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SECTION II – LITIGATION

# 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.[2] Interestingly, in some jurisdictions, an *ex ante* judicial authorization procedure has been recently relaunched, thereby emphasizing

[1] We would like to thank the International Network of Judges and Scholars, acting within the Project the 'Covid-19 Litigation Project', started by the University of Trento in late 2020 to select and collect the case law upon which this contribution is built. Responsibilities are exclusively ours.

[2] T. Ginsburg, M. 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://ssrn.com/abstract=3608974 or http://dx.doi.org/10.2139/ssrn.3608974>accessed 3 August 2021.

the role of courts as guardians of fundamental rights in times of emergency.[3]

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 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.[4]

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.[5] 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.[6] In fact, the role of courts has remained

[3] 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.

[4] 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).

[5] 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).

[6] 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 precau-

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.[7]

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.[8] 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.[9] Even supranational institutions have played a more active role in this respect.[10] For example, the European Union

tionary 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 Health Care Services (2020) 47 Cal.App.5th 76, 728; State Defendants' Supp. Oppo., p. 14, 11. 10- 12.)

[7] 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).

[8] 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.

[9] 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.

[10] 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

has developed an unprecedented Health Union policy in the framework of art. 168 TFEU.[11] 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.[12]

By contrast, local courts often address pandemic-related litigation first, with a more limited chance for supreme courts to intervene[13] and with even more a limited role for supranational courts, at least so far.[14] 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.[15] 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.[16] 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

[11]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.

[12] 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.

[13] 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 refèré' 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 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).

[14] See, however, European Court of Human Rights, , Vavřička 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.

[15] 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

[16] 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.

or less stringent standards have been adopted in neighboring States,[17] 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.[18] In authoritarian regimes, courts have not always had the chance to exercise their role, being the judicial oversight extremely limited or null.[19]

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 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);

[17] 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.

[18] This is the case for Brazil, where the federal Government has remained quite reluctant to adopt restrictive measures despite the active role of courts.

[19] See Tom Ginsburg and Mila Versteeg, 'Binding The Unbound Executive: Checks And Balances In Times Of Pandemic' [2020] SSRN Electronic Journal.; Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, administrative decision making and judicial review. The courts' perspectives', forthcoming, EJRR.

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.[20] 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.[21]

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.[22] 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 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

[20] 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)).

[21] See, e.g., for Russia, Tuimazinsky Interdistrict Court of the Republic of Bashkortostan, Case UID 03RS0№-29, 5-448 / 2020, in which, however, the sanction was deemed proportionate and upheld.

[22] These are the six objectives envisaged by the Who, 'Covid-19 Strategic Preparedness And Response Plan' (WHO 2021) available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjWnMCol5XyAhXFC-wKHfgxCDAQFjAAegQIBRAD&url=https%3A%2F%2Fapps.who.int%2Firis%2Frest%2Fbitstreams%2F1335425%2Fretrieve&usg=AOVaw3o8x3dEIHCScVZcEwxv4d9 accessed 3 August 2021.

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,[23] 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.[24] Whereas in some contexts judicial review has been mainly aimed at substantive scrutiny focused on the balancing of rights and interests of involved parties,[25] 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.[26] 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.[27] In these situations, the former is a right-based approach, and the latter is a duty-based approach.[28]

*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 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

[23] 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).

[24] 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.

[25] Such as in most cases presented in this article and in the ones by C., Angiolini, G. Sabatino and S. Fassiaux, in this Issue. See, part. sub lett.*(e)* in this paragraph, paragraph 4 and corresponding footnotes.

[26] 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.

[27] 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).

[28] F. Cafaggi P. Iamiceli, The protection of fundamental rights, (n 19).

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.[29] New forms of judicial review have also been introduced or reshaped because of the pandemic emergency, especially related to urgent procedures.[30] 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.[31] However, in emergency procedures, available when the protection of fundamental rights is at stake, courts have been ready to intervene.[32] 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.

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[29] 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.

[30] See, for Spain, (n 3), and, for Italy, Italian Council of State, 13 May 2021, n. 350, (n 4). 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/Patroni+Griffi+-+Il+giudice+amministrativo+come+giudice+dell'emergenza.docx/cb4dde87-351c-8396-ce13-d31b48c2aa9e?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.

[31] 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.

[32] 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."

Firstly, the outcomes of litigation appear to be quite sensitive to the different phases of the pandemic.[33]

The reference to phases incorporates both the evolution of the pandemic and its scientific understanding.[34] 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.[35] 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.[36] As the knowledge about the pandemic's evolution increased, courts have been more stringent in assessing legislative and administrative discretion, calling for clearly grounded scientific evidence.[37]

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

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[33] Clearly, while the pandemic evolution has followed different paths depending on the dynamics of contagion and the institutional and sanitary responses the development of knowledge has been relatively uniform and shared.

[34] 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.

[35] 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."

[36] 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 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.

[37] This evolution has been observed by scholars across different timelines; for Belgium, P. 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, E. Albin, I. Bar-Siman-Tov, A. Gross, T. Hostovsky-Brandes, 'Israel: Legal Response to Covid-19', The Oxford Compendium of National Legal Responses to Covid-19, (2021) <https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e13> accessed 3 August 2021.

necessary ground, though not sufficient, for public decision-making.[38]

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 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.[39]

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.[40] 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.[41] 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

[38] 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.

[39] 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 N. Askitas, K. Tatsiramos, B. Verheyden, '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 Moein, S., Nickaeen, N., Roointan, A. et al. '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 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:> T 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.

[40] 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 T. Alamoa, D.G. Reinab, P. Millan Gata, V.M. Preciadod, G. Giordano, Data-Driven Methods for Present and Future Pandemics: Monitoring, Modelling and Managing?, available online at https://arxiv.org/pdf/2102.13130.pdf.

[41] 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.

different contexts and is worth examining further.[42]

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-based[43] and that the scientific basis should be incorporated into the decision-making process with full respect for transparency, procedural fairness, and logical consistency.[44] 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.[45] Though with significant variations linked with different legal traditions, they all confine judicial discretion, guiding courts' reasoning in their

[42] 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)

[43] 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/ADI6586vacinaobrigatoriedade.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 scientific evidence. For a wider discussion, see Sébastien Fassiaux, 'Comparative Survey. Vaccination', in this Issue.

[44] 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).

[45] 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.

complex task of balancing the interests at stake.[46]

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.[47] 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 restrictive measures even in a condition of uncertainty.[48]

National courts have primarily relied on the precautionary principle.[49] 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 Section[50].

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.[51] 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.

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[46] 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.

[47] *Criminal proceedings against Mathieu Blaise and Others* [2019] Judgment of the Court (Grand Chamber) of 1 October 2019, ECLI:EU:C:2019:800

[48] Ibid.

[49] 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.

[50] 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.

[51] WHO Covid-19 Strategic Preparedness and Response Plan, (n 12).

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.[52] 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.[53] 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.[54]

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.[55] What would not have been proportionate in ordinary

[52] European Court of Human Rights, judgement of 8 April 2021, Vavřička and Others v. the Czech Republic, cit. At national level, see, e.g., for Portugal 1896/10.3TXCBR-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.

[53] 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).

[54] 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 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.

[55] 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 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

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.

## 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.[56]

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,[57] Chinese litigation has mainly involved public authorities enforcing restrictive measures and sanctions against infringers.[58]

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.[59] Nevertheless, evenin this case, oversight has often focused on governments' ability to provide a sound scientific basis for their decisions.[60]

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.[61]

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 authorities[62] and keen on procedural oversight

relief outweighs the harm that will befall the Plaintiffs if the injunctive relief is not granted."

[56] See Tom Ginsburg and Mila Versteeg, 'Binding The Unbound Executive: Checks And Balances In Times Of Pandemic' [2020] SSRN Electronic Journal (n 2), 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.

[57] See, e.g., Supreme Court of India, 23 March 2021, NO. 476 OF 2020, Small Scale Industrial Manufactures 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.

[58] See fn 27 above.

[59] The Belgian caselaw is rather comparable to the Italian one in this regard. See P. Popelier et al., 'Health Crisis Measures and Standards for Fair Decision-Making: A Normative and Empirical-Based Account of the Interplay Between Science, Politics and Courts', EJRR, (2021) 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 deferential as to the application of proportionality and zoning.

[60] See fn 39-39 above.

[61] E. Albin, I. Bar-Siman-Tov, A. Gross, T. Hostovsky-Brandes, 'Israel: Legal Response to Covid-19', (n 37).

[62] 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

rather than substantive.[63] 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.[64] 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.[65] 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 proportionate, and vaccines are distributed equally and free of charge.[66]

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,[67]

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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.

[63] This is the view of T. Ginsburg – M. Versteeg, *The Bound Executive: Emergency Power during the Pandemic* (n 2), although examples exist of substantive oversight on restrictive measures based on balancing among the interests at stake.

[64] See fn 30 above.

[65] T. Ginsburg – M. Versteeg, The Bound Executive: Emergency Power during the Pandemic, (n 2).

[66] Brazil, Federal Supreme Court – Supremo Tribunal Federal, 17 December 2020, Direct Action of Unconstitutionality n. 6.586.

[67] 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".

South African courts have often been quite deferential to the government, both in the first and in more recent phases of the pandemic.[68] On the other hand, a more critical oversight has emerged in other countries, such as Kenya[69] or Malawi,[70] 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.[71]

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 measured aimed at protecting health with other rights and freedoms affected by the restrictions. In some cases, the judicial outcome is interestingly comparable.[72]

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[68] 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".

[69] 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 & another 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).

[70] 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.

[71] 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, Loielo v Giles, S ECI 2020 03608 (on curfew).

[72] 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 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

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.[73] 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 relief[74] to those aimed at suspension or annulment of administrative acts[75] through those aimed at establishing liabilities and addressing claims for damages or other types of compensation.[76]

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

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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>).

[73] 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 insolation measure based on the infection rates, the state of the intensive care units, the emergence of variants in the UK and South Africa.

[74] 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".

[75] 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.

[76] 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.

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 decisions[77].

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;[78]
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.[79] 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.[80] Effects may be radical, such as annulment, or more moderate, such as modifying the administrative measure.[81] 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.[82] 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.

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[77] This is the case for Belgium described above, fn 20.

[78] 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.

[79] 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."

[80] 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.

[81] See, for example, for France: Council of State, 30 December 2020, no. 448201; for Israel: Supreme Court of Israel, HCJ 6939/20 Idan Mercaz Dimona Ltd.v. Government of Israel, decision of 2 February 2021.

[82] 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).

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.[83] 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 according to general principles and specific rules regulating the pandemic.[84] 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.[85]

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.[86] 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

[83] 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

[84] 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.

[85] 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.

[86] G. Calabresi, 'The costs of accidents. A legal and economic analysis', (Yale University Press, 1970).

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.[87]

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.

## 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

[87] F. Cafaggi – P. Iamiceli, 'The protection of fundamental rights', (n 19).

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.[88] 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.[89] They have also contributed to taking equality into account when businesses have complained about stores' abilities to sell non-essential products.[90]

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, 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.[91] 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.[92] In contrast, the choice to be vaccinated has remained chiefly free, with some exceptions linked to health-related professions.[93]

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[88] 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.

[89] 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.

[90] 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.

[91] See H. Wenander, 'Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism' EJRR, 12 (2021), 127–142; T. Mattsson, A. Nordberg, M. Axmin, 'Sweden: Legal Response to Covid-19', in The Oxford Compendium of National Legal Responses to Covid-19, <https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e12?rskey=MCXz1K&result=17&prd=OCC19> accessed 10 August

[92] 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.

[93] 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 fn 7.

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.[94] 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.[95] 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 vaccination shows that voluntary choices associated with soft law instruments have been used. Soft law can effectively manage inter-dependent 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?[96] 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

[94] 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.").

[95] 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).

[96] 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 that a continuing categorical elimination of fingerprinting is not necessary.".

the closure of economic activities. Though relevant, the individual nature of the applicant may exclude the collective interests are 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.

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.[97] 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.[98]

## 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 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

[97] European Court of Human Rights, judgement of 8 April 2021, Vavřička 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").

[98] 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.

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

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SECTION II – LITIGATION

# COVID-19 and Government Response in Germany. Building Resilience by Comparison of Experience

## 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

[1] See more extensively E. Buoso and C. 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 9 August 2021.

[2] See <https://archiv.cdu.de/www.cdu.de/corona/mpk-beschluesse-3.3> accessed 9 August 2021.

[3] As shown on the homepage of the Robert Koch-Institut <www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Daten/Fallzalen_Kum_Tab.html> accessed 9 August 2021.

[4] Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (*Infektionsschutzgesetz – IfSG*), 1 January 2001 (BGBl. I, p. 1045), § 28b.

the shutdown at the national level until the end of June 2021.[5]

## 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]

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[5] For a more detailed analysis, see Section 5 of this chapter.

[6] N. Luhmann, 'Legitimation durch Verfahren' (Frankfurt am Main, 2001), 174, 203.

[7] M. Friehe, 'Freiheit in höchsten Nöten: Warum die Corona-Krise nicht zum Verfassungsnotstand stilisiert werden darf' (VerfBlog, 28 March 2020) <https://verfassungsblog.de/freiheit-in-hoechsten-noeten/> accessed 9 August 2021.

[8] German Basic Law *(Grundgesetz – GG)*, Art. 83.

[9] German Basic Law *(Grundgesetz – GG)*, Art. 65 (1).

[10] G. 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 (fantigrossi.it)> accessed 9.8.2021.

[11] S. Schönberger, 'Die Stunde der Politik' (VerfBlog, 29 March 2020) <https://verfassungsblog.de/die-stunde-der-politik/> accessed 9 August 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] M. Friehe, 'Freiheit in höchsten Nöten' (n 7).

## 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 "counterlimits" 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 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 op-

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[15] See H. Dreier, 'Rechtsstaat, Föderalismus und Demokratie in der Corona-Pandemie' (2021) Die Öffentliche Verwaltung, 229.

[16] A. B. Kaiser, 'Ausnahmeverfassungsrecht' (Tübingen, 2020) 207.

[17] V. Boehme-Neßler, 'Das Parlament in der Pandemie – Zum Demokratiegrundsatz am Beispiel von § 28a InfSchG' (2021) Die Öffentliche Verwaltung, 243.

[18] H. Maurer and C. 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] P. 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).

posed 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 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

[23] M. Sauga, 'Die schwarze Null ist gut für Deutschland' (Spiegelonline, 4 May 2018), <www.spiegel.de/spiegel/olaf-scholz-will-keine-neuen-schulden-machen-warum-das-gut-ist-a-1206284.html> accessed 9 August 2021.

[24] M. Greive and J. 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 9 August 2021.

[25] See <www.bundestag.de/dokumente/textarchiv/2020/kw13-de-corona-schuldenbremse-688956> accessed 9 August 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 fü Wirtschaft un Energie, Bundesministerium für der Finanzen, KFW) 6 April 2020 <https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/20200406-bundesregierung-beschliesst-weitergehenden-kfw-schnellkredit-fuer-den-mittelstand.html> accessed 9 August 2021. See also T. I. 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 9 August 2021.

[28] See below E. 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] C. Wolf and others, 'Die zivilrechtlichen Auswirkungen des COVID-19-Gesetzes' (2020) Juristische Arbeitsblätter, 401.

[31] See P. Häberle and H. J. Lutz, 'Infektionsschutzgesetz Kommentar' (München, 2020).

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 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

[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] M. Fuchs, 'Corona, 'Gesundheitsdiktatur' und 'Legiszid'' (2020) Die Öffentliche Verwaltung, 653; T. 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*.

[39] P. 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.

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 *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.

[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)

[46] See *Bayerisches Infektionsschutzgesetz* (*BayIfSG*) of 25 March 2020 (*GVBl*. 2020, p. 174).

[47] E. 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

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**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

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### 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,

[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-voruebergehende-krisenmassnahme/59444/> accessed 21 August 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 H. Bonin and others, BMAS Kurzexpertise. 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 (GMBl, Aug. 20, 2020) 484. Last amended on 7 May 2021 (GMBl, May 7, 2021) 622.

[51] Conference of Prime Ministers with the Chancellor, Decision 19 January 2021 <www.bundesregierung.de/breg-de/suche/bund-laender-beschluss-1841048>.

[52] Ministry for Labour and Social Affairs SARS-CoV-2-Arbeitsschutzverordnung (*Corona-ArbSchV*)

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 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 2013[59] 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

(2021) § 2, section 4 <*www.bundesanzeiger.de*> accessed 20 August 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 del Home-Office-Plätze verdoppelt* (IT.NRW, 9 December 2020) <www.it.nrw/itnrw-zahl-der-home-office-plaetze-verdoppelt-101915> accessed 20 August 2021. See also W. Görl, 'Wie eine Stadtverwaltung im Home-Office funktioniert' (2020) Süddeutsche Zeitung <www.sueddeutsche.de/muenchen/muenchen-stadtverwaltung-aemter-home-office-1.4861999> accessed 18 August 2021.

[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-digitalpakt-schule-6496.php> and of the Federal Government <www.bundesregierung.de/breg-de/themen/coronavirus/unterstuetzung-fuer-familien-1738334 >.

[56] L. Wößmann and others, 'Bildung erneut im Lockdown: Wie verbrachten Schulkinder die Schulschließungen Anfang 2021?' (2021) Ifo Schnelldienst 74, 36; D. Fickermann and others, 'Bibliographie zum Thema »Schule und Corona«' (2021) Die Deutsche Schule 17, 213–233.

[57] L. 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>.

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 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

[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) <www.bmwi.de/Redaktion/DE/Downloads/P-R/rundschreiben-anwendung-vergaberecht.html>accessed 18 August 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 20 August 2021. See J. Jürgens, 'Das Vergaberecht in der (Corona)Krise: Zwischen Beschleunigung und Protektionismus' (2020) Vergaberecht, 4/2020, 578-583.

[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/landesrechtliche-vorschriften/>. 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/>.

[64] See Baugesetzbuch § 246b; J. Hartl, 'Öffentlichkeitsbeteiligung unter Pandemie-Einschränkungen. PlanSiG - ein unglückliches Kürzel in unglücklichen Zeiten' (2020) Alternative Kommunalpolitik, 4/2020, 54-56; J. 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 W. Ernst, W. Zinkahn, W. Bielenberg, M.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 B. 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.

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 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-app[71] 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 countries[73] 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

[66] The register can be accessed on<www.intensivregister.de/#/index> accessed 20 August 2021.

[67] See 93rd Conference of Health Ministers Decision 6 November 2020 <www.gmkonline.de/Beschluesse.html> accessed 20 August 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/COVID-19/Impfstrategie_Covid19.html>accessed 18 August 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 20 August 2021.

[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 20 August 2021.

[71]See <www.bundesregierung.de/breg-de/themen/corona-warn-app>accessed 20 August 2021. On the legal issues raised by this app see T. 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] F. 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 21 August 2021.

[73] J. Kühling and R. Schidbach, 'Corona-Apps - Daten und Grundrechtsschutz in Krisenzeiten' (2020) NJW, 1545; J. Li and X. Guo, 'Global Deployment Mappings and Challenges of Contact-tracing Apps for COVID-19' (2020) SSRN; J. 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.

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-app[76] and about one million for the Luca-app[77]), 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 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

[74] The system is well explained on the website of the Ministry for Health <www.bundesgesundheitsministerium.de/coronavirus/faq-covid-19-impfung/faq-digitaler-impfnachweis.html >.

[75] T. 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_KennzahlenTab.html > accessed 20 August 2021.

[77] L. Rabe, 'Downloads der Luca-App über den Apple App Store in Deutschland bis Mai 202' (2021) statista.com.

[78] A. Dix, 'Mit Apps gegen Corona – Was bringen Luca und Corona-Warn-App?' (2021) ZD-Aktuell, 04441; J-P. Stroscher, and S. 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 20 August 2021.

[80] See the official statistic of the Federal Constitutional Court available at <www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/vorwort.html> accessed 21 August 2021.

[81] Federal Constitutional Tribunal (Bundesverfassungsgericht - BVerfG) 1 June 2021, 1 BvR 927/21 <www.bverfg.de/e/rk20210601_1bvr092721.html> accessed 21 August 2021; BVerfG 31 May 2021, 1 BvR 794/21 <www.bverfg.de/e/rk20210531_1bvr079421.html> accessed 21 August 2021.

[82] High Constitutional Court of Baden-Württemberg (VGH Baden-Württemberg), decision 5 February 2021 <http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=33772> accessed 21 August 2021.

[83] BVerfG, 15 April 2020, 1 BvR 828/20 <www.bverfg.de/e/rk20200415_1bvr082820.html> accessed 21 August 2021.

[84] BVerfG, 29 April 2020, 1 BvQ 44/20 <www.bverfg.de/e/qk20200429_1bvq004420.html> accessed 21 August 2021.

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, 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

[85] Constitutional Court of Saarland (VerfGH Saarland) 28 March 2020 - Lv 7/20 eA <https://verfassungsgerichtshof-saarland.de/frames/index.html> accessed 21 August 2021; Administrative Court Berlin (VG Berlin), 31 May 2021 – VG 3 L 180/21 <https://openjur.de/u/2341796.html > accessed 21 August 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 21 August 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-Neßler 'Das Parlament in der Pandemie' (2021) DÖV, 243.

[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 21 August 2021.

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.

[89] J. Heidtmann, 'Im Westen Sit-ins, im Osten Randale', (2020) Süddeutsche Zeitung <www.sueddeutsche.de/politik/demonstration-berlin-corona-massnahmen-hildmann-1.5014391> accessed 21 August 2021.