition; and (iv) risks for child safety because of domestic violence and abuse.²⁹³

²⁸⁷ UN Women and Translators Without Borders, *COVID-19: How to include marginalized and vulnerable people*.

²⁸⁸ 'Press Release of the Special Rapporteur on the Rights of Women in Africa on violation of women's rights during the COVID-19 Pandemic' *African Commission on Human and People's Rights* (6 May 2020) <<https://www.achpr.org/pressrelease/detail?id=495>> accessed 23 December 2020; 'The IACHR calls on Member States to adopt a gender perspective in the response to the COVID-19 pandemic and to combat sexual and domestic violence in this context' *OAS* (11 April 2020) <http://www.oas.org/en/iachr/media_center/PReleases/2020/074.asp> accessed 23 December 2020; OAS, CIM & MESECVI, *Violence Against Women and the Measures to Contain the Spread of COVID-19* (OAS OEA/Ser.L/II.6.26, 2020) <<http://www.oas.org/en/cim/docs/COVID-19-RespuestasViolencia-EN.pdf>> accessed 23 December 2020; Council of Europe, *COVID-19 crisis: Secretary General concerned about the increased risk of domestic violence* 30 March 2020) <<https://www.coe.int/en/web/portal/-/covid-19-crisis-secretary-general-concerned-about-increased-risk-of-domestic-violence>> accessed 23 December 2020; Council of Europe, *Declaration of the Committee of the Parties to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) on the implementation of the Convention during the COVID-19 pandemic* (20 April 2020) <<https://rm.coe.int/declaration-committee-of-the-parties-to-ic-covid-16809e33c6>> accessed 23 December 2020; 'Guidance Note on CEDAW and COVID-19' *CEDAW* (2020) <https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/CEDAW_Guidance_note_COVID-19.docx> accessed 23 December 2020; OHCHR, *States must combat domestic violence in the context of COVID-19 lockdowns - UN*

rights expert (27 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25749&LangID=E>> accessed 23 December 2020; Association of Southeast Asian Nations, *ASEAN calls for protective and preventive measures against domestic violence towards women and children during COVID-19 pandemic* (5 June 2020) <<https://asean.org/asean-calls-protective-preventive-measures-domestic-violence-towards-women-children-covid-19-pandemic/>> accessed 23 December 2020; UN WOMEN, *COVID-19 and Ending Violence Against Women and Girls* (2020) <<https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006>> accessed 23 December 2020.

²⁸⁹ OAS, CIM & MESECVI, *Violence Against Women and the Measures to Contain the Spread of COVID-19*.

²⁹⁰ Council of Europe, *COVID-19: Ensure women's access to sexual and reproductive health and rights* (7 May 2020) <<https://www.coe.int/en/web/commissioner/-/covid-19-ensure-women-s-access-to-sexual-and-reproductive-health-and-rights>> accessed 23 December 2020.

²⁹¹ Council of Europe, *COVID-19 crisis: Secretary General concerned about the increased risk of domestic violence*.

²⁹² African Committee of Experts on the Rights & Welfare of the Child, *Guiding Note on Children's Rights during COVID-19* (8 April 2020) <<https://www.acerwc.africa/Latest%20News/guiding-note-on-childrens-rights-during-covid-19/>> accessed 23 December 2020.

²⁹³ United Nations, *Policy brief: The Impact of COVID-19 on Children* (15 April 2020) <https://unsdg.un.org/sites/default/files/202004/160420_Covid_Children_Policy_Brief.pdf> accessed 23 December 2020.

Additionally, internet connection and access to electronic devices can be a significant obstacle, especially for children in vulnerable and secluded communities, hindering their education and reinforcing their sense of isolation.

With regards to people with disabilities, one of the most significant challenges they face during the pandemic is the lack of access to adequate information. Most of the time, information is not available as auditory, visual, psychosocial, and physical measures. As a result, they are excluded from decision-making processes and are often unaware of important steps to be taken in events such as the pandemic. Hence, this makes it harder for them to access health services.²⁹⁴ People with disabilities are more likely to experience poverty, face catastrophic health expenses, have lower levels of education, and live in households more exposed to economic hardship.²⁹⁵ Additionally, they face multiple barriers such as stigma, inaccessibility to infrastructures, transports and information systems, and the lack of inclusive public policies

and services.²⁹⁶ It is crucial to understand and take into account the differentiated impacts that persons with disabilities face during the pandemic and to develop an inclusive social response to Covid-19 for them.²⁹⁷

With regards to migrants, several international organizations and representatives issued guidelines and statements to ensure respect of their rights during the pandemic.²⁹⁸ Many migrants and refugees are hosted in developing countries where health services conditions are precarious. Many live in overcrowded camps or settlements where they lack access to clean water, sanitation, and health services.²⁹⁹ They also face issues including lack of education for their children, xenophobia, discrimination, immigration detention, and difficulties to find safe and appropriate jobs.

Trafficked and exploited persons, who were already in a particularly precarious situation, see their vulnerabilities exacerbated by the pandemic because of the rise of unemployment, and the delays experienced by immigration services.³⁰⁰

²⁹⁴ UN Women and Translators Without Borders, *COVID-19: How to include marginalized and vulnerable people*.

²⁹⁵ UNPRPD, UN Human Rights Special Procedures, Embracing Diversity, UNICEF, International Disability Alliance, International Labour Organization, *Disability Inclusive Social Protection Response to COVID-19 Crisis* (2020) <https://www.ohchr.org/Documents/Issues/Disability/Leaflet_CRPD_COVID19.pdf> accessed 23 December 2020.

²⁹⁶ *Ibidem*.

²⁹⁷ UN Human Rights Special Procedures, World Health Organization, Embracing Diversity, *Disability Considerations during the COVID-19 outbreak* (2020) <https://www.ohchr.org/Documents/Issues/Disability/COVID-19_disability_logos.pdf> accessed 23 December 2020.

²⁹⁸ UN Committee on Migrant Workers & UN Special Rapporteur on the Human Rights of Migrants, *Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants* (26 May 2020) <<https://www.ohchr.org/Documents/Issues/Migration/CMWPSMJointGuidanceNoteCOVID-19Migrants.pdf>> accessed 23 December 2020; OHCHR, *COVID-19 and the Human Rights of Migrants: Guidance* (7 April 2020) <https://ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19Migrants.pdf> accessed 23 December 2020; United Nations, *Policy brief: COVID-19 and people on the move* (2020) <https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_people_on_the_move.pdf> accessed 23 December 2020; 'La CIDH urge a los Estados proteger los derechos humanos de las personas migrantes, refugiadas y desplazadas frente a la pandemia del COVID-19' *OAS* (June 2020) <<http://www.oas.org/es/cidh/prensa/comunicados/2020/077.asp>> accessed 23 December 2020; Council of Europe, *States should ensure rescue at sea and allow safe disembarkation during the COVID-19 crisis* (16 April 2020) <https://www.coe.int/en/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZWOAJBMLI/content/states-should-ensure-rescue-at-sea-and-allow-safe-disembarkation-dur

[ing-the-covid-19-crisis?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2F covid-19%3Fp_id%3D101_INSTANCE_5cdZWOAJBMLI%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1](https://www.coe.int/en/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZWOAJBMLI/content/states-should-ensure-rescue-at-sea-and-allow-safe-disembarkation-during-the-covid-19-crisis?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2F covid-19%3Fp_id%3D101_INSTANCE_5cdZWOAJBMLI%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1)> accessed 23 December 2020; African Union, *Statement of the African Union (AU) Labour Migration Advisory Committee (LMAC) on the novel Coronavirus Disease COVID-19 and the condition of African Migrant Workers* (14 April 2020) <<https://au.int/en/pressreleases/20200414/statement-lmac-condition-african-migrant-workers-covid-19>> accessed 23 December 2020; African Union, *Migration & Mobility in Contexts of COVID-19* (10 April 2020) <<https://au.int/en/pressreleases/20200410/migration-mobility-contexts-covid-19>> accessed 23 December 2020; OHCHR, *UN experts call on Governments to adopt urgent measures to protect migrants and trafficked persons in their response to COVID-19* (3 April 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25774&LangID=E>> accessed 23 December 2020; OHCHR (n.d.), *The rights and health of refugees, migrants and stateless must be protected in COVID-19 response: A joint statement by UNHCR, IOM, OHCHR and WHO* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25762&LangID=E>> accessed 23 December 2020; European Union Agency for Fundamental Rights & Council of Europe, *Fundamental rights of refugees, asylum applicants and migrants at the European borders* (2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf> accessed 23 December 2020.

²⁹⁹ FRA & Council of Europe, *Fundamental rights of refugees*.

³⁰⁰ Maria Grazia Giammarinaro, *COVID-19 Position paper The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons* (Special Rapporteur on Trafficking in Persons, especially women and children, June 2020) <<https://www.ohchr.org/Documents/Issue/Traffic>

Similarly, internally displaced persons face issues related to their limited access to health care, water, sanitation, food, and adequate housing, as well as discrimination.³⁰¹

The elderly population is among the most vulnerable groups to Covid-19, with the overall highest mortality rate. The elderly may not be able to access health services, or such services may be inadequate for their needs, and will likely depend on family and caregivers, which can be challenging in case of emergency. Further, they are isolated when their relatives, if any, cannot visit them.³⁰² They may also be unable to follow instructions or have difficulties in understanding them, which is why it is necessary to take into consideration their particular situation and conditions in determining policies that will assist them and protect them from additional risks.³⁰³

Finally, LGBTQIA+ persons face challenges to access healthcare systems due to stigma and discrimination, especially in contexts where their sexual orientation is criminalized. They also tend to be more isolated and may not be able to leave an affected area as easily as other non-marginalized persons.³⁰⁴ Finally, they may suffer from pre-existing inequalities such as homelessness, reduced access to work and livelihood, and compromised immune systems, which makes them more vulnerable to Covid-19.³⁰⁵

3.3. Rights Infringed by COVID-19 that Particularly Affect Marginalized Communities

Some of the most important human rights are highly undermined during pandemics, including the right to water and sanitation, the right to work, the right to health, the right to education, the right to food, the right to housing, the right to a healthy environment, and digital rights.

The right to water and sanitation is among the most affected human rights. The lack of access to clean water and sanitation exacerbates conditions of vulnerability, since marginalized populations living in shelters, informal settlements, the homeless and rural populations will often not be able to fully comply with the health guidelines in tackling the pandemic. Water is also likely to become scarce due to environmental concerns heightened during the pandemic, thus making it more difficult to access clean water. Several UN experts, including the Special Rapporteur on the human rights to safe drinking water and sanitation, issued a statement in March 2020 calling on governments to prohibit water cuts to those who cannot pay bills, and provide water free of cost for the duration of the crisis to people in conditions of poverty.³⁰⁶

The health-related measures adopted throughout the world have caused massive economic and social shocks, and the global economy is sliding into a recession, with workers facing unemployment, loss of income and

ing/COVID-19-Impact-trafficking.pdf> accessed 30 September 2021

³⁰¹ 'COVID-19: Do not forget internally displaced persons, UN expert urges Governments worldwide' *OHCHR* (1 April 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25763&LangID=E>> accessed 30 September 2021.

³⁰² UN Women and Translators Without Borders, *COVID-19: How to include marginalized and vulnerable people*.

³⁰³ 'IACHR Urges States to Guarantee the Rights of Older People during the COVID-19 Pandemic' *OAS* (13 April 2020) <http://www.oas.org/en/iachr/media_center/PReleases/2020/088.asp> accessed 23 December 2020; Council of Europe, *Older persons need more support than ever in the age of the Covid-19 pandemic* (20 March 2020) <https://www.coe.int/en/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZW0AJBMLI/content/older-persons-need-more-support-than-ever-in-the-age-of-the-covid-19-pandemic> accessed 23 December 2020; 'Unacceptable' – UN expert urges better protection of older persons facing the highest risk of the COVID-19 pandemic' *OHCHR* (27 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25748&LangID=E>> accessed 23 December 2020; Special Envoy of the United Nations Secretary-General on Disability and Accessibility & Independent Expert on the enjoyment of all human rights by older persons, *Joint Statement Women and girls with disabilities and older women in relation to the*

COVID-19 pandemic (28 April 2020) <<https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/04/covid19-joint-statement-women-girls-disabilities-olderwomen-covid19.pdf>> accessed 23 December 2020; Special Envoy of the United Nations Secretary-General on Disability and Accessibility & Independent Expert on the enjoyment of all human rights by older persons, *Joint Statement: The right to life of persons with disabilities and older persons infected by Covid-19* <<https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/04/Version2-Decl-Estandar-Bioet-Dpcd-ENabril20.pdf>> accessed 23 December 2020; United Nations, *Policy brief: the impact of COVID-19 on older persons* (May 2020) <https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_covid-19_and_older_persons_1_may_2020.pdf> accessed 23 December 2020.

³⁰⁴ UN Women and Translators Without Borders, *COVID-19: How to include marginalized and vulnerable people*.

³⁰⁵ 'COVID-19 and the Human Rights of LGBTI people' *OHCHR* (17 April 2020) <<https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>> accessed 23 December 2020.

³⁰⁶ 'COVID-19 will not be stopped without providing safe water to people living in vulnerability – UN experts' *OHCHR* (23 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25738&LangID=E>> accessed 23 December 2020.

livelihoods, hence infringing the right to work.³⁰⁷ Special attention should be paid to vulnerable groups that were already facing difficulties to access decent jobs, such as women, informal economy workers, young workers, older workers, migrants and refugees, and the self-employed.³⁰⁸

Disparities related to the right to health and access to health services are being exacerbated by the Covid-19 pandemic. In this context, the IACHR and Office of the Special Rapporteur on Economic, Social, Cultural, and Economic Rights (OSRESCER) called special attention to pre-existing inequalities to ensure timely and appropriate care.³⁰⁹ They also placed special focus on efforts directed towards treating mental health issues since psychological distress in populations is widespread due to the immediate health impacts of Covid-19 and the consequences of physical isolation, economic turmoil and uncertainty.³¹⁰ Moreover, some people already experiencing mental health issues might have seen their treatments interrupted or modified, which only adds to their vulnerability.³¹¹

The right to education was severely impacted by school closings, which is daunting to children as it goes beyond a mere interruption of classes. In some cases, the right to adequate food is also compromised, notably where school breakfast or lunch programs are available because many children rely on free or subsidized school meals on a daily basis.³¹² As mentioned earlier, it may also leave children, particularly girls, more vulnerable to abuse, domestic work prioritization over education, and other harmful practices. These measures could lead to permanent dropout rate

increases, particularly for girls, children with disabilities and children coming from economically disadvantaged parents.³¹³

The right to food has also been adversely impacted. It was estimated that 820 million people were already identified as chronically food insecure prior to the outbreak of Covid-19, and the food security of 135 million people was categorized as crisis level or worse, a number that is estimated to have doubled during the pandemic.³¹⁴ Lockdown measures and border closures have affected food supply chains by slowing harvests and constraining transport of food to markets.³¹⁵ The Special Rapporteur on the Right to Food called for the immediate lifting of international economic sanctions in countries like Syria, Venezuela, Iran, Cuba, and Zimbabwe to prevent a hunger crisis.³¹⁶ She underscored that most of those countries are already under stress and cannot handle economic sanctions while fighting Covid-19.³¹⁷ However, the international community has been largely slow to respond.

Homelessness is a vital human rights issue, since the rights to housing, health and food are fundamental to human dignity.³¹⁸ Housing became the front line defense against the coronavirus, but it may not be an adequate measure for those who do not have a home and are forced to shelter in overcrowded places, lacking access to water and sanitation as well as the ability to safely distance from others, and the uncertainty regarding allowed duration of stay.³¹⁹ Likewise, people facing economic hardship and job losses may face eviction from their homes for failure to pay their rent or mortgage.³²⁰

³⁰⁷ ILO, *Policy brief: A policy framework for tackling the economic and social impact of the COVID-19 crisis* (May 2020) <https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/briefingnote/wcms_745337.pdf> accessed 23 December 2020.

³⁰⁸ *Ibidem*.

³⁰⁹ 'IACHR and OSRESCER Urge States to Guarantee Comprehensive Protection for Human Rights and Public Health during the COVID-19 Pandemic' *OAS* (20 March 2020) <http://www.oas.org/en/iachr/media_center/PReleases/2020/060.asp> accessed 23 December 2020.

³¹⁰ United Nations, *Policy brief: COVID-19 and the need for action on mental health* (13 May 2020) <https://www.un.org/sites/un2.un.org/files/un_policy_brief-covid_and_mental_health_final.pdf> accessed 13 December 2020.

³¹¹ *Ibidem*.

³¹² ACERWC, *Guiding Note on Children's Rights during COVID-19* <<https://www.acerwc.africa/Latest%20News/guiding-note-on-childrens-rights-during-covid-19/>> accessed 23 December 2020.

³¹³ *Ibid*. See also, United Nations, *Policy brief: Education during COVID-19 and beyond* (August 2020) <https://www.un.org/sites/un2.un.org/files/sg_policy_brief_covid-19_and_education_august_2020.pdf> accessed 23 December 2020.

³¹⁴ United Nations, *Policy brief: The impact of COVID-19 on food security and nutrition* (June 2020) <https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_covid_impact_on_food_security.pdf> accessed 23 December 2020.

³¹⁵ *Ibidem*.

³¹⁶ OHCHR, *COVID-19: Economic sanctions should be lifted to prevent hunger crises – UN expert* (31 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25761&LangID=E>> accessed 23 December 2020.

³¹⁷ *Ibidem*.

³¹⁸ OHCHR Special Rapporteur on the right to adequate housing, *Protecting those living in homelessness* (28 April 2020) <https://www.ohchr.org/Documents/Issues/Housing/SR_housing_COVID-19_guidance_homeless.pdf> accessed 23 December 2020.

³¹⁹ OHCHR, *Housing, the front line defence against the COVID-19 outbreak, says UN expert* (18 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25727&LangID=E>> accessed 23 December 2020.

³²⁰ *Ibidem*.

Additionally, the right to a healthy environment is under threat. As analyzed in other sections of this report, there has been an increase in rollback of environmental regulations, relaxed standards for pollution from emitting sources, and a lack of enforcement of laws and regulations related to environmental protection. In the context of pre-existing inequalities, vulnerable populations have historically carried the burden of adverse environmental impacts, as they are relegated to areas where toxic wastes are dumped or live closer to polluting facilities, thus having a precarious air and water quality.³²¹ Environmental protection should be in the forefront of governments plans of action, as it is crucial that the pandemic does not serve as a scenario for furthering the current environmental and climate crisis. In particular, climate change-related impacts have proven to be felt worse by marginalized communities, who have little to no capacity to cope with the effects of climate change.

Finally, digital rights have also been in the center stage of Covid-19 response and have been infringed.

While the adoption of various digital technologies to stop the spread of Covid-19 has great potential to augment the power of cities to manage the crisis, the use of these technologies has also highlighted the extensive digital divide,³²² and risks stemming from function creep and mass surveillance.³²³ As highlighted by the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, multiple governments have imposed internet shutdowns during the pandemic, 'risk[ing] the health and life of everyone denied such access'.³²⁴ One of the largest digital rights violations during the pandemic is surveillance. At least 27 countries have used data from cell phone companies to track their citizens.³²⁵ Other digital rights violations include censorship, misinformation, and disinformation. From January 26 to May 26, 2020, several rights organizations found 163 cases of digital rights

breaches in Hungary, Bosnia and Herzegovina, Croatia, Serbia, Romania, and North Macedonia.³²⁶

3.4. Conclusions and Summary of Key Recommendations

The Covid-19 pandemic has emphasized pre-existing and deeply rooted inequalities worldwide. Policies such as capital and financial market liberalization have contributed to greater disparities and insecurities. There are obvious gaps both within and between countries. Covid-19 has shown how vulnerable categories are particularly exposed during health crises where some individuals cannot even afford basics such as soap and clean water. A recent report done by the United Nations Development Programme (UNDP) estimates that developed countries have 55 hospital beds, more than 30 doctors and 81 nurses for every 10,000 people. For the same number of people in a less developed country there are seven beds, 2.5 doctors and six nurses.

The pandemic has contributed to an acceleration in technological change such as remote working and distance learning. However, this can be considered as luxury for many. For instance, 86% of primary school-age children in low human development countries are currently not getting an education, compared to just 20% in countries with very high human development.

This could lead to levels of regression taking us back to a time long before the SDGs or even the MDGs.³²⁷ Thus, the pandemic reveals how our societies are characterized by profound inequalities.

In these unforeseen times, governments need to actively pursue expanded access to internet connectivity for all members of the public. Such expanded access will enable an equitable spread of information, safety precautions, and public participation in government and legal processes.

³²¹ 'The Americas: Governments should strengthen, not weaken, environmental protection during COVID-19 pandemic' *OAS* (13 August 2020) <http://www.oas.org/en/iachr/media_center/PReleases/2020/198.asp> accessed 23 December 2020.

³²² Don Rodney Junio, 'Digital Divide in the Time of COVID-19' (14 April 2020) United Nations University <<https://cs.unu.edu/news/news/digital-divide-covid-19.html>> accessed 23 December 2020.

³²³ Elise Racine, 'What does the Covid-19 pandemic mean for digital rights?' *LSE* (30 April 2020) <<https://blogs.lse.ac.uk/internationaldevelopment/2020/04/30/what-does-the-covid-19-pandemic-mean-for-digital-rights/>> accessed 23 December 2020.

³²⁴ UNGA, Disease pandemics and the freedom of opinion and expression: Report of the Special Rapporteur on

the promotion and protection of the right to freedom of opinion and expression (A/HRC/44/49, April 2020).

³²⁵ Kareem Fahim, Min Joo Kim, and Steve Hendrix, 'Despite uncertain benefits, surveillance spreads across the world' *Privacy International* (2 May 2020) <<https://privacyinternational.org/examples/3803/despite-uncertain-benefits-surveillance-spreads-across-world>> accessed 23 December 2020.

³²⁶ 'Over 150 Digital Rights Breaches During COVID-19 Pandemic' *BIRN* (3 June 2020) <<https://birn.eu.com/news-and-events/over-150-digital-rights-breaches-during-covid-19-pandemic/>> accessed 23 December 2020.

³²⁷ UNDP, (n.d.), *Coronavirus vs. Inequality* <<https://feature.undp.org/coronavirus-vs-inequality/>> accessed 23 December 2020.

Indeed, intergovernmental organizations have already demanded that such expansions occur domestically, as much as practicable.³²⁸

The economic impacts of the pandemic on workers in the informal economy and vulnerable populations might be lessened through a variety of measures. Stronger employment policies and institutions³²⁹ can help. In the formal sector, policy tools used to support the economy include unemployment insurance, working time reduction programs, and income subsidies.³³⁰ Comprehensive social protection systems³³¹ are also helpful measures. These systems could combine contributory and non-contributory schemes to guarantee some level of social protection for all.³³²

Systems of cash transfer are highly effective as they enable fast and contactless delivery of financial assistance but not always feasible, especially at scale.³³³ Other possible social assistance transfers might include in-kind transfers and school feeding programs.³³⁴ Similarly, these programs should include an inclusive and intersectional lens to cope with pre-existing inequalities and vulnerable groups.

The use of appropriate language when spreading and sharing information is crucial for children and the elderly to effectively understand. Additionally, it is necessary to be mindful of any impairments that may hinder communication, as well as language barriers when it comes to migrants and refugees.

Chapter 4: Right to Water

4. Introduction

Hand hygiene is among the most effective practices to confront the Covid-19, but not everyone has access to water and sanitation infrastructure in their homes.

Three billion people do not have a place in their home to wash their hands. Three quarters of those reside in poverty-stricken countries and constitute the most vulnerable, such as children and families living in informal settlements, migrant and refugee camps, or in areas of active conflict.³³⁵ Additionally, one in seven people, roughly 946 million, defecate in the open, 9 out of 10 of whom live in rural areas.³³⁶

Given that water is essential for life, access to clean water must be guaranteed to people, particularly in the context of pandemics such as Covid-19. In this setting, it is necessary to review the content of the human right to water and sanitation and analyze the way it has been violated in the context of a pandemic. It is necessary to differentiate urban from rural areas. Although these areas may experience similar problems regarding the Covid-19 effects in relation to the lack of access to drinking water, the causes may differ.

4.1. Human Right to Water and Sanitation

The human right to water and sanitation was recognized for the first time by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment N° 15 (GC N° 15) in 2002, developing its contents from articles 11 and 12 of the ICESCR.³³⁷ Also, in 2010 the UN General Assembly explicitly recognized the human right to water and sanitation through Resolution 64/292³³⁸ and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights. A similar interpretation has been given by the IACHR in different statements indicating that access to water and basic sanitation constitute an autonomous right recognized in the Inter-American framework by itself, but it is a right whose protection can be initiated through the

³²⁸ 'States of the Region must Accelerate Universal Internet Access Policies during COVID-19' *OAS* (31 August 2020) <<http://www.oas.org/en/iachr/expression/showarticle.asp?IID=1&artID=1182>> accessed 23 December 2020.

³²⁹ ILO, *ILO: As job losses escalate, nearly half of global workforce at risk of losing livelihoods* (29 April 2020) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_743036/lang-en/index.htm> accessed 23 December 2020.

³³⁰ Federico Diez et al., *Options to Support the Incomes of Informal Workers During COVID-19* (20 May 2020) IMF.

³³¹ ILO, *ILO: As job losses escalate*.

³³² ILO, *Extending social protection to informal workers in the COVID-19 crisis: country responses and policy considerations* (8 September 2020) <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_754731.pdf> accessed 23 December 2020.

³³³ Diez et al., (n 330).

³³⁴ *Ibidem* at 4.

³³⁵ World Health Organization and UNICEF, *Hand Hygiene for all* (2020) <https://www.who.int/water_sanitation_health/publications/200626-unicf-who-hand-hygiene-global-initiative.pdf> accessed 23 December 2020.

³³⁶ *Ibidem*.

³³⁷ Economic and Social Council, *General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* (2002).

³³⁸ This concern has been present since the beginning of international environmental law, for example in the Conference of Stockholm (1972). In the same way, other important documents to consider would be the Vancouver Declaration on Human Settlements (Habitat I, 1976), Section II, Point 1; Istanbul Declaration on Human Settlements (Habitat II, 1996), Chapter I, Point 8; New Urban Agenda (Habitat III, 2016), Point 13 (a).

principles of interdependent and interrelated rights.³³⁹

In line with this, and prior to its recognition as an autonomous right, the international community's concern for the environmental situation, and particularly the scarcity and supply of water, began to acquire greater importance. This was reflected in various non-binding international instruments, which reinforced the concept of water as a fundamental guarantee. Despite the implicit recognition, the development of normative content of this right was linked to the deployment of other fundamental guarantees such as the rights to health, to live in a healthy and balanced environment, to food, to housing and to self-determination of peoples.³⁴⁰

Examples of this recognition can be found in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child.

4.2. Contents of the Human Right to Water and Sanitation

General Comment N° 15 is the instrument establishing the cornerstone of the normative content associated with the human right to water and sanitation, containing freedoms and entitlements.

According to paragraph 10, freedoms “include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies.” In the same line, entitlements establish ‘the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water’. These classifications can be understood as rights of a subjective nature, with a strong public dimension regarding the provision of vital services to which States are obliged.³⁴¹

In relation to the general legal obligations of the States, core obligations include to respect, protect and fulfil the enjoyment of the right to water and

sanitation. This obligation acquires special meaning in times of emergency and natural disasters, when States are obliged to protect “objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.” Also, States have obligations to take steps towards the full realization of this human right, which must be deliberate, concrete and targeted at its realization, without discrimination of any kind. For the adequate realization of human dignity, water should be treated as a social and cultural good, ensuring that this right can be realized by present and future generations.

In ‘Covid-19 and Human Rights We are all in this together,’ the UN notes that strategies to contain the virus are difficult for those without good quality safe housing, such as the homeless or slums residents where lack of access to clean water and sanitation is a fundamental issue and promoting hand washing is impossible. In the same way, Townsend (2020)³⁴² remarks that privatization of water resources and its distribution may be one of the causes that increases the gap to achieve equal access to water. Understood as an indivisible whole, SDG 6 addresses water and sanitation to achieve universal and equitable access to safe and affordable drinking water, sanitation and hygiene for all, an objective within which is incorporated the restoration of water-related ecosystems and the implementation of integrated management of water resources at all levels.

4.3. How the Human Right to Water Has Been Violated in Urban and Rural Areas

The need for an access source to drinking water is vital in the midst of the Covid-19 pandemic. The pandemic has worsened certain gaps that, for example, Latin America has been experiencing in recent decades regarding the provision of drinking

³³⁹ Inter-American Commission on Human Rights, *Case of the indigenous communities of the Lhaka Honhat Association (Our Land) v. Argentina* (2020); Inter-American Commission on Human Rights, ‘Annual Report 2015’, Chapter IV A (2015); Inter-American Commission on Human Rights, *Case of the Indigenous Community Yakye Axa v. Paraguay* (17 June 2005); Inter-American Commission on Human Rights, ‘Rights of Indigenous and Tribal Peoples over their Ancestral Lands and Natural Resources, Norms and jurisprudence of the Inter-American Human Rights System’ (2009).

³⁴⁰ Elena Valdés de Hoyos, Isabel Patricia and Enrique Uribe Arzate, ‘El derecho humano al agua: Una cuestión de

interpretación o de reconocimiento,’ (2016) 34 Cuestiones Constitucionales: 3-25.

³⁴¹ Becerra Ramírez, José de Jesús and Irma Salas Benítez, ‘El derecho humano al acceso al agua potable: Aspectos filosóficos y constitucionales de su configuración y garantía en Latinoamérica,’ (2016) 19(37) Prolegómenos: 125-146.

³⁴² Dina Townsend, ‘COVID-19 Symposium: COVID-19 and the Human Right to Water and Sanitation’ (March 2020) OpinJuris <<http://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-human-right-to-water-and-sanitation/>> accessed 23 December 2020.

water and sanitation services. Given that water is essential for life, access to clean water must be guaranteed to people, and particularly in the context of pandemics such as Covid-19. Considering that, according to the Special Rapporteur on the human right to water and sanitation's report,³⁴³ many of these issues must be addressed from the regulatory frameworks of domestic law that progressively enable responses from the States aimed at ensuring the exercise of the right to water and sanitation.

The effects of the pandemic in relation to the human right to water and sanitation are not distributed equitably, falling harder on marginalized groups. Women and girls are in an especially vulnerable situation with regard to contagion, since they are often assigned the tasks of care and hygiene in the home,³⁴⁴ which in many cases translates into the search for drinking water to a high risk of contagion.³⁴⁵ The most disadvantaged urban populations often have precarious systems for the provision of essential services, which leads to increasing discrimination that reduces the possibilities of access and affordability.³⁴⁶

As for urban and peri-urban areas, the main problem is related to access to plumbing infrastructure for accessing drinking water and sanitation, particularly in peri-urban zones of metropolitan areas. In these areas, drinking water is delivered by means of cistern or cistern trucks, in a discontinuous supply, and often implies higher costs than the rest of the population supplied at home. The high monetary expenses related to infrastructure for water-related services are one of the main reasons that increase the impacts on vulnerable populations.

In the case of rural populations, due to the lack of approaches in sanitation that attend different cultural visions about infrastructure as well as adequate technologies, the management of water and sanitation projects continues to be unsuccessful.

Furthermore, researchers have found a direct link between the lack of adequate water, sanitation and hygiene (WASH) and child morbidity and mortality.³⁴⁷

These problems are observed in Lima,³⁴⁸ Buenos Aires,³⁴⁹ Guayaquil³⁵⁰ and Santiago,³⁵¹ where we can find similarities in the problems of peri-urban zones, where low-income populations live. The problem of infrastructure for access to drinking water became more complex with Covid-19. In all these cases, the States have to take actions to provide clean water to these persons, mainly through tanker trucks, but avoid relying on them as long-term policies. According to data provided by CONICET in Argentina, problems of access to drinking water and sanitation services are one of the main problems of Greater Buenos Aires, increasing social and environmental vulnerability as well as negatively enhancing health problems.³⁵² On the other hand, in countries like Colombia there is a greater impact on Afro-descendant populations and Indigenous peoples. Those towns located in rural and remote areas are more affected.

Ecuador, Bolivia, Perú, Colombia and México have taken measures to make charging for services more flexible, cheaper or are providing water with tanker trucks. In Lima, the provider of the Potable Water and Sewerage service of Lima (SEDAPAL) has distributed water free of charge to 700,000 inhabitants daily. In Colombia, the government announced the reconnection of service to households that had suspended drinking water

³⁴³ Human Rights Council, *Report of the Special Rapporteur on the human rights to safe drinking water and sanitation* (2017).

³⁴⁴ Economic Commission for Latin America and the Caribbean - CEPAL, *La pandemia del COVID-19 profundiza la crisis de los cuidados en América Latina y el Caribe* (2020) <https://repositorio.cepal.org/bitstream/handle/11362/45335/5/S2000261_es.pdf> accessed 23 December 2020.

³⁴⁵ Human Rights Council, *Report by the Special Rapporteur on the human right to safe drinking water and sanitation on his mission to El Salvador* (2016).

³⁴⁶ Human Rights Council, *Report* (n 343).

³⁴⁷ Amy Waller et al., 'Multiple and complex links between baby WASH and stunting: an evidence synthesis,' (2020) 265 *Journal of Water, Sanitation and Hygiene for Development*.

³⁴⁸ National Geographic, *Perú: La problemática del acceso al agua potable en asentamientos humanos en la periferia de Lima* (5 June 2020) <<https://www.nationalgeographic.com/medio-ambiente/2020/06/problematika-del-acceso-a-l-agua-potable-lima-peru/>> accessed 23 December 2020.

³⁴⁹ 'Contagio comunitario en las villas hacinadas de Buenos Aires' *El Diario.es* (29 May 2020), <https://www.eldiario.es/internacional/covid-19-propaga-villas-buenos-aires_1_6012566.html> accessed 23 December 2020.

³⁵⁰ Agencia EFE, *Agua y alcantarillado preocupan más que el COVID-19 en suburbios de Guayaquil* (15 April 2020) <<https://www.efe.com/efe/america/sociedad/agua-y-alcantarillado-preocupan-mas-que-el-covid-19-en-suburbios-de-guayaquil/20000013-4221417>> accessed 23 December 2020.

³⁵¹ '700 familias viven sin agua potable en campamentos en Batuco en medio de la crisis sanitaria por COVID-19' *Futuro360* (9 June 2020) <https://www.futuro360.com/desafiotierra/700-familias-viven-sin-agua-potable-batuco_20200609/> accessed 23 December 2020.

³⁵² Consejo Nacional de Investigaciones Científicas y Técnicas - CONICET, *Relevamiento del impacto social de las medidas del Aislamiento dispuestas por el PEN* (April 19, 2020) <https://www.conicet.gov.ar/wp-content/uploads/Informe_Final_Covid-Cs.Sociales-1.pdf> accessed 23 December 2020.

service due to non-payment, as well as the freezing of rates and charges for the purification of water. Subsequently, direct subsidies to rural and community aqueducts were announced. In June 2020, Ecuador published the Organic Law of Humanitarian Support, in which article 5° addressed the non-increase of costs in basic services, whether delivered by public or private services or delegations and the temporary suspension of cuts for non-payment.

In none of these cases did States discuss long-term measures to solve infrastructure problems in terms of access to drinking water. The crisis posed by Covid-19 has exposed a structural problem regarding the effectiveness and exercise of the human right to water at a time when access to hand washing is vital to prevent the increase of infections in the populations more vulnerable.

4.4. Conclusions and Summary of Key Recommendations

It is necessary to increase financial flows to provide adequate infrastructure for LAC areas, especially in peri-urban and rural zones, where people do not have available clean drinking water and sanitation services to achieve long-term solutions.

Infrastructure's expansion is key to ensure access to drinking water, and sanitation services cannot interrupt the exercise of the human right to water.

Long-term solutions should consider a controlled and organized growth of cities that allows expanded access to drinking water and sanitation services to people in the most vulnerable situations, and also strengthens resilience, sustainability and efficiency of cities, which is only possible with the participation and local governance designs considering different actors, improving their coordination, and enhanced alignment of national, subnational, and local policies with international agendas.³⁵³ The assurance of these policies regarding access to drinking water will improve to the extent that

national legal systems incorporate elements of the human right to water.

Thus, as they ensure the right to access water and sanitation, the non-interference of this right and the collective right to have a network for the provision of this service, which enables joint action between public-private actors.

Chapter 5: Right to Food

5. Introduction

Food is essential for human survival and barriers to the enjoyment of this basic need can be considered a threat to life. The biggest challenges regarding food access and enjoyment of human rights are hunger and food security, as noted in SDG 2. The FAO reported that nearly 820 million people suffer from hunger every day.³⁵⁴ In some countries, the quality of food is not enough to ensure healthy nutrients. Food insecurity and other food issues do not only concern access to food but also access to efficient tools and opportunities to produce food.³⁵⁵

Recognized in the Universal Declaration of Human Rights (UDHR), the right to adequate food stems from the right to an adequate standard of life. The right to adequate food has been recognized in the ICESCR as a 'fundamental right of everyone to be protected against hunger'.³⁵⁶ Such right is realized when a person has "the physical and economic access to adequate food or means for its procurement," including through agriculture.³⁵⁷ The IACHR, in Resolution 04/2020, called for better protection of the rights of people with Covid-19 and recommended that States provide sufficient water and food to people infected with the virus.³⁵⁸ This was supported by Resolution 01/2020, which emphasized the difficulty that regions such as the Americas experience with food insecurity.³⁵⁹ These vulnerabilities are intertwined with high levels of inequality and poverty, which are exacerbated by trade measures and policies that reduce support for small-scale, sustainable crop production.

³⁵³ Shyla Del-Aguila-Arcentales, Aldo Alvarez-Risco, and Marc A. Rosen. 'Sustainable Cities', in Marc A. Aldo Alvarez-Risco et al. (eds.), *Building Sustainable Cities: Social, Economic and Environmental Factors* (Springer 2020).

³⁵⁴ FAO, IFAD, UNICEF, WFP and WHO, *The State of Food Security and Nutrition in the World 2021. Transforming food systems for food security, improved nutrition and affordable healthy diets for all*. (Rome, FAO 2021) <<https://doi.org/10.4060/cb4474en>> accessed 8 December 2021.

³⁵⁵ G. Kent, *Freedom from want The Human Right to Adequate Food* (Georgetown University Press 2005) 7, 12.

³⁵⁶ International Covenant on Economic, Social and Cultural Rights (1976) article 11, 2.

³⁵⁷ Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).

³⁵⁸ Inter-American Commission on Human Rights, Resolution 04/2020 (27 July 2020) <<https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-20-en.pdf>> accessed 23 December 2020.

³⁵⁹ Inter-American Commission on Human Rights, *Pandemia y Derechos Humanos en las Américas*. Resolución 1/2020, Comisión Interamericana de Derechos Humanos (CIDH), <<https://www.oas.org/en/iachr/decisions/pdf/Resolucion-1-20-en.pdf>> accessed 23 December 2020.

5.1. Food Workers (Balance of Rights)

The pandemic has highlighted the weaknesses of the global food system currently based on industrial agriculture, long specialized chains and foreign and mostly undocumented migrant workers.³⁶⁰ Covid-19 lockdowns have interrupted the lives of workers in several sectors. These lockdowns significantly underlined the vulnerability and precarious employment status of some workers in the food sector and have exposed a lack of adequate policies necessary to protect workers and enforce their rights in times of crisis. Many of these workers have lost their jobs in the pandemic, highlighting the challenging conditions they experience, such as living from pay-check to pay-check with very little savings and, in many cases, dependent on state aid. Most of the workers were left without free access to healthcare or financial support. For workers in the informal economy, this resulted in a loss of their livelihoods. The lack of a social safety net meant the inability to support their families, and the lockdowns and travel bans have prevented them from finding an alternative job.³⁶¹

While food workers represent an important position in the economy of a State, they are also highly exposed to vulnerabilities. Food and agricultural workers risk Covid-19 infection because

of the close contact in which they must work. Such contacts are extended because of their long work shifts; exposure could also occur when they are in contact with contaminated surfaces or objects, such as tools, equipment, tractors, workstations, toilet facilities, or breakroom tables. Even off-work, they may be near each other during breaks, when sharing transportation and housing.³⁶²

5.2. Access to Food: Higher Prices, Economic Aspects

The Covid-19 pandemic has reduced access to food and adequate nutrition across the globe. New causes of food insecurity have emerged and preexisting causes have been exacerbated. While all have been affected in some way by the pandemic-induced changes in food access, certain communities – including the elderly,³⁶³ those who obtain food through informal markets,³⁶⁴ laborers in the informal economy,³⁶⁵ and low-income families³⁶⁶ – have been significantly impacted.

Pandemic-related furloughs and unemployment,³⁶⁷ limitation of hours and services at supermarkets,³⁶⁸ and restriction of economic activity to formal, ‘essential’ services³⁶⁹ have caused food demand³⁷⁰ and prices to skyrocket.³⁷¹ At a high level, pandemic responses have limited worker mobility,

³⁶⁰ Yael Pantzer, ‘Without Rights of Agri-Food Workers, EU’s Food Supplies Rests on Shaky Grounds’ *SlowFoodEurope* (16 April 2020) <<https://www.slowfood.com/without-rights-for-agri-food-workers-eus-food-supplies-rest-on-shaky-ground/>> accessed 8 December 2021.

³⁶¹ UNPRI, *Theme 1: protecting workers’ rights through the Covid-19 crisis* <<https://www.unpri.org/covid-19-resources/theme-1-protecting-workers-rights-through-the-covid-19-crisis/6342.article>>-accessed-23-December-2020.

³⁶² CDC, *Agriculture Workers and Employers: Interim Guidance from CDC and the U.S. Department of Labor* <<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.htm>> accessed 23 December 2020.

³⁶³ Julia A. Wolfson, Cindy Leung, & Jeffrey Kullgren, ‘Food as a Critical Social Determinant of Health Among Older Adults During the Coronavirus Disease 2019 (COVID-19) Pandemic’ (July 2020) *JAMA* <<https://jamanetwork.com/channels/health-forum/fullarticle/2769122>> accessed 23 December 2020.

³⁶⁴ See, e.g., Marc C. A. Wegerif, July 2020, ‘Informal’ food traders and food security: experiences from the Covid-19 response in South Africa,’ *12 Food Security* 797, <<https://link.springer.com/article/10.1007/s12571-020-01078-z>> accessed 23 December 2020.

³⁶⁵ ‘COVID-19 and the crisis in food systems: Symptoms, causes, and potential solutions’ *iPES Food* (4 April 2020) <http://www.ipes-food.org/_img/upload/files/COVID-19_CommuniqueEN.pdf> accessed 23 December 2020; see also HRW, *Nigeria: Protect Most Vulnerable in COVID-19 Response* (14 April 2020) <<https://www.hrw.org/news/2020/04/1>

[4/nigeria-protect-most-vulnerable-covid-19-response](https://www.hrw.org/news/2020/04/1/nigeria-protect-most-vulnerable-covid-19-response)> accessed 23 December 2020.

³⁶⁶ Sameer M. Siddiqi, ‘Food Access: Challenges and Solutions Brought on by COVID-19’ *The RAND Blog* (31 March 2020) <<https://www.rand.org/blog/2020/03/food-access-challenges-and-solutions-brought-on-by.html>> accessed 23 December 2020.

³⁶⁷ Martin Hensher, ‘Covid-19, unemployment, and health: time for deeper solutions?’ *The BMJ* (8 October 2020) <<https://www.bmj.com/content/371/bmj.m3687>> accessed 23 December 2020.

³⁶⁸ Cormac O’Shea & Edel Hughes, ‘Opening hours and changes at Aldi, Tesco, Dunnes and Lidl as Ireland enters Phase 1’ *Irish Mirror* (21 May 2020) <<https://www.irishmirror.ie/news/irish-news/aldi-tesco-lidl-opening-hours-2064065>> accessed 23 December 2020.

³⁶⁹ See, e.g., República de Colombia, Ministerio del Interior, Decreto Número 457 de 2020 (Mar. 18, 2020), <<https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20457%20DEL%2022%20DE%20MARZO%20DE%202020.pdf>> accessed 23 December 2020. (In Colombia, “essential goods” in the context of the pandemic can only be sold in markets, grocery stores, or other similar formal stores).

³⁷⁰ OECD, *Food Supply Chains and COVID-19: Impacts and Policy Lessons* (2 June 2020), <<http://www.oecd.org/coronavirus/policy-responses/food-supply-chains-and-covid-19-impacts-and-policy-lessons-71b57aea/>> accessed 23 December 2020.

³⁷¹ See, e.g., Joseph Opoku Gakpo, ‘COVID-19 virus spread prompts food insecurity fears in Africa’, (26 March 2020) *Cornell Alliance for Science* <<https://allianceforscience.com>

which has in turn contributed to labor shortages and disruptions in transport and logistics services.³⁷² For example, transportation of food has been disrupted due to reduced air cargo capacity as well as new border requirements such as the necessity for drivers to get tested or quarantine, thus delaying farm labor, food processing, food availability, and access to food across the globe.³⁷³ In some countries, border officials exploit the crisis to extract bribes in exchange for the authorization to bring food from one country to another.³⁷⁴ Further, the shutdown of market floor trading has impacted the ability to exchange commodities.³⁷⁵

Disruptions in food supply chains³⁷⁶ have accompanied shifts in consumer demand away from higher value items toward staples, ready-to-eat, and nonperishable food items.³⁷⁷ Domestic food prices have increased³⁷⁸ and commodity prices have decreased³⁷⁹ as a result. Food price volatility has affected countries ranging from Argentina and Ecuador to France and Uganda.³⁸⁰ In the United States³⁸¹ and Kenya, Covid-19-led market disruptions have left farmers with no choice but to euthanize livestock and destroy crops.³⁸² In a survey by the International Committee of the Red Cross (ICRC) across 11 countries in Africa, 94% of

respondents said that food prices had increased, while 82% also noted that their incomes had decreased.³⁸³ A similar survey conducted in Ukraine found 75% of respondents reported an increase in the price of basic items.³⁸⁴

A subcategory of the concept of the right to adequate food under international human rights law,³⁸⁵ the right of access to food is primarily derived from ICESCR Article 11. There are a number of ways that governments and interest groups have attempted to apply the laws on access to food during the pandemic or, in instances where the laws have not been properly applied, named and shamed relevant governments. In line with ICESCR Article 11, the Scottish Government put in place a £70 million Food Fund for those who would be otherwise unable to access food.³⁸⁶ Despite this and other legislation put forth in Northern Ireland, England, and Wales, on August 5, 2020, the UN Special Rapporteur on extreme poverty and human rights and Special Rapporteur on the right to food sent a communication to the U.K. Government concerning 'the deepening level of food insecurity among low-income households, particularly families with children, and the lack of

cornell.edu/blog/2020/03/covid-19-virus-spread-prompts-food-insecurity-fears-in-africa/> accessed 23 December 2020.

³⁷² OECD, *COVID-19 and the Food and Agriculture Sector: Issues and Policy Responses* (2-5, 29 April 2020) <https://read.oecd-ilibrary.org/view/?ref=130_130816-9uut45lj4q&title=Covid-19-and-the-food-and-agriculture-sector-Issues-and-policy-responses> accessed 23 December 2020.

³⁷³ OECD, *OECD Policy Responses to Coronavirus: Food Supply Chains and COVID-19: Impacts and Policy Lessons* (2 June 2020) <<http://www.oecd.org/coronavirus/policy-responses/food-supply-chains-and-covid-19-impacts-and-policy-lessons-71b57aea/>> accessed 23 December 2020.

³⁷⁴ Peter S. Goodman, Abdi Latif Dahir and Karan Deep Singh, 'The Other Way Covid Will Kill: Hunger' *New York Times* (11 September 2020) <<https://www.nytimes.com/2020/09/11/business/covid-hunger-food-insecurity.html?auth=login-email&login=email>> accessed 23 December 2020.

³⁷⁵ *Ibidem*.

³⁷⁶ FIAN International, *Monitoring Report on the Right to Food and Nutrition During COVID-19* (14 June 2020) <https://www.fian.org/files/files/Covid_Monitoring_Report_Template_EN.pdf> accessed 23 December 2020.

³⁷⁷ OECD, *COVID-19 and the Food and Agriculture Sector: Issues and Policy Responses* (3, 29 April 2020) <https://read.oecd-ilibrary.org/view/?ref=130_130816-9uut45lj4q&title=Covid-19-and-the-food-and-agriculture-sector-Issues-and-policy-responses> accessed 23 December 2020.

³⁷⁸ FAO, *Global food prices rise in August* (3 September 2020) <<http://www.fao.org/news/story/en/item/130585/icode/>> accessed 23 December 2020.

³⁷⁹ The World Bank, *Most Commodity Prices to Drop in 2020 As Coronavirus Depresses Demand and Disrupts Supply*

(23 April 2020) <<https://www.worldbank.org/en/news/press-release/2020/04/23/most-commodity-prices-to-drop-in-2020-as-coronavirus-depresses-demand-and-disrupts-supply>> accessed 23 December 2020.

³⁸⁰ FIAN International, *A Recipe for Disaster: COVID Response Based on the Industrial Food System* (June 17, 2020) <<https://www.fian.org/en/press-release/article/a-recipe-for-disaster-covid-response-based-on-the-industrial-food-system-2510>> accessed 23 December 2020.

³⁸¹ Michael Corkery & David Yaffe-Bellany, 'Meat Plant Closures Mean Pigs Are Gassed or Shot Instead' *New York Times*, (14 May 2020) <<https://www.nytimes.com/2020/05/14/business/coronavirus-farmers-killing-pigs.html>> accessed 23 December 2020.

³⁸² FIAN International, *Monitoring Report on the Right to Food and Nutrition During COVID-19* (14 June 2020) <https://www.fian.org/files/files/Covid_Monitoring_Report_Template_EN.pdf> accessed 23 December 2020.

³⁸³ Goodman et. al., 'The Other Way Covid Will Kill: Hunger.' (n 374).

³⁸⁴ ICRC, *ICRC: Protect livelihoods during COVID-19 or risk a boom in aid-dependency* (3 June 2020) <<https://www.icrc.org/en/document/icrc-protect-livelihoods-during-covid-19-or-risk-boom-aid-dependency>> accessed 23 December 2020.

³⁸⁵ See, e.g., International Covenant on Economic, Social, and Cultural Rights, Article 11. See also CESCR General Comment No. 12: *The Right to Adequate Food* (Art. 11) 12 May 1999, E/C.12/1999/5.

³⁸⁶ "Coronavirus (COVID-19: Food Fund guidance for local authorities)," Scottish Government (April 5, 2020) <<https://www.gov.scot/publications/coronavirus-covid-19-food-fund-guidance-to-local-authorities/pages/the-food-fund/>> accessed 23 December 2020.

comprehensive measures to ensure their access to adequate food'.³⁸⁷

Perhaps the paradigmatic case regarding the right to food in the context of the pandemic is an appeal of a June case in Uganda. Uganda-based civil society organization, the Center for Food and Adequate Living Rights, appealed the decision³⁸⁸ of a Covid-19 related case in which the Kampala High Court declined to recognize a governmental violation of the right to food for its failure to establish food reserves in the context of the pandemic, which, the plaintiffs argued, are critical to mitigation of the food crisis.³⁸⁹

Drawing on the international framework underpinning the right to food, a number of human rights NGOs submitted an *amicus curiae* brief in support of the plaintiffs' case.³⁹⁰

5.3. Sustainable Agriculture

Using low levels of technology, many traditional farmers chose to preserve traditional farming knowledge and use locally adapted agricultural systems that guarantee both food security, sustainability and the conservation of agrobiodiversity.³⁹¹ Sustainable agriculture is thus based on small-scale farms using fewer off-farm inputs (such as chemicals) and technologies, and combining plant and animal production where and when appropriate.³⁹² Agricultural systems around the world are considered to be sustainable when they increase productivity, employment and value

addition in food systems, protect and enhance natural resources, and improve the resilience of people, communities and ecosystems.³⁹³ As such, sustainable agriculture can be defined as 'an agriculture that can evolve indefinitely toward great human utility, greater efficiency of resource use, and a balance with the environment that is favorable both to humans and most other species'.³⁹⁴

The Global Forest Coalition, reflecting on the impacts of extensive agro-industrial production around the world and community responses to the challenges of Covid-19, noted that traditional practices are lighting the way towards transformational change in food systems.³⁹⁵ They concluded that sustainable agriculture is vital to overcome health crises such as Covid-19.³⁹⁶ This can be illustrated by examples such as the Ethiopian population who grazes its livestock over 60% of the country and managed to overcome outbreaks among livestock populations thanks to their traditional farming practices and knowledge.³⁹⁷ In addition, community responses to the pandemic have illustrated the resilience of traditional farming practices such as methods to store food or agroecology.³⁹⁸

Even before the pandemic, industrial agriculture food production (mainly ovo-dairy and meat) negatively impacted populations and the environment, especially highly vulnerable populations suffering from food crises.³⁹⁹ Land overexploitation, the modernization of the

³⁸⁷ *Mandates of the Special Rapporteur on extreme poverty and human rights; and the Special Rapporteur on the Right to Food*, United Kingdom of Great Britain and Northern Ireland, AL GBR 8/2020 (August 5, 2020) <<https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25477>> accessed 23 December 2020.

³⁸⁸ *Center for Food and Adequate Living Rights (CEFROHT) v Attorney General (MISCELLANEOUS CAUSE NO. 75 OF 2020)* [2020] UGHCCD 157 (4 June 2020) <<https://ulii.org/ug/judgment/hc-civil-division-uganda/2020/157>> accessed 23 December 2020.

³⁸⁹ FIAN International, *Human Rights Organizations Join Efforts to Defend the Right to Food in Uganda During COVID-19* (4 August 2020) <<https://www.fian.org/en/news/article/human-rights-organizations-join-efforts-to-defend-the-right-to-food-in-uganda-during-covid-19-2549>> accessed 23 December 2020.

³⁹⁰ Center for Economic and Social Rights et al, *Amicus Curiae Brief* <https://www.fian.org/files/files/FINAL_amicus_WEB.pdf> accessed 23 December 2020.

³⁹¹ M. A. Altieri, 'Linking ecologists and traditional farmers in the search for sustainable agriculture,' (2004) *Frontiers in Ecology and the Environment* 2; 35, 42.

³⁹² L. Horrigan, R. S. Lawrence and P. Walker, 'How sustainable agriculture can address the environmental and human health harms of industrial agriculture,' (2002) *Environmental Health Perspectives*, 110; 5.

³⁹³ See Food and Agriculture Organization of the United Nations, sustainable food and agriculture definitions, <[http://www.fao.org/sustainability/en/#:~:text=To%20be%20sustainable%2C%20agriculture%20must,and%20social%20and%20economic%20equity.&text=FAO%20promotes%20SFA%20to%20help,Sustainable%20Development%20Goals%20\(SDGs\)](http://www.fao.org/sustainability/en/#:~:text=To%20be%20sustainable%2C%20agriculture%20must,and%20social%20and%20economic%20equity.&text=FAO%20promotes%20SFA%20to%20help,Sustainable%20Development%20Goals%20(SDGs))> accessed 23 December 2020.

³⁹⁴ Clive A. Edwards and Richard R. Harwood, *Sustainable Agricultural Systems*, 4.

³⁹⁵ Milena Bernal, 'World Food Day: Lessons from COVID-19 can lead the way to sustainable food systems' (15 October 2020) Global Forest Coalition <<https://globalforestcoalition.org/world-food-day-2020/>> accessed 23 December 2020.

³⁹⁶ *Ibidem*.

³⁹⁷ *Ibidem*.

³⁹⁸ *Ibidem*.

³⁹⁹ Andrew Wasley and Alexandra Heal, 'Revealed: development banks funding industrial livestock farms around the world. Investigation uncovers finance worth \$2.6bn pumped into meat and dairy industries, despite warnings of links to climate catastrophe' *The Guardian* (2 July 2020) <<https://www.theguardian.com/environment/2020/jul/02/revealed-development-banks-funding-industrial-livestock-farms-around-the-world>> accessed 23 December 2020.

production chains, as well as difficult socioeconomic conditions greatly impacted the survival of rural and Indigenous populations that inhabit and conserve strategic ecosystems such as the Amazon region.⁴⁰⁰

The Covid-19 health crisis is further deepening the hunger crisis impacting the poorest and most vulnerable groups.⁴⁰¹ As a consequence of the pandemic's impacts on agriculture, it was estimated that more than 130 million additional people were going to face starvation by the end of 2020, doubling the number of people facing acute hunger to 265 million people.⁴⁰²

Yet, due to lockdowns measures, farmers and other actors in the food system were and continue to be unable to plant crops in a timely manner, to use the optimal quality and quantities of seeds, fertilizers and pesticides (also due to delayed deliveries), to harvest, to store crops adequately or to sell crops before they would become unmarketable.⁴⁰³ As a consequence, farmers experienced disruptions to crop production from which their farming activities and sustainable food systems may take months or years to recover.⁴⁰⁴

For example, Afghan farmers were unable to sow their crops on time due to measures to prevent the spread of the virus.⁴⁰⁵ Such disruptions also negatively impacted food supply chains. To mitigate these effects, FAO suggests that crop production intensification be built on sustainable farming systems using management practices such as minimum soil disturbance, permanent organic soil cover, species diversification, integrated pest management, plant nutrition based on healthy soils and efficient water management.⁴⁰⁶

In addition, mandatory health measures have discouraged the use of sustainable and small-scale production.⁴⁰⁷ In Colombia, farmers, who represent 43.6% of the national population, are deeply

affected by the health crisis as well.⁴⁰⁸ The Corabastos marketplace, a 420,000 square meter agricultural mini-city with 57 warehouses where the crops coming from all over the country is bought and sold to supply food to the population of Bogotá, and which used to be visited by 250,000 people every day, had to reduce its capacity to 35 percent, to close some warehouses and to reduce its operation to half.⁴⁰⁹ In addition, amidst the concerns of the pandemic, people stopped buying fresh produce, leading to spoilage of tons of food and directly impacting farmers' already precarious lives.⁴¹⁰ Further, since the first week of March 2020, the price of the U.S. dollar rose rapidly to Colombian Peso, reaching 4,200 pesos on March 24, 2020, the highest price in its history, before decreasing to below 4,000 pesos.⁴¹¹

The rise of the price of the U.S. dollar in Colombia severely affected small producers due to the rise of production costs, as most inputs to feed chickens and inputs needed for milk production as well as herbicides, pesticides and fertilizers prices all significantly increased, and although the price of the dollar fell in May 2020, the price of imported inputs never decreased.⁴¹²

The health crisis has highlighted that current food and agriculture systems are failing to address global challenges. Sustainable agriculture could help guarantee the right to food and could provide a path to shift towards a better post-Covid-19 sustainable and resilient agriculture. Therefore, the global effort to build back better should address farming activities and support farmers. Promoting investments in inclusive systems as well as small-scale and traditional farming systems securing access to land, water, land management and strengthening public policies that respond to needs of pastoralists are necessary steps towards the sustainability of our world.

⁴⁰⁰ Jon M. Nelson, 'Of farms and forests: farm-level land-use decisions, socio-environmental systems, and regional development in Brazil's Atlantic Rainforest' (2020) 6(3) *Environmental Sociology* 322, 341.

⁴⁰¹ Oxfam, *The Hunger Virus: How COVID-19 is Fuelling Hunger In A Hungry World* (July 2020) <<https://reliefweb.int/sites/reliefweb.int/files/resources/Final%20English%20Brief%20-%20The%20Hunger%20Virus%20-%20Emmbargoed%209%20July%202020-2.pdf>> accessed 23 December 2020.

⁴⁰² World Food Programme <<https://www.wfp.org/news/covid-19-will-double-number-people-facing-food-crises-unless-swift-action-taken#:~:text=The%20number%20of%20people%20facing,according%20to%20a%20WFP%20projection>> accessed 23 December 2020.

⁴⁰³ *Ibidem*.

⁴⁰⁴ *Ibidem*.

⁴⁰⁵ World Bank Group, *Food security and Covid-19* <<https://www.worldbank.org/en/topic/agriculture/brief/food-security-and-covid-19>> accessed 23 December 2020.

⁴⁰⁶ *Ibidem*.

⁴⁰⁷ Molly D. Anderson and Marta Guadalupe Rivera Ferre, 'Unsustainable by Design: Extractive Narratives of Ending Hunger and Regenerative Alternatives' (2020) *Current Opinion in Environmental Sustainability*.

⁴⁰⁸ 'Así son los campesinos colombianos' *Dinero* (16 April 2020) <<https://www.dinero.com/pais/articulo/asi-son-los-campesinos-colombianos/284136>> accessed 23 December 2020.

⁴⁰⁹ Julián Ríos Monroy, 'El campo en pandemia' *El tiempo* (June 2020) <<https://www.eltiempo.com/colombia/otras-ciudades/coronavirus-en-colombia-vida-en-el-campo-dura-po-durante-la-cuarentena-por-covid-19-513268>> accessed 23 December 2020.

⁴¹⁰ *Ibidem*.

⁴¹¹ *Ibidem*.

⁴¹² *Ibidem*.

5.4. Food Security

The FAO definition of food security comprises four key dimensions of food supplies: availability, stability, access, and utilization. Access to food is the ability of individuals, populations or even countries to buy and own sufficient quantities and qualities of food. Over the last 30 years, access to food improved in many developing countries thanks to the decline of food prices and the rise of household incomes. As a result of the increase of the population's purchasing power, people were able to purchase nutritious food containing more proteins, micronutrients, and vitamins, and thus food not only for survival but also for a better quality of life.⁴¹³

Since the spread of the coronavirus in the early months of 2020, agricultural and food markets have faced disruptions and other issues due to labor shortages caused by lockdown measures adopted to limit the spread of the virus. In addition, there has been a shift in food demand due to loss of income as well as closures of restaurants and schools. A survey showed that the poorest households spend approximately 70% of their incomes on food while also having limited access to financial markets, which makes their food security especially vulnerable to income shocks.⁴¹⁴ South Asia and Africa are the most impacted, especially in countries that were already suffering from military conflicts, extreme poverty or climate-related disasters such as drought, flooding or soil erosion.⁴¹⁵ The European Commission (EC) highlighted the need to take action to reduce the environmental impact of the food system, especially in the aftermath of the pandemic and the economic downturn. The EC stressed that the pandemic has indeed underlined the interrelations between people's health, ecosystems, supply chains, consumption patterns and planetary boundaries.

Through its 'Farm to Fork' strategy, at the heart of the European Green Deal, the EU addresses the challenges of sustainable food systems and recognizes the link between healthy people and a healthy planet. It is a new comprehensive approach

mapping out ways for the EU to significantly decrease the use of pesticides and antibiotics, boost organic farming, promote plant-based proteins and make every link of the system more sustainable. The end goal is to create a favorable food environment that would make it easier to choose healthy and sustainable diets and thus, benefit consumers' health and quality of life.

The pandemic has exacerbated an already existing food crisis that leaves millions of people living in hunger. Governments should not only respect their existing duty to guarantee food for their citizens but also improve and empower their old mechanism or implement new ones in order to satisfy this fundamental need for human survival.

5.5. Conclusions and Summary of Key Recommendations

The World Food Programme reported that an extra 265 million people were at risk, with the potential for multiple famines in the 2020.⁴¹⁶ Oxfam confirmed these claims and has also identified 10 countries and regions where the food crisis is getting worse after the pandemic: Yemen, Democratic Republic of Congo, Afghanistan, Venezuela, the West African Sahel, Ethiopia, Sudan, South Sudan, Syria and Haiti.⁴¹⁷

There is no doubt that the Covid-19 pandemic presents an incomparable and unprecedented challenge for national authorities regarding food safety control systems and the need to continue functions and activities of food production following national regulations and international recommendations. For example, different food routine activities are hard to ensure, such as the inspection of food business operations, certifying exports, control of imported foods, monitoring and surveillance of the safety of the food supply chain, analysis of food quality, managing food incidents, providing advice on food safety and food regulations for the food industry.⁴¹⁸ In addition, the pandemic comes on top of other crises that smallholder food producers and marginalized communities are already experiencing as a result of

⁴¹³ Josef Schmidhuber and Francesco N. Tubiello, 'Global food security under climate change' (11 December 2007) 104(50) PNAS 19703, 19708.

⁴¹⁴ D. Laborde, W. Martin, R. Vos, 'Estimating the poverty impact of COVID-19: The MIRAGRODEP and POVANA frameworks' (2020) IFPRI Technical Note, IFPRI <<https://tinyurl.com/y9fazbfz>> accessed 23 December 2020.

⁴¹⁵ Goodman *et al.*, 'The Other Way Covid Will Kill: Hunger' (n 374).

⁴¹⁶ World Food Programme <<https://www.wfp.org/news/covid-19-will-double-number-people-facing-food>>

crises-unless-swift-action-taken> accessed 23 December 2020.

⁴¹⁷ Oxfam International (n.d.), *World on the brink of a 'hunger pandemic': coronavirus threatens to push millions into starvation* <<https://www.oxfam.org/en/world-midst-hunger-pandemic-conflict-coronavirus-and-climate-crisis-threaten-push-millions>> accessed 8 December 2021.

⁴¹⁸ FAO, *COVID-19 and Food Safety: Guidance for competent authorities responsible for national food safety control systems (Policy Support and Governance)* <<https://www.fao.org/policy-support/tools-and-publications/resourc-details/en/c/1274826/>> accessed 23 December 2020.

climate change consequences and disasters. In 2019, of the total people suffering from acute food insecurity 77 million people lived in countries affected by conflict, 34 million were affected by climate change and 24 million people in economic crises, however, the virus has complicated existing crises, threatens to worsen others and creates new ones.⁴¹⁹

One of the problems in facing this food crisis stems from the fact that developing countries do not have the same resources and infrastructure as developed countries. For example, severe lockdown measures that were taken at an early stage of the pandemic are sustainable only if combined with broad and inclusive social protection programs that can protect families and individuals. Effective ways are needed, like the ones used during Ebola, that can deliver support during difficult times. In addition, humanitarian activities, such as the distribution of food and cash should be considered as essential services. National authorities should cooperate with those NGOs without creating restriction and impediment.⁴²⁰

Chapter 6: Rights of Indigenous Groups, Afro-descendant Communities and Environmental Defenders

6. Introduction

It is estimated that there are 476 million Indigenous peoples⁴²¹ living in 90 countries in the world.⁴²² In

general, Indigenous and tribal peoples are known for having deep connections to nature and the territories they occupy, which is why regional and international human rights frameworks protect Indigenous peoples' collective rights to their land and natural resources. As highlighted by the UN Special Rapporteur on Indigenous Peoples when explaining health risks to which Indigenous peoples are exposed to during the pandemic, '[o]ften depending on fragile ecosystems for their subsistence, they also suffer particular health impacts from environmental degradation, including pollution of water resources on their traditional lands caused by extractive industries and pesticides from monoculture'.⁴²³

As highlighted by the OHCHR, the pandemic is 'disproportionately affecting Indigenous peoples, exacerbating underlying structural inequalities and pervasive discrimination'.⁴²⁴ For instance, in the United States, the rate of known cases in the eight counties with the largest populations of Native Americans is nearly double the national average.⁴²⁵

The Amazon rainforest has been particularly affected.⁴²⁶ In the Brazilian Amazon region, Covid-19's death toll on Indigenous peoples was 150% higher than the rest of the country's average toll in June 2020.⁴²⁷ In view of this situation, international and regional human rights bodies have issued recommendations on how states should respond to the pandemic considering their rights and special needs.

⁴¹⁹ Global Network Against Food Crises, *Key takeaways of the Global Network Against Food Crises on Preventing a food catastrophe during the COVID-19 pandemic* (2020) <http://www.fightfoodcrises.net/fileadmin/user_upload/fightfoodcrises/doc/GN_KeyMessages_FoodCrises_Covid19.pdf> accessed 23 December 2020.

⁴²⁰ 'Concern – Covid Hunger. Extreme Poor' *ReliefWeb* <www.concern.net> accessed 23 December 2020.

⁴²¹ Using the ILO's Convention on Indigenous and Tribal Peoples (Convention No. 169) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the modern understanding of Indigenous peoples is based on the individual's self-identification as Indigenous, his/her acceptance by the community as a member, and the community's historical continuity with pre-colonial and/or pre-settler societies, distinct social, economic or political systems, distinct language and culture and intent to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. Other tribal peoples that are not Indigenous, such as Afro-Descendent communities in Latin America, are also protected under ILO Convention 169 for their choice to live in ethnically and culturally distinct collectives with a common identity, history, and tradition. United Nations Permanent Forum on Indigenous Issues, *Indigenous Peoples, Indigenous Voices: Factsheet* <https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>-accessed-23-December-2020.

⁴²² The World Bank, *Indigenous People* <<https://www.worldbank.org/en/topic/indigenouspeoples#:~:text=There%20are%20approximately%20476%20million,percent%20of%20the%20extreme%20poor>> accessed 23 December 2020.

⁴²³ UNGA, *Rights of indigenous peoples* (20 July 2020) A/75/185 <<https://undocs.org/en/A/75/185>> accessed 23 December 2020.

⁴²⁴ OHCHR, *Covid-19 and Indigenous Peoples' Rights* (29 June 2020) <https://www.ohchr.org/Documents/Issues/IPeoples/OHCHRGuidance_COVID19_IndigenouspeoplesRights.pdf> accessed 23 December 2020.

⁴²⁵ New Mexico Department of Health, *Covid-19 in New Mexico* <<https://cvprovider.nmhealth.org/public-dashboards.html>> accessed 23 December 2020.

⁴²⁶ M. A. Tigre, 'How is COVID-19 affecting Amazonia? – Violations to Human Rights and the Environment' (*Völkerrechtsblog*, 2020) <<https://voelkerrechtsblog.org/how-is-covid-19-affecting-amazonia/>> accessed 13 December 2021.

⁴²⁷ Yasmin Setubal, 'Covid-19: Taxa de mortalidade entre os indígenas da Amazônia Legal é 150% maior do que a média nacional, aponta estudo' *O Globo* (22 June 2020) <<https://oglobo.globo.com/sociedade/covid-19-taxa-de-mortalidade-entre-os-indigenas-da-amazonia-legal-150-maior-do-que-media-nacional-aponta-estudo-24492819>> accessed 22 December 2020.

The following were identified as factors that have contributed, in different degrees according to each communities' realities, to Indigenous and tribal peoples' vulnerability during the Covid-19 pandemic: (i) socio-economic disenfranchisement, such as pre-existing conditions of inequality, including lack of access to clean water, sanitation and health services that potentialize the spread of diseases; (ii) political marginalization, including exclusion from political arenas and representation mechanisms that would allow them to participate in shaping Covid-19 response policies for their communities; (iii) immunologic, as communities that lived in isolation have built less immune response to virus infections such as Covid-19; and (iv) territorial vulnerability, as traditional livelihoods depend on a harmonic relation with nature within their territories, which are increasingly under pressure from land use changes.⁴²⁸

6.1. Right to Self-isolation and Secluded Populations

The risks of contamination by Covid-19 are considered higher for communities living in significant levels of isolation since it is most likely that they do not present immune defense to viruses.

There are few tribes still living in almost complete isolation in the world,⁴²⁹ and most of the groups identified as isolated or in stages of initial contact are located in the Amazon region. It is estimated that approximately 200 Indigenous communities live in higher levels of isolation in this region.⁴³⁰ The option to live in self-isolation is an essential component of the right to self-determination as recognized in international and regional human rights frameworks, such as the

American Convention on Human Rights and ILO Convention 169.⁴³¹

Indigenous organizations have strongly condemned the frequent entrance onto Indigenous territories by non-community members, especially where communities have lived in greater degrees of isolation, such as in the Amazon. Non-community members have not only acted as vectors for contamination, but have also caused environmental damage, which further hinders communities' ability to cope with the pandemic.⁴³² In fact, studies show that frequent entrance of non-Indigenous peoples is one of the main factors leading to contamination by Covid-19 in the Amazon. Specialists also observed a correlation between high rates of deforestation due to illegal activities in Indigenous lands and higher levels of vulnerability, such as the case of the Yanomami land.⁴³³ Frequently trespassed by thousands of illegal miners, the territory which is home to approximately 27,000 Indigenous persons,⁴³⁴ among which groups in voluntary isolation, has had three Covid-19-related deaths up until the first week of June, including a 15-year old boy.⁴³⁵ Indigenous peoples living in the shared border between Colombia, Ecuador and Peru, who have struggled against the expansion of extractive activities and the dominance of armed non-state actors, have also pointed out how these activities increase their vulnerability and violate their rights. In this context and due to governments' insufficient response, Indigenous organizations have self-isolated and taken measures to avoid the entrance of outsiders in their lands.⁴³⁶ In Colombia, Indigenous communities established a national prevention strategy to block the entrance of non-community members, including maintaining territorial control through Indigenous guards and

⁴²⁸ Coordinadora de las Organizaciones Indígenas de la Cuenca Amazonica (COICA), *Crisis multidimensional de la pandemia COVID-19 para los Pueblos Indígenas Amazonicos Transfronterizos en Colombia, Ecuador y Perú* <https://www.cejil.org/sites/default/files/2020_04_20_carta_ppii_transfronterizos_cidh_onu.pdf> accessed 22 December 2020.

⁴²⁹ Rainforest Foundation Norway, *Isolated tribes around the world* <<https://www.regnskog.no/en/isolated-tribes/this-is-isolated-tribes>> accessed 22 December 2020.

⁴³⁰ OAS, *Indigenous and tribal peoples of the Pan-Amazon Region* <<http://www.oas.org/en/iachr/reports/pdfs/Panamazonia2019-en.pdf>> accessed 22 December 2020.

⁴³¹ IACHR, *Indigenous peoples in voluntary isolation and initial contact in the Americas* <<http://www.oas.org/en/iachr/indigenous/docs/pdf/report-indigenous-peoples-voluntary-isolation.pdf>> accessed 22 December 2020.

⁴³² 'Referendo Na Medida Cautelar Na Arguição De Descumprimento De Preceito Fundamental 709 Distrito

Federal' (Supremo Tribunal Federal) <<http://portal.stf.jus.br/processos/downloadPeca.asp?id=15344621000&ext=.pdf>> accessed 22 December 2020.

⁴³³ 'Como desmatamento pode explicar casos de Covid-19 entre indígenas' *Instituto Socioambiental* <<https://acervo.socioambiental.org/acervo/noticias/como-desmatamento-pode-explicar-casos-de-covid-19-entre-indigenas>> accessed 22 December 2020.

⁴³⁴ 'Terra Indígena Yanomami' *Terras Indígenas no Brasil* <<https://terrasindigenas.org.br/pt-br/terras-indigenas/4016>> accessed 22 December 2020.

⁴³⁵ 'Covid-19 ameaça aldeias yanomamis vizinhas a garimpo' *BBC News* <<https://www.bbc.com/portuguese/brasil-52886924>> accessed 22 December 2020.

⁴³⁶ 'Pueblos Indígenas se Atrincheraan para Protegerse del Coronavirus' *RFI* <<https://www.rfi.fr/es/am%C3%A9ricas/20200401-varios-pueblos-ind%C3%ADgenas-se-atrincheran-para-evitar-el-coronavirus>> accessed 22 December 2020.

drawing on knowledge of Indigenous medicine from community experts.⁴³⁷

Indigenous organizations have also reached out to national courts and regional human rights mechanisms to demand that governments enforce protections of Indigenous land rights and the right of communities to self-isolate. For instance, in its request to the IACHR's Rapporteur and the United Nations' Special Rapporteur on Indigenous Peoples Rights, the Indigenous Organizations of the Amazon River Basin underscored that the threat of Covid-19 is deeply related to the historical inaction of governments that have allowed the unfettered exploitation of natural resources in Indigenous territories and the persecution of environmental and human rights leaders.⁴³⁸ In Brazil, Indigenous organizations appealed to the Constitutional Court to order the federal government to, among other things, implement sanitary barriers and remove invaders from their lands.⁴³⁹

6.2. Lack of Access to Health Services, Water and Sanitation

According to General Comment 14 of the CESCR, the human right to health, as established in the ICESCR, includes four core components: availability, accessibility, acceptability and quality. The component of 'accessibility' entails that health services need to be accessible physically, economically (affordable), and that there should be no discrimination. States should also follow minimum human rights standards concerning Indigenous peoples' health and wellbeing, as established in the UNDRIP: the right to access, without any discrimination, all social and health services and to enjoy the highest attainable standard of physical and mental health.

Nevertheless, Indigenous communities have historically experienced poorer health, increased rates of disability and lower quality of life than non-Indigenous peoples.⁴⁴⁰ The UN calculates Indigenous peoples' life expectancy to be up to 20 years lower than that of non-Indigenous peoples.⁴⁴¹ Health care is commonly less obtainable in communities that live in more remote areas as a result of an uneven distribution of healthcare services. Health care costs are another challenging factor for Indigenous communities. Finally, Indigenous peoples have been frequently excluded from the development of health policies that affect them.

These inequalities have been exacerbated during the pandemic and have become an obstacle for Indigenous communities to access health services.

When the pandemic broke out, Indigenous communities struggled to receive information on how to cope with the pandemic that was culturally appropriate and tailored to their social, economic and cultural realities.⁴⁴² In communities that received visits from government health care employees, the outsiders became vectors of contamination.⁴⁴³ Even when communities obtained information on how to prevent the disease, lack of access to water and sanitation has also impacted Indigenous peoples' capacity to avoid contagion. In many Indigenous lands, water bodies have been polluted by extractive industries or by pesticides from agriculture and there is little sanitation infrastructure in place.⁴⁴⁴

Additionally, decisions regarding the closure of national borders have caused significant damage to some Indigenous communities. For example, in Venezuela, Indigenous communities are being left without access to health services, medicines, and food since the decision of the Brazilian and Colombian governments to close their borders.⁴⁴⁵

⁴³⁷ 'Colombia's indigenous peoples fend off COVID-19 using time-tested traditions' *The city paper* <<http://thecitypaperbogota.com/news/colombias-indigenous-peoples-fend-off-covid-19-using-time-tested-traditions/24384>>-accessed 22 December 2020.

⁴³⁸ Coordinadora de las Organizaciones Indígenas de la Cuenca Amazonica (COICA), *Crisis multidimensional de la pandemia COVID-19 para los Pueblos Indígenas Amazonicos Transfronterizos en Colombia, Ecuador y Perú* <https://www.cejil.org/sites/default/files/2020_04_20_carta_ppii_transfronterizos_cidh_onu_.pdf> accessed 22 December 2020.

⁴³⁹ 'Referendo Na Medida Cautelar Na Arguição De Descumprimento De Preceito Fundamental 709 Distrito Federal' (Supremo Tribunal Federal) <<http://portal.stf.jus.br/processos/downloadPeca.asp?id=15344621000&ext=.pdf>> accessed 22 December 2020.

⁴⁴⁰ United Nations Department of Economic and Social Affairs, *In the face of danger: looking back at a year like no*

other <<https://www.un.org/development/desa/en/>> accessed 22 December 2020.

⁴⁴¹ OHCHR, *The Right to Health* <<https://www.ohchr.org/documents/publications/factsheet31.pdf>> accessed 22 December 2020.

⁴⁴² OAS, *Resolution 01/20, Pandemic and Human Rights in the Americas* <<https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>> accessed 23 December 2020.

⁴⁴³ 'Brazil losing a generation of indigenous leaders to Covid-19' *The Guardian* <<https://www.theguardian.com/global-development/2020/jun/21/brazil-losing-generation-indigenous-leaders-covid-19>> accessed 22 December 2020.

⁴⁴⁴ UNGA, *Rights of Indigenous Peoples* <<https://undocs.org/en/A/75/185>> accessed 22 December 2020.

⁴⁴⁵ 'Indigenous migrant women from Venezuela: extremely vulnerable to COVID-19' *OpenDemocracy* <<https://www.opendemocracy.net/en/democraciaabierta/mujeres-ind%C3%ADgenas-migrantes-de-venezuela-vul>

It is also important to highlight that Indigenous communities are not a homogeneous social group and therefore can have different health needs. For instance, Indigenous populations living in urban areas have felt different impacts of the pandemic, such as the 1,500 members of the Embera community who currently live in Bogotá who have been evicted from their homes. Depending on the informal economy and inability to pay rent as a result of the isolation measures adopted by the government, they are currently living in the streets with almost no access to food and in precarious sanitary conditions.⁴⁴⁶

On the other hand, cases from Africa, Latin America and Asia indicate that Indigenous peoples that live in rural areas may not have access testing.⁴⁴⁷

In Brazil, despite the existence of a specific public national health service for Indigenous peoples, the service is only offered to those living in rural areas and the federal government has restricted access to peoples living in territories that have been officially recognized as Indigenous land.

6.3. Right to Participation, FPIC and Access to Information

Notwithstanding international recognition of Indigenous peoples' rights to participate in matters that affect them, States routinely fail to comply with their duties.⁴⁴⁸ At the beginning of the Covid-19 pandemic, Indigenous organizations sounded an alarm on the main causes of increased vulnerability of Indigenous peoples during the pandemic, including marginalization from decision-making processes, restricted access to information and lack of culturally adequate information about the disease, access to healthcare and preventing contagion.⁴⁴⁹

Based on internationally recognized human rights standards, the UNDRIP establishes that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights and specifically mentions the right to participate in the development of Indigenous health programs. It also foresees States' duties to consult and cooperate in good faith with Indigenous peoples concerned through their own representative institutions in order to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them. These rights are not only an important expression of Indigenous peoples' right to self-determination, but also play a crucial role in the promotion of democratic governance and social inclusion.

However, states have failed to comply with these rights during the pandemic, for instance by not including Indigenous representatives in devising emergency plans for communities or ignoring recommendations by human rights bodies on how to ensure protection of these rights in times of social distancing. In Brazil, considering the insufficient efforts carried out by the federal government to avoid contagion in Indigenous territories, Indigenous organizations won a preliminary measure at the Constitutional Court condemning the federal government to elaborate a full emergency plan and create an 'emergency room' to monitor the spread of the disease in Indigenous territories ensuring Indigenous participation in both initiatives.

As noted above, there have been instances in which these rights and duties have been violated during the pandemic. In Colombia, the Ministry of Interior authorized the use of online consultations for legislative and administrative measures and FPIC procedures were conducted virtually. The process was later cancelled and met with strong critique from Indigenous and Afro-descendant communities.⁴⁵⁰ In Brazil, the government did not

nerabilidad-extrema-ante-la-covid-19-en/> accessed 22 December 2020.

⁴⁴⁶ 'Colombia: miles de indígenas en riesgo de contraer COVID-19' *AP News* <<https://apnews.com/7182bd31a69478126927ee276f644944>> accessed 22 December 2020>.

⁴⁴⁷ UNGA, *Rights of Indigenous Peoples* <<https://undocs.org/en/A/75/185>> accessed 22 December 2020.

⁴⁴⁸ OHCHR, *Report of the United Nations Expert Mechanism on the Rights of Indigenous Peoples on the right to participate in decision making* <<https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyDecisionMaking.aspx>> accessed 23 December 2020.

⁴⁴⁹ Coordinadora de las Organizaciones Indígenas de la Cuenca Amazonica (COICA), *Crisis multidimensional de la pandemia COVID-19 para los Pueblos Indígenas Amazónicos Transfronterizos en Colombia, Ecuador y Perú* <https://www.cejil.org/sites/default/files/2020_04_20_carta_ppii_

transfronterizos_cidh_onu_pdf> accessed 22 December 2020.

⁴⁵⁰ 'Attempting to impose consultations by moving them on-line, under the guise of protecting Indigenous and Afro-Descendant Peoples from Covid-19, is disingenuous and considering its potential consequences can only be described as sinister. Consultations with ethnic peoples, whether conducted on-line or in-person, must be aimed at obtaining their free prior and informed consent (FPIC) in accordance with their own decision-making processes. This means that Indigenous and Afro-Descendant peoples must be able to practice their traditional consensus building processes, that often include all community members holding gatherings that can be of considerable duration. Requiring them to engage in such processes during a pandemic is highly irresponsible, if not criminal', *Open letter to the Colombian Ministry of the Interior and the President of the Republic of Colombia, Mr. Ivan Duque. Copy to: United*

suspend concession procedures of projects during the pandemic, as was the case with the mining project Belo Sun and the Space Center Alcântara and has not observed consultation rights of Indigenous and Afro-descendant communities affected.⁴⁵¹ Planning investments for post-Covid-19 recovery,⁴⁵² the government of Ecuador decided to draft, amidst the pandemic, a new bill on the right to consultation.

Indigenous organizations protested that not only the legislation entails a right to *consultation* and not to *consent*, but they have not been consulted in the drafting process.⁴⁵³

An important part of the right to participate in political life and decision-making is the right to have access to information, a fundamental human right enshrined in international legal documents such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

During the pandemic, it became evident that access to information is closely connected to the right to the enjoyment of the highest attainable standard of physical and mental health in the UNDRIP. As highlighted by the Special Rapporteur on Indigenous Peoples, “informed discussion among and within communities about potential preventive responses depends on communities receiving accessible, accurate and regularly updated information on the progression of the virus.”⁴⁵⁴ In many regions, however, Indigenous communities are often not recognized as such by governments and have had no access to resources to support adequate responses to Covid-19 and

ensure their communities were healthy and well-informed regarding the virus.⁴⁵⁵ Physical distance, social distancing measures and government measures restricting movement has also affected Indigenous groups that live in more remote areas in exchanging information with authorities.⁴⁵⁶

6.4. Persecution of Environmental and Human Rights Defenders

Environmental and human rights defenders (EHRD) have been crucial in denouncing human rights violations, fighting environmental crimes, and demanding action when marginalized groups are being disproportionately affected. With States’ Covid-19 responses generating new societal challenges, this work has become pivotal during the pandemic. On the other hand, environmental and human rights defenders have historically faced threats against their lives and work, with defenders that specifically work with land, Indigenous and environmental issues being even more vulnerable as they are three times as likely to suffer attacks than others.⁴⁵⁷

Since the Covid-19 outbreak, environmental and human rights defenders have played an important role in monitoring governments’ responses, ensuring that vulnerable communities receive adequate and appropriate information about the outbreak, and raising the alarm when response measures harm communities and/or the environment. In fact, many EHRD leaders have increased mobilization, leading to a ‘reawakening’ of civic organization in some countries.⁴⁵⁸ For

Nations Special Rapporteur on the rights of indigenous peoples Subject: Colombia’s Consultation Fiasco, Underlying Problems and Indigenous Peoples’ Solutions Berlin (19 June 2020), <<https://www.forestpeoples.org/en/news-article/2020/open-letter-colombian-ministry-interior-and-president-republic-colombia-mr-ivan>>-accessed-23-December-2020.

⁴⁵¹ See also Liana Amin Lima da Silva and Priscylla Monteiro Joca, ‘Incumplimiento De Los Protocolos Autónomos De Consulta Durante El Covid-19 En Brasil’ *Debates Indigenas* (1 October 2020) <<https://www.debatindigenas.org/notas/73-incumplimiento-protocolo-con-sulta-brasil.html>> accessed 23 December 2020; Por Ana Mendes, ‘Alcântara: o custo do Centro Espacial para as comunidades quilombolas’ *Repórter Brasil* (7 December 2017) <<https://reporterbrasil.org.br/2017/12/alcantara-o-custo-do-centro-espacial-para-as-comunidades-quilombolas/>> accessed 23 December 2020; Ruam Oliveira, ‘Ameaça a quilombolas pode travar acordo espacial EUA-Brasil em Alcântara’ *Tilt Uol* <<https://www.uol.com.br/tilt/noticias/redacao/2020/10/19/ameaca-a-quilombolas-pode-travar-acordo-espacial-eua-brasil-em-alcantara.htm>> accessed 23 December 2020.

⁴⁵² Amazon Watch, *Manufacturing Consent: Ecuador to Draft New Bill on the Consultation of Indigenous Peoples, Without Consulting Them* (18 November 2020)

<<https://amazonwatch.org/news/2020/1118-manufacturing-consent-ecuador-to-draft-new-fpic-bill-without-indigenous-consultation>> accessed 23 December 2020.

⁴⁵³ ‘Indígenas advierten a Ecuador sobre proyecto de ley de consulta previa’ *El Mercurio* (2 December 2020) <<https://elmercurio.com.ec/2020/11/19/indigenas-advier-ten-a-ecuador-sobre-proyecto-de-ley-de-consulta-previa/>> accessed 23 December 2020.

⁴⁵⁴ United Nations General Assembly (July 20, 2020) A/75/185 <<https://undocs.org/en/A/75/185>> accessed 23 December 2020.

⁴⁵⁵ ‘COVID-19 in Indigenous Communities’ *Cultural Survival* <<https://www.culturalsurvival.org/covid-19/tracking-indigenous-communities>> accessed 23 December 2020.

⁴⁵⁶ UNGA A/75/185, (n 454).

⁴⁵⁷ Front Line Defenders, *Front Line Defenders Global Analysis 2018* (Front Line Defenders, 2019) <<https://www.frontlinedefenders.org/en/resource-publication/global-analysis-2018>> accessed 23 December 2020.

⁴⁵⁸ The Fund for Global Human Rights, *How are Human Rights Defenders Responding to COVID-19?* (15 July 2020) <<https://globalhumanrights.org/blogs/how-are-human-rights-defenders-responding-to-covid-19/>> accessed 23 December 2020.

instance, in the Philippines, Tunisia, Nigeria and Kenya, EHRD have built coalitions to continue their work amidst the pandemic, by engaging with vulnerable communities and demanding meaningful participation in the adoption of new bills.⁴⁵⁹

The life and work of EHRD are protected by a series of international treaties, such as the ICCPR. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms also articulates the minimum internationally recognized standards that apply to human rights defenders.⁴⁶⁰ Regarding EHRD specifically, in 2019 the UN Human Rights Council unanimously adopted a landmark resolution to protect environmental human rights defenders, calling on States to create a safe and enabling environment for EHRDs and ensure effective remedies for human rights violations.⁴⁶¹

Despite these legal guarantees and the recognition of their important work for human rights monitoring, the situation of EHRD has worsened during the pandemic, including with regard to specific gendered violence.⁴⁶² As many governments have suspended constitutional guarantees and restricted public gatherings and freedom of movement claiming health concerns, EHRD have encountered greater obstacles in realizing their work. These include criminalization of their activities and attacks to their civic freedoms,⁴⁶³ smearing and online defamation.⁴⁶⁴

Lockdown measures and the impossibility to carry out consultations have also allowed extractive projects to proceed without opposition from human rights defenders, for instance, in Peru and Colombia.⁴⁶⁵ Weakening the protection of civil and political rights has been addressed by UN human rights specialists,⁴⁶⁶ underscoring that some measures are being enforced in a discriminatory manner against opposition figures and groups.⁴⁶⁷ The IACHR also highlighted how emergency measures taken by countries around the region could be used to attack EHRD and asked States to balance the need to restrict rights in order to protect public health and states' duty to defend and monitor human rights during the pandemic.⁴⁶⁸

Finally, Covid-19 response measures have also led to increased threats to EHRD's right to life, health and personal integrity. For instance, isolation measures have made EHRDs living in conflict-ridden areas an easy target to armed groups, which is worsened by the fact that they have lost protective accompaniment and media coverage in some places.⁴⁶⁹ According to the IACHR, the situation of EHRD killings in the Americas, historically the deadliest region for defenders,⁴⁷⁰ has become even more alarming during the pandemic.⁴⁷¹ This is specifically worrisome for Indigenous peoples, since in 2019 they accounted for 40% of the global killings due to their role protecting the environment and their territories.⁴⁷² In Colombia, the most dangerous country for EHRD in 2019, the number of killings increased in the first months of 2020,⁴⁷³ reaching 287 killings of social

⁴⁵⁹ *Ibidem.*

⁴⁶⁰ United Nations General Assembly (8 March 1999) RES 53/144 <<https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>> accessed 23 December 2020.

⁴⁶¹ United Nations Human Rights Council (March 20, 2019) A/HRC/40/L.22/Rev.1 <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/071/97/PDF/G1907197.pdf?OpenElement>> accessed 23 December 2020.

⁴⁶² *Ibidem.*

⁴⁶³ 'COVID-19: Human Rights Defenders and Civic Freedoms' *Business & Human Rights Resource Center*, (last updated: 21 December 2020) <<https://www.business-humanrights.org/en/big-issues/covid-19-coronavirus-outbreak/covid-19-human-rights-defenders-and-civic-freedoms/>> accessed 23 December 2020.

⁴⁶⁴ 'FLD Documents Impacts of COVID-19 on HRD' *Front Line Defenders* (n.d.) <<https://www.frontlinedefenders.org/en/campaign/covid-19-attacks-hrds-time-pandemic>> accessed 23 December 2020.

⁴⁶⁵ 'Defending Rights in Times of COVID: A Regional Review of the Conditions for Defending Human Rights and Freedom of Expression in Mexico and Central America' *Front Line Defenders* (Espacio_OSC, Iniciativa Mesoamericana de mujeres defensoras de derechos humanos, Trade Unions for Energy Democracy, nacla, CEJIL, Red Nacional de Defensoras

de Derechos Humanos en México, UDEFEGUA, 2020) <https://media.business-humanrights.org/media/documents/2020_10_15_Brief_-_Balance_regional_FINAL_EN.pdf> accessed 23 December 2020.

⁴⁶⁶ OHCHR, *COVID-19: States should not abuse emergency measures to suppress human rights – UN experts* (16 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>> accessed 23 December 2020.

⁴⁶⁷ *Ibidem.*

⁴⁶⁸ OAS, *IACHR Calls on States to Protect and Preserve the Work of Human Rights Defenders During the COVID-19 Pandemic* (5 May 2020) <https://www.oas.org/en/iachr/media_center/PReleases/2020/101.asp> accessed 23 December 2020.

⁴⁶⁹ *Ibidem.*

⁴⁷⁰ Global Witness, *Defending Tomorrow: The climate crisis and threats against land and environmental defenders* (Global Witness, July 2020) <<https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>> accessed 23 December 2020.

⁴⁷¹ *Ibidem.*

⁴⁷² *Ibidem.*

⁴⁷³ Juan Carlos Garzón Vergara et al., *Impactos y Riesgos del COVID-19 en la paz y las dinámicas del conflicto* (Fundación Ideas par la Paz, 2020) <<http://ideaspaz.or>

leaders and human rights defenders between January and December 2020.⁴⁷⁴ When not killed, imprisoned EHRD have faced grave risk of contracting Covid-19, as alerted by UN human rights experts concerned with the state of these prisoners in Egypt.⁴⁷⁵

6.5. Role of Indigenous Communities in Avoiding the Next Pandemic

Despite suffering numerous historical injustices, Indigenous peoples' role in Covid-19 recovery goes beyond that of mere victims. As discussed above, while 'modern' society's unsustainable consumption and production patterns have stretched planetary boundaries to critical degrees,⁴⁷⁶ Indigenous knowledge systems and practices have gained more attention. In practice, the positive impacts of many successful cases of ecosystem management by Indigenous peoples have been felt locally and on a global scale. Indigenous lands hold 80% of the world's forest biodiversity and store at least a fourth of the above-ground carbon that exists in tropical forests.⁴⁷⁷

Research also shows that forest land managed by Indigenous communities suffers less deforestation and emits at least 73% less carbon when compared to other territories in Bolivia, Brazil and Colombia.⁴⁷⁸

As emerging research shines a light on the interconnections between the increase of animal-borne diseases, such as Covid-19, and human disruption of ecosystems,⁴⁷⁹ it is clear that Indigenous peoples are important collaborators in helping to avoid another pandemic. The extent of their contribution, however, is hampered by the

lack of protection and enforcement of their rights. Despite greater recognition of their rights and importance of their worldviews, Indigenous communities are still being marginalized from policy-making processes at the national and international levels.⁴⁸⁰

6.6. Conclusions and Summary of Key Recommendations

Indigenous communities have suffered a differentiated impact stemming from Covid-19. Their health and lives have been affected not only by the pandemic itself, but also by the measures adopted by governments worldwide. Most of these measures do not take into consideration their particular situations, nor are they directed towards closing the pre-existing inequality gap. Therefore, a more conscious and intersectional framework needs to be applied when dealing with Covid-19 impacts on Indigenous communities.

The OHCHR issued specific recommendations and guidelines to be considered when adopting measures that could have an impact on the rights of Indigenous peoples during the pandemic, which aim at remaining mindful of their knowledge and modes of living.⁴⁸¹ In particular, ensuring access to reliable information and meaningful participation in decision-making processes is highly significant. The IACHR Resolution No. 01/2020 specifically encourages the application of an intersectional approach when dealing with issues that may affect Indigenous communities.⁴⁸²

On a broader scale, securing Indigenous peoples' collective land rights and protecting their culture and knowledge systems contributes to

[g/media/website/FIP_COVID19_web_FINAL_V3.pdf](https://www.ohchr.org/media/website/FIP_COVID19_web_FINAL_V3.pdf) accessed 23 December 2020.

⁴⁷⁴ Instituto de estudios para el desarrollo y la paz, *Líderes Sociales y Defensores de Derechos Humanos Asesinados en 2020* (INDEPAZ) <<http://www.indepaz.org.co/lideres/>> accessed 23 December 2020.

⁴⁷⁵ OHCHR, *Imprisoned human rights defenders in Egypt at grave risk of COVID-19, say UN human rights experts* (24 August 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26182&LangID=E>> accessed 23 December 2020. See also African Commission on Human and Peoples' Rights, *Press release of the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa on the protection of Human Rights Defenders during the COVID-19 pandemic* (1 May 2020) <<https://www.achpr.org/pressrelease/detail?id=496>> accessed 23 December 2020.

⁴⁷⁶ Will Steffen et al., 'Planetary boundaries: Guiding human development on a changing planet' *Science* (347, 6223, 2015).

⁴⁷⁷ IUCN, *IUCN Director General's Statement on International Day of the World's Indigenous Peoples 2019* (9 August 2019) <<https://www.iucn.org/news/secretariat/201908/iucn-director-generals-statement-international-day>

[-worlds-indigenous-peoples-2019](https://www.un.org/development/desa/indigenous-peoples-2019)> accessed 23 December 2020.

⁴⁷⁸ Allen Blackman et al., 'Titling indigenous communities protects forests in the Peruvian Amazon (2017) PNAS 114, 16

⁴⁷⁹ John Vidal, 'Destroyed Habitat Creates the Perfect Conditions for Coronavirus to Emerge' *Scientific American* (18 March 2020) <<https://www.scientificamerican.com/article/destroyed-habitat-creates-the-perfect-conditions-for-coronavirus-to-emerge/>> accessed 23 December 2020.

⁴⁸⁰ Dwayne Mamo, 'The Indigenous World 2020' *IWGIA* (2020) <http://iwgia.org/images/yearbook/2020/IWGIA_The_Indigenous_World_2020.pdf> accessed 23 December 2020.

⁴⁸¹ United Nations OHCHR, Office of the High Commissioner of Human Rights, *COVID-19 and Indigenous Peoples' Rights* (29 June 2020) <https://www.ohchr.org/Documents/Issues/IPeoples/OHCHRGuidance_COVID_19_IndigenouspeoplesRights.pdf> accessed 23 December 2020.

⁴⁸² OAS, *Resolution 01/20, Pandemic and Human Rights in the Americas* <<https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>> accessed 23 December 2020.

building a more sustainable planet for humanity as a whole, and allows them to be more prepared to face the next pandemic.⁴⁸³ Thinking about the health of the planet as a whole and considering Indigenous peoples' role as environmental stewards, to decrease the chances of future pandemics, post-Covid-19 recovery must include respect for protection and promotion of Indigenous rights in all regions of the world according to international and regional human rights frameworks. This must include the protection of Indigenous cultures and knowledge systems, granting and enforcing land tenure to communities, while strengthening environmental protection of Indigenous territories and the regions surrounding them.

Likewise, specific and intersectional measures need to be adopted and strengthened to protect the rights of EHRD, especially rights to life and personal integrity, since their work is extremely relevant for vulnerable communities and the environment. Some guidelines are: (i) to encourage meaningful participation in Covid-19 response, (ii) maximize access to information in a timely fashion, (iii) respect freedom of expression and make laws penalizing it more specific and limited, (iv) for States to ensure non-discriminatory measures of restriction on freedom of movement and assembly, as well as the release of defenders that have been detained in connection to their human rights work, (v) the need for a proportionate and necessary restriction on freedom of assembly, and (vi) adequate management of health related data, as well as other impacts on privacy, such as proportional, lawful and necessary surveillance.⁴⁸⁴

Moreover, governments should take into effective consideration, respect, promote and fulfil the norms enshrined in international, regional, and national law, Indigenous protocols and customary law for the protection of Indigenous peoples' rights. Especially because of the circumstances imposed by the pandemic, the respect for Indigenous peoples' rights should be promoted and enhanced, not made subject to any restriction or violation. In respecting Indigenous rights to self-determination and FPIC, governments and non-governmental institutions should:

- recognize and respect Indigenous protocols and customary laws, and Indigenous leaders and authorities as communities' legitimate institutions, and include them in decision-making processes concerning Covid-19 and related health measures;
- recognize Indigenous peoples' right to self-determination, including their right to stay uncontacted and voluntarily isolated;
- respect Indigenous health protocols of isolation and limitations to avoid spreading the virus;
- abstain from entering Indigenous territories and lands – where this is not possible, permission must be obtained from the legitimate Indigenous representative institutions, respecting health protocols and all established precautions to minimize physical contact;
- respect the Indigenous right to FPIC for what concerns the prevention, development, application and monitoring of measures aimed at preventing the spreading of Covid-19;
- at the same time, suspend all consultation and FPIC-seeking procedures in Indigenous territories as established, *inter alia*, in Resolution 1/2020 of the IACHR and in Indigenous customary protocols;
- consider the establishment of a fund for the recovery of Indigenous communities that have been affected by the pandemic and commit specific public funds to the re-establishment of Indigenous livelihoods and customary economic system at a level at least comparable to the pre-pandemic period.

⁴⁸³ Enforcing the right to communal land and natural resources is considered an adequate strategy to reduce structural poverty and ensure that Indigenous peoples have a dignified life while respecting their cultural distinctiveness. On the interconnectedness of ensuring a dignified life and the right to traditional land, see Alejandro Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards' (2017) 24, 3 *International Journal on Minority and Group Rights* 229, 253. In line with this argument and proposing how to tackle

the root causes of severe poverty among Indigenous peoples, see Sustainable Development Goals Knowledge Platform, Permanent Forum on Indigenous Issues (PFII), *Suggestions For The High Level Political Forum's Consideration To Ensure That Indigenous Peoples Are Not Left Behind In The 2030 Agenda* (2017).

⁴⁸⁴ United Nations OHCHR, Office of the High Commissioner of Human Rights, *Civic Space and COVID-19: Guidance* (4 May 2020) <<https://www.ohchr.org/Documents/Issues/CivicSpace/CivicSpaceandCovid.pdf>> accessed 23 December 2020.

Chapter 7: Right to Life/Health

7. Introduction

The WHO's 2005 International Health Regulations (IHRs) define health measures in Article 1.1. as 'procedures applied to prevent the spread of disease or contamination' although they should not imply necessarily 'law enforcement or security measures'.

The support of national competent authorities is explicitly mentioned in Article 4 since they are the main actors monitoring possible health risks affecting individuals. As one of the methods to make effective the right to health security, surveillance is defined as 'the systematic ongoing collection, collation and analysis of data for public health' with 'the timely dissemination of public health information for assessment and public health response as necessary'. Article 45(2) affirms that the Parties of the WHO may only reveal and process personal data relying on legal principles and procedures if the information corroborates the concept of international security agreed on by the IHR. Therefore, personal data should be disclosed under the principle of proportionality, that is to say, fairly, lawfully, adequate, relevant, and not excessively produced in relation to its purpose. It must be accurate, corrected when appropriate or erased when inaccurate as well as incomplete to be kept no longer than necessary.

The right to protection is also a legal requirement stated by the Charter of Fundamental Rights of the European Union (CFREU). That includes the access of individuals to preventive health care and the right to benefit from medical treatment in the union. Article 35 affirms that its application should coexist with the national laws and practices. Since the CFREU was conceived in a context when pandemics were an exclusive topic for epidemiologists, virologists, zoonotic researchers and other experts at public health safety, the meaning of protection was much more restricted to the safeguard of personal data, freedom of assembly and association, family and environment. Moreover, Article 53 avers that nothing in the Charter 'shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized [...] by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.

Taken together, the IHRs and the CFREU represent differing ends of the spectrum of international legal and regulatory structures

relating to the right to life and the right to health. The IHRs are geared toward a global scale and containing disease at a multiplicity of jurisdictions in order to balance recognized international law constructs of the right to health with the attendant concerns regarding privacy and individual rights that constitute fundamental elements of the right to life. As legal instruments, however, the IHRs lack the binding and justiciable qualities of other international human rights law treaties. Conversely, the CFREU, which is grounded in the legal principles of the European Community, reflects concerns regarding individual rights and protections, especially those for personal data such as that connected with health care services as a paramount element. And, as part of the European governance structure, the CFREU is binding and justiciable in various European forums as well as national legal mechanisms. In the context of the Covid-19 pandemic, understanding how these legal and regulatory mechanisms have worked in tandem and with concerns over environmental issues that, together, form fundamental elements of the rights to life and health in the international context is vital for gathering lessons and moving forward with planning for the next iteration of pandemic. With this in mind, Chapter 7 offers an in-depth case study on Sweden, a State which is part of the EU, an active international human rights advocate and an example of a State that responded in a different manner than most of the international community to the Covid-19 pandemic.

7.1. General Laws on Health Security Applied in Sweden

Sweden illustrates the paths one can follow when the Nordic region or other continents are under analysis with reference to Covid-19. As discussed below, the Communicable Disease Act, the Zoonosis Act and the Swedish Environmental Code are the main legal frameworks considered to be the principal laws used by the Swedes to face the pandemic outbreak. The Nordic governments have followed more or less the same paths to converge relatively, for instance, on public instructions and testing campaigns. This is why we selected the three Swedish legal texts aforementioned to indicate how they connect with the international agreements and regimes either to protect human rights or to prevent the spread of international threats through dangerous pathogens.

Furthermore, the Swedish legislation concerning disaster law puts emphasis on effective response and not preparedness being that assertion also valid to the Nordic region.

Due to the high number of cases and deaths in Sweden caused by Covid-19, the common inquiry is

if the Swedish authorities infringed any national and European laws concerning the notion of effective response. According to the Swedish laws and its harmonization in the European Union, Sweden has acted within the parameters of the law producing scientific evidence and proof on the dynamics of the pandemic in order to base its course of actions. Although Sweden is far behind in testing rates per 100,000, the number of tests increased by the Public Health Agency of Sweden (PHAS) since the beginning of the outbreak.

According to the Swedish Communicable Diseases Act, if there is a lack of information or scientific evidence, the law cannot enforce the regional and municipal authorities to take necessary measures against Covid-19 or any other infectious disease. The point is that the Swedish Communicable Diseases Act is much more effective about rapid responses to the outbreak of infectious diseases, including pandemics, than a legal framework based on preparedness.⁴⁸⁵

Chapter I, section 4, provides that 'Infection control measures shall be based on science and proven experience and may not be more far-reaching than is justifiable with regard to the danger to human health'. That may explain why the notion of disaster, risk or emergency concerning the Covid-19 outbreak for the Swedish authorities took a different path compared to other European countries not opting, for instance, for a lockdown. The same legal instrument says that the regions should follow the national guidelines and corroborate the implementation of actions or orientation decided by the PHAS.

Nevertheless, metropolitan areas have not been targeted with any special measure to avoid agglomeration in public means of transportation and in city services.

Another variable considered is the number of non-Swedish nationals and residents crossing the Swedish borders daily. A person that lives in Copenhagen and works in Malmö will not be easily tested in Sweden by the public services. The Swedish Communicable Diseases Act states only Swedish nationals and residents are entitled to receive treatments regarding infectious diseases free of charge. With reference to those nationals from the EU, they can only benefit from the healthcare system if they meet some legal requirements. In general, citizens from the EU must prove they have formally contributed to a health security system where they reside in order to

access the public health services in Sweden. However, there is not yet a consensus in the EU if the costs created by Covid-19 will be covered by a common fund in the organization. Additionally, every year millions of travelers depart from Swedish airports from the three biggest metropolitan areas, i.e., Göteborg, Malmö and Stockholm.

Regarding those diseases linked to animals as vectors, the legal formula is similar to the content of the Swedish Communicable Diseases Act. According to the *Zoonoslag* (Zoonoses Act), General Provisions, Section 1, knowledge and scientific evidence will be taken into consideration before any measure is implemented by the authorities.⁴⁸⁶ The Act says, "the law only applies to such zoonoses for which there is sufficient knowledge for effective control" and the production of samples for tests explicitly mentioned 'there are provisions on control and preventive measures in the Act on sampling of animals'. Given the example seen from Covid-19 throughout 2020, it is clear that knowledge and scientific evidence are not always promptly available. Rather, countries should adopt a precautionary approach when addressing zoonotic diseases, following the development of international environmental law.

The mechanism of information should be coordinated and produce effective communication as Section 3 affirms: 'The veterinarian must promptly notify the Swedish Board of Agriculture and the County Administrative Board. The County Administrative Board shall without delay notify the infection control physician'. The County Administrative Board has the responsibility to contact the National Veterinary Institute, the National Food Administration, the Public Health Agency of Sweden, the infection control physician, the municipal council in charge of environmental and health protection areas but also those veterinarians in the affected district in case any zoonosis is detected. The legal pattern of material evidence connects, consequently, the Swedish Communicable Diseases Act and the *Zoonoslag* to issues concerning the environment.

Although a relatively recent code regulating fauna, flora, waters, air, climate and a myriad of other topics, the Swedish Environmental Code shows how the Swedish legal system is framed by material and scientific evidence.⁴⁸⁷ Chapter 13 imposes compulsory investigation for genetically modified organisms, especially products placed in

⁴⁸⁵ Smittskyddslag (2004) 168 <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/smittskyddslag-2004168_sfs-2004-168> accessed 23 December 2020.

⁴⁸⁶ Zoonoslag (1999) 658 <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/zoonoslag-1999658_sfs-1999-658> accessed 23 December 2020.

⁴⁸⁷ The Swedish Environmental Code (2000) 61 <<https://www.government.se/legal-documents/2000/08/ds-200061/>> accessed 23 December 2020.

the market, if there is a potential risk of damage that should be assessed beforehand. Section 8 affirms that “[i]t shall constitute a proper basis for an acceptable assessment of the damage to health and the environment that the organisms are liable to cause.

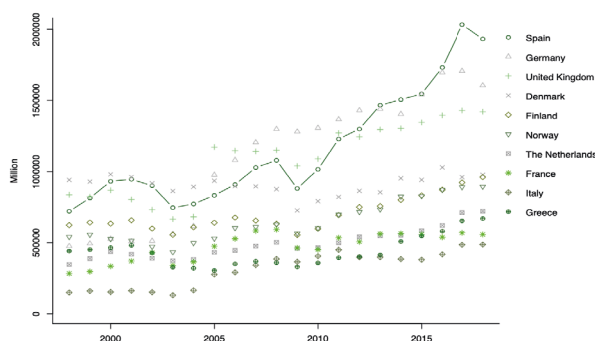
The investigation shall be made in accordance with scientific knowledge and proven experience.”

With respect to environmental and health impact assessments on chemical products and biotechnical organisms, Section 7 brings forward that the ‘Manufacturers and importers of chemical products or biotechnical organisms shall ensure that an appropriate investigation is carried out as a basis for assessment of the damage to human health or the environment that the product or organism is liable to cause. The investigation shall be carried out in accordance with scientific knowledge and proven experience’. The procedural law involved in possible litigation and the court composition are detailed in the Chapter 20, Section 4, predicting that ‘[a]n environmental court shall consist of a president, who shall be a legally qualified district court judge, an environmental adviser and two expert members. The court may also comprise an additional qualified judge and an additional environmental adviser’. Section 11 concerning the Superior Environmental Court and the Court of Appeal further states the judges must be legally qualified and have technical or scientific training and experience of environmental issues.

7.2. How Have the Nordic Authorities Promoted Health Security During the Covid-19 Outbreak?

The Swedish government, Parliament and national authorities, similarly to other Nordic countries, have acted within the limits of the law isolating groups of risk, incentivizing home-based work and creating a robust system of information advising the population of how individuals could avoid the spread of Covid-19 in urban areas, specifically Gothenburg, Malmö and Stockholm. With geographical points of intersection, especially Malmö, from where commuters head to Copenhagen daily to work, and Stockholm as an international urban region through Arlanda Airport, Sweden faced other complications to control the spread of the pandemic. Moreover, according to the official statistics published by the Swedish⁴⁸⁸ and Spanish authorities,⁴⁸⁹ the number

of flights between Sweden and Spain has increased significantly in the last few years (Fig. 1). The most affected European countries during the Covid-19 outbreak are also the ones in contact with the Nordic region based on the high number of travelers. This is why it is extremely important to take into consideration the urban dynamics and people’s dislocation to implement successful measures against potential pandemic threats in an international context.



The second lesson has to do with those municipalities more exposed to a pandemic. Göteborg, Malmö, Stockholm and Copenhagen have brutal statistics in terms of travelers and commuters crossing these urban areas. In that case, the mechanisms of surveillance, for example, tests, public information on social distance, the use of masks and sanitizers, are vital.

A third and final lesson is about the strengthening of primary health care attention alongside the creation of robust common funds with the purpose of financing the municipal system of surveillance.

According to the IHR, point 4 of the Annex I, letter “c”, makes clear the local communities have to ‘implement preliminary control measures immediately’. Therefore, the States are responsible to design models of governance from a bottom-up view forging a multi-layered strategy in which local, regional and national levels participate. A global health concept for human protection is conceived as an international regime under the umbrella of the IHR meaning countries shall pay attention to the weaknesses that may eventually put their populations at risk. The case of Sweden is a typical example of a territory exposed to millions of

⁴⁸⁸ ‘Luftfart’ Trafik Analys <<https://www.trafa.se/luftfart/>> accessed 3 December 2019.

⁴⁸⁹ Instituto Nacional de Estadística, *Estadística de Movimientos Turísticos de Frontera (FRONTUR), 2020* <https://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176996&menu=ultiDatos&id

p=1254735576863> accessed 30 September 2021. Read also on the number of visitors in Spain, even under the pandemic period, was around 17 million visitors. See Instituto Nacional de Estadística, *España Recibe un Millón de Turistas Internacionales en Octubre, un 86,6% menos que en el mismo mes de 2019* (News Release, 5 December 2020).

travelers crossing its borders with actions yet to be coordinated with countries such as Spain, Germany and UK where the effects of the Covid-19 were devastating to promote public health surveillance in international areas especially airports.

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