Uncertainty, administrative decision making and judicial review. The courts' perspectives[*]

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Abstract

The role of courts has been rather significant in the COVID-19 pandemic, weakening the theory that the judiciary is not equipped to manage emergencies and contribute to govern crisis management. Although the analysis shows that differences exist across countries, depending on institutional varieties and political contexts, the experience of COVID-19 has shown that, even in times of emergency, courts can adapt, and provide the necessary balance to the power shift towards the executives. Both action and inaction affecting fundamental rights have been scrutinised, with different intensity across countries, to ensure that governments took the necessary measures to contrast the pandemic, taking into account fundamental freedoms and the rule of law. Deference to political decision-making has varied across jurisdictions and along the multiple phases of the health crisis. Differences in the balancing have emerged compared to ordinary times. Uncertainty has played a major role, calling for new strategies in regulatory, administrative and judicial decision making, and new balances between precaution and evidence-based approaches. The role of scientific evidence in political and administrative decision-making has been at the core of judicial review aimed at ensuring transparency and procedural accountability. Proportionality and reasonableness with multiple conceptual variants, partly associated with the different national legal traditions, have been used to scrutinise the legality of restrictive governmental measures. Courts are likely to continue playing a significant but different role in the years to come, when liability issues and recovery measures will likely become the core of litigation.

Table of contents

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1. Health protective measures to contrast pandemic: a conceptual framework

Covid-19 is not the first global sanitary crisis. Other viruses are currently causing severe losses like tuberculosis, SARS, and HIV. However, the institutional implications of COVID 19 crisis have been more significant[4]. The crisis management of COVID 19 should not be seen as a single and unitary phenomenon. There have been various stages of the crisis dependent upon the evolution of scientific knowledge and governmental capabilities to operate in times of pandemic.

How does the current crisis differ from other health and sanitary current and past crises? What challenges does it pose and how are institutions responding? What is the role of courts in this crisis? More particularly, how do courts deal with uncertainty as a major determinant in both regulatory and administrative decision-making? This article offers some tentative answers from the perspectives of national courts exercising judicial review over governmental restrictive measures.

Within variations across legal traditions, protecting health is a constitutional duty of governments. Failure to protect health is a violation of a constitutional right. Governments have positive obligations to regulate and intervene to contrast the pandemic. Positive obligations include both reactive and preventive measures. Symmetrically to the duties there are rights to preventive measures, rights to access medical treatments, rights to access vaccination, rights to compensation for limitations determined by restrictive measures. Failure to act and inappropriate risk management by governments can both lead to health under-protection.

Prevention of the spread of pandemic often includes the possibility that other fundamental rights are limited or even temporarily suspended to protect health . The determinants of governmental measures and the different strategies adopted have been scrutinized by courts[5]. In this article we examine governmental action and inaction and, within action, the adoption of both restrictive and laxer measures. Although intergovernmental and supranational institutions, like the European Union, play a role in the fight against the pandemic and the crisis stemming from it, this article does not examine the possible impact of such institutions' actions (or inaction) upon fundamental rights[6].

How do governments decide to act or abstain from acting and how should they select the best and most effective measures to counter the pandemic? These decisions have to be made in conditions of uncertainty. Uncertainty concerns lack of knowledge about the evolution of COVID 19 and about its effects. Uncertainty creates fear, and fear produces distrust. Uncertainty has characterized both

[4] A. Alemanno, Taming COVID-19 by Regulation: An Opportunity for Self-Reflection, European Journal of Risk Regulation, 11 (2020), pp. 187–194.

[5] See Ferraresi et al., The 'Great Lockdown' and its determinants, Economic Letters, 2020, p. 109628, who identify the following factors "for the same level of the severity of the pandemic (as measured by the number of cases identified) countries characterised by (i) low political stability; (ii) low level of development; (iii) low level of digitalisation; (iv) high degree of decentralisation; (v) closed-economy and (vi) being away from electoral years, have adopted less stringent measures".
On the effectiveness of judicial review of governmental action, see, with special regard to the Czech context, Jan Petrov (2020) The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?, The Theory and Practice of Legislation, 8:1-2, 71-92, DOI: 10.1080/20508840.2020.1788232.

[6] Moving from the Commission Communication, Building a European Health Union,11 November 2020, COM(2020)724 final, the role of the European Union in the fight against the pandemic has been deeply examined in the Special Issue 4, Beyond COVID-19: Towards a European Health Union, EJRR, Volume 11, December 2020; see A. Alemanno, Towards a European Health Union: Time to Level Up, ibidem, p. 721 seq.; Id., The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?, EJRR, 2020, pp. 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, EJRR, 2020, pp. 297-306

administrative and judicial decision-making. The precautionary principle has usually informed decision making under uncertainty. Executives, that have to decide in conditions of uncertainty, take contingent based decisions that can be modified depending on the effects they produce or do not produce[7]. The role of courts is to ensure that emergency measures last as long they are necessary and effective[8]. This aspect not only implies that decisions are usually temporary and that a sequence of decisions with temporal limitations has to be scrutinised by courts. It also means that variables related to closures or openings of schools, firms, churches, may be conditional on the level of contagion spread and on the effects of the governmental measure[9]. The short time and contingent nature of administrative decisions require an innovative approach to judicial review. Judicial review has to be continuous, taking into account the evolution of administrative action and the interdependence of measures over time.

Governments are not the only actors involved in prevention and healthcare. Private, individual and collective, actors bear responsibility with legal implications as well. The precautionary principle applies to both governments and private actors.

1.1.(*ii*) The methodological framework

This article is based on a data set composed by 950 templates of judicial decisions collected in 47 countries across the six continents[10]. This dataset will be partly integrated into a database set up with WHO. The data set is not meant to be comprehensive but selective[11]. Of 950 judgments 575 have been selected for publication in the database. Within that sample, 104 have been examined in this article.

The dataset will continue to increase over time with the selection of judgments related to COVID 19 related governmental measures.

The objective of this analysis is to evaluate the roles played by courts in monitoring and reviewing governmental measures with special reference to fundamental rights in the context of scientific uncertainty. It is not a comprehensive comparative analysis of the COVID 19 judgments issued by courts across the globe.

The selection of the judgments examined in this article was made on the basis of diversity of legal orders and on the content of the decisions. Priority has been given to the judgments that quashed the

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[7] According to the OECD "Most administrations have introduced some form of shortened legislative procedures for putting in place the crisis responses. These have included utilising fast track or emergency legislation in which legislative measures can be rapidly implemented, which bypass the ordinary procedures for making regulations, in derogation of existing standards and rules, leaving significantly less time for scrutiny of the measures through RIA, stakeholder consultation and parliamentary scrutiny" (OECD, Regulatory quality and COVID-19: The use of regulatory management tools in a time of crisis, September 2020, available at www.oecd.org. Last visited

[8] See French Constitutional Council decision 2021/824, August 5, 2021, par.30 and 43.

[9] See, e.g., for Canada, Ontario Superior Court of Justice, 2020 ONSC 7665, 10 December 2020, Canadian Appliance Source LP v. Ontario (Attorney General), where the Court rejected a store's claim for reopening allowance based on a literal though functional interpretation of the statutory provisions aimed at allowing reopening depending on the public health status of a region. Indeed, as the Court observes, the Regulations had to address the public health crisis and the need for essential services.

[10] The database is designed within a project by the university of Trento supported and partly financed by WHO. It will be released in the Autumn 2021 and be accessible at the page: ….***

[11] The database is designed within a project by the university of Trento supported and partly financed by WHO. It will be released in the Autumn 2021 and be accessible at the page https://www.covid19litigation.org The database will present a selection of leading cases in the field of Covid-19-related litigation, mainly those adjudicated by Supreme Courts through a balancing of fundamental rights, also in the light of general principles, in different fields of interest (from education to healthcare, through immigration or commercial activities' regulation, to name a few).

governmental decisions because in violation of constitutionally protected rights. The aim of the selection of the judgments considered in the article was to show the significance of courts in assessing the measures and the alignment of misalignment with national governments. The metric of significance is both quantitative and qualitative. A low number of judgments is more revealing of lower relevance than of compliance with rule of law and fundamental rights. Qualitative significance is harder to measure but clearly judgments quashing or modifying the measures suggest an active monitoring role of the courts and greater significance.

The analysis suggests that the role of courts has been significant in some areas, especially in democratic regimes where independent courts can oversee governmental measures. Less significant in countries where the independence of courts is not fully protected from the interferences of political power. It also suggests that, where governmental responsiveness to the sanitary crisis has been particularly critical, courts have tried to steer administrative action through judicial review and, depending on applicable procedural rules, to mandate the adoption of specific actions and measures.

We have identified some themes that have been central in the judicial analysis. We have looked for the distinction between emergency and ordinary times and suggest, in the light of the case law, that emergency has modified, often implicitly, how principles have been applied by courts. However, we have not found a radical difference between countries that have declared emergency and states that have operated with ordinary instruments without a formal declaration of the state of emergency.

The themes selected encompass the balance between conflicting constitutionally protected rights, the scientific evidence based decisions of governments, the principle of proportionality. These are often interconnected and courts have linked the balance of rights and responsibilities with the principle of proportionality and, to a more limited extent, to that of solidarity and fairness.

2. Restrictive measures to contrast the pandemic: the principles

Prevention of contagion's spread entails several types of governmental and community actions. Governmental actions may prescribe restrictions and may provide incentives to adopt precautionary measures and conducts. They have to comply with rule of law principles[12].

Ex ante prevention occurs before the pandemic breaks out. *In itinere* prevention occurs when the pandemic is in place and contagion must be limited and circumscribed. Prevention of contagion depends on both individual and collective behaviour. Individual choices to comply or not comply bear consequences not only on those who make those choices but also on the community. Hence, the selection of protective measures has to factor the high level of interdependence of compliance and lack of compliance with the measures. If the rate of non-compliance is high or even significant, it may undermine the positive consequences stemming from compliance. The efforts of those who comply may become valueless if the rate of non-compliance is high.

Restrictive measures may have two objectives: protecting individual health and preventing contagion, resulting in protecting collective health and freedom. The prevention of contagion protects the collective interest to reduce the spread of pandemic. Public health protection can be the justification for limiting freedoms and fundamental rights

[12] See Council of Europe "A toolkit for member states – Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis".

The precautionary principle is one of the normative foundations of the Covid-19 protective measures[13]. It requires competent authorities to adopt measures even though science has not fully clarified the extent and nature of the underlying risks, whose possible impact on human health is however apparent. It does not suggest that restrictive measures should not be based on scientific evidence. Just on the contrary, it implies a comprehensive assessment of the risk to health based on the most reliable scientific available data and the most recent results of international research[14]. Yet, when the latter are inconclusive or insufficient and it proves to be 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 materialise, the precautionary principle may justify the adoption of restrictive measures[15].

When determining the duration, the scope, and the intensity of the measure, the precautionary principle is usually applied in combination with the principle of proportionality[16]. The precautionary principle has also been applied to evaluate governmental inaction[17].

The precautionary principle influences both governmental measures restricting individual and collective freedoms and vaccination but in different ways[18]. The features of the precautionary principle in times of pandemic differ from those in ordinary times, being different the type and level of uncertainty and the magnitude and pace of risks at stake. It refers to hypothetical risks whose probability and magnitude are *ex ante* unknown.

Both the content of positive obligations and the structure of balancing change in favour of health protection, and the limitation of other rights may be permitted to the extent necessary to promote collective health protection[19].

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[13] See in Belgium Council of State Schoenaerts, n. 248.162 20 august 2020, in Italy TAR Campania 4127/2021, Tar Calabria Catanzaro, Sez. I, 18 December 2020, n. 2075, Tar Piemonte, Sez. I, 3 December 2020, n. 580 Tar Lazio, Sez. III-*quater*, 4 January 2021, n. 35.

[14] CJEU, C 616/17, Blaise, 1 October 2019.

[15] CJEU, C 616/17, Blaise, 1 October 2019.

[16] On the relationship between precautionary principle and proportionality see Italian Council of State, Advice, sec. I, 850/2021 (see footnote below*). See in relation to the jurisprudence of CJEU joined Cases C-78/16 and C-79/16 Pesce and others [2016] ECLI:EU:C:2016:428, para 48 referring to, inter alia, judgment in Case C-101/12 Schaible [2013] ECLI:EU:C:2013:661, para 29 and the analysis of Klaus Meßerschmidt, COVID-19 legislation in the light of the precautionary principle , Theory and practice of legislation, 2020, p. 288 ff.

[17] On the precautionary principle related to COVID 19 in the EU see I. Goldner Lang, "Laws of Fear" in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19, European Journal of risk regulation, 2021, p. 00, ff.

[18] See, for example, out of the current pandemic context, Italian Constitutional Court in its decision 5/2018: "Faced with unsatisfactory vaccination coverage in the present and prone to criticality in the future, this Court believes that it is within the discretion - and the political responsibility - of the governing bodies to appreciate the urgency to intervene, in light of new data and epidemiological phenomena emerged in the meantime, even in the name of the precautionary principle that must govern an area which is so critical for public health as is that of prevention" (unofficial translation).

[19] 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.

The precautionary principle affects the balance between conflicting rights and the choice of the appropriate measure to reduce the risks and mitigate their consequences should they materialize[20]. It contributes to the definition of both risk assessment and risk management. The former concerns the 'if' of the governmental measure, the latter focuses on the 'how'. Uncertainty can refer to both, but the judicial scrutiny may vary when examining the 'if' question and the consequences of action and inaction.

It is important to underline that the precautionary principle is applied in a framework of scientific uncertainty and limited knowledge[21]. Both scientists involved in policy making and governments have taken measures in the context of uncertainty about both the characteristics of the viruses and the expected effectiveness of the protective measures. Governments have operated under a trial and error framework and, in some instances, have backed off from choices made earlier on[22]. Judicial review has applied the precautionary principle in light of the evolution of scientific knowledge.

A second important principle, influencing both the adoption and the characteristics of the protective measures, is solidarity. As a value linked with fairness, it has contributed to guide the global response to the pandemic, sometimes mirroring national or supranational constitutional traditions[23]. Solidarity is highly relevant when individual conducts are interdependent as it is the case in pandemics. Individual behaviour may affect others by spreading or reducing the risk of contagion[24]. In Covid 19

[20] See Italian Council of State, Advice, sec. I, 13 May 2021, n. 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 (Tar Catanzaro, Sec. I, December 18, 2020, no. 2075, Tar Piemonte, Sec. I, December 3, 2020, no. 580), 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).

[21] See Klaus Meßerschmidt**,** COVID-19 legislation in the light of the precautionary principle, Theory and practice of legislation, 2020, p. 282 ff. stating that the emphasis of modern legislation usually is on means-ends-rationality, the PP justifies measures to prevent damage in some cases even though the causal link cannot be clearly established on the basis of available scientific evidence. For a general analysis of the relationship between uncertainty and administrative decision making in the field of environmental law see Stewart, R.B. (2002), "Environmental regulatory decision making under uncertainty", Swanson, T. (Ed.) *An Introduction to the Law and Economics of Environmental Policy: Issues in Institutional Design* (*Research in Law and Economics, Vol. 20*), Emerald Group Publishing Limited, Bingley, pp. 71-126**.**

[22] For example in Germany the decision taken by the Chancellor Merkel to back off from a severe lock down during Easter 2021 following a disagreement with scientists about its effects.

[23] At international level, solidarity has been acknowledged as a key component of the global responsiveness to the pandemic (see WHO *Covid-19 Strategic Preparedness and Response Plan*, cit.). From a constitutional perspective, it is part of the EU infrastructure reflected in the Charter of Fundamental Rights of the EU (see chapter IV on Solidarity, including art. 35 on Healthcare); see also art. 3, Brazilian Constitution ("The fundamental objectives of the Federative Republic of Brazil are: I – to build a free, just and *solidary* society", emphasis added).

[24] See European Court of Human Rights, judgement of 8 April 2021, *Vavřička and Others v. the Czech Republic* [GC], no. 47621/13, ECLI:CE:ECHR:2021:0408JUD004762113 in relation to vaccination: "279. While childhood vaccination, being a fundamental aspect of contemporary public health policy, does not in itself raise sensitive moral or ethical issues, the Court accepts that making vaccination a matter of legal duty can be regarded as so doing, as attested by the examples of constitutional case law set out above (at paragraphs 95-127). It notes in this regard that the recent change of policy in Germany was preceded by an extensive societal and parliamentary debate on the issue. The Court considers, however, that this acknowledged sensitivity is not limited to the perspective of those disagreeing with the vaccination duty. As submitted by the respondent Government, it should also be seen as encompassing the value of social solidarity, the purpose of the duty being to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination (see in this respect Resolution 1845(2011) of the Parliamentary Assembly of the Council of Europe, set out at paragraph 143 above). "

cases the level of risks concerning the probability to become infected and the capacity to infect others may vary. This variation makes the impact of the restrictive measure more or less effective in relation to individuals but its overall effectiveness is measured by the number of people complying with the measure. Solidarity may require that those who bear lower risks have to contribute more compared to those who bear higher risks. Their cost-benefit ratio may be lower but the principle of solidarity imposes the compliance even when the benefits might not outweigh the costs.

Solidarity is a constitutional principle that confers rights and imposes duties both on institutions and on private parties[25]. In the case of institutions it is vertical solidarity, in the case of private parties it is horizontal solidarity. Horizontal solidarity may be induced in different ways, including nudging or mandatory precautions, as recently endorsed by the European Court of Human Right[26]. The scope of duties imposed by protective measures based on solidarity and the limitations of freedoms affect the population with different intensity. Even if the principle of solidarity is not explicitly recognized, courts have used equality and non-discrimination to evaluate the allocation of costs resulted from restrictive measures.

Duties and responsibilities related to restrictive measures have an impact on trust. Horizontal solidarity increases interpersonal trust whereas vertical solidarity increases institutional trust[27].

Hence, the government's obligation of adopting measures and the citizens' duty to comply with measures imposed by governments might be based on the principle of solidarity or that of fairness. Citizens' freedoms are limited in order to ensure protection of collective health and in particular of the vulnerable ones.

In the context of Covid 19, solidarity and fairness contribute to regulate distributional consequences concerning risks and costs of the pandemic and the restrictive measures to contrast the spread. When the sources of the risks of contagion are different from those who are likely to suffer the most if contagion spreads, the distribution of costs and benefits may impact on different social groups. In the case of Covid 19 solidarity may impose costs on the young generation to benefit the more senior people. But the distribution of costs also may concern different economic categories. Among entrepreneurs there are those who suffered and those who benefitted from the crisis. Among the former significant differences have emerged based on the choices made by national governments to bear the costs of the restrictive measures.

Hence, protecting collective health is based on the combination between the precautionary and the solidarity principles. They concern both the if and the how of restrictive measures. Failure to comply with preventive measures represents, at the same time, a violation of the precautionary principle and of the principle of solidarity. Governments' failure to adopt preventive measures may result in a violation of the precautionary and solidarity principles.

[25] See for example the Italian Constitutional Court 22 June 1990, n. 207, Id. 23 june1994, n. 258, Id. 18 April 1996, n. 118 and more recently Id. 5/2018.

[26] ECtHR, Vavřička and Others v. the Czech Republic, Appl no. 47621/13, 8 April 2021: "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" (emphasis added).

[27] See 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.

The governmental instruments' choice is informed by the proportionality principle in light of the principles of precaution and solidarity. Hard law is usually mandatory and binding. Soft law is usually voluntary. As we shall see, the voluntary nature of the choice by the addressees of the measure does not imply lack of consequences.

Governments have privileged hard rules to restrict freedoms and protect health. Mandatory hard rules combined with administrative and, to a limited extent, criminal sanctions have been subject to judicial scrutiny through the lenses of proportionality and (or) deterrence[28]. Notable exceptions concern countries that have chosen a soft law approach and deployed recommendations not backed by sanctions[29]. The role of courts has been lower in countries deploying soft law.

The choice between hard and soft instruments has been a political rather than legal but clearly legal principles have influenced the instrument and the type of sanctions to be used in case of violation.

The precautionary principle is compatible with the use of hard and soft law, and it has to be applied in conformity with the principle of proportionality[30].

2.1 Vaccination from soft and voluntary to hard and mandatory?

The alternative between mandatory and voluntary vaccination presents specific issues. Vaccination differs from the other protective measures because it is a medical treatment and impinges on self-determination. The freedom of people to choose vaccination is usually more protected given the degree of interference with individual choices than choices related to other measures concerning freedom to move, to meet, even freedom of expression. The right to self-determination is protected to a larger extent than for other restrictive measures. However, vaccination is aimed not only at preventing the virus for the individual but also at reducing contagion[31]. The balance between the right to self-determination and the protection of the collective interest against the spread of contagion has been challenged before national courts. For example, the Brazilian Federal Supreme Court (Supremo Tribunal Federal) recognised that indirect measures may be implemented to promote the vaccination (eg, restriction to the exercise of certain activities or to the frequency of certain places), to the extent that such measures are (i) based on scientific evidence and pertinent strategic analyses, (ii) accompanied by extensive information on the effectiveness, safety and contraindications of immunizers, (iii) respect human dignity and the fundamental rights of people; (iv) meet the criteria

[28] This type of caselaw is relative common in China (Wugang People's Court (Hunan Province), 18th September 2020, First Instance Decision (Administrative) no. 127; Yanbian Intermediate People's Court, Jilin, China [L.X. v. Police officer of Police Department in Wangqing, Yanbian, Jilin]2020, Sep.29,2020) and Russia (Tuimazinsky Interdistrict Court of the Republic of Bashkortostan, Case UID 03RS0№-29, 5-448 / 2020; Trans-Baikal Regional Court, Supreme Court of the Russian Federation, Case No. 7-12-168 / 2020; Supreme Court of the Karachay-Cherkess Republic, decision of 29th June 2020; Kemerovo Regional Court, decision of 29th June 2020; Supreme Court of the Republic of Mordovia, decision of 29th June 2020; Russia, Trans-Baikal Regional Court, decision of 29th June 2020). See, however, in other world regions for New Zealand, District Court at Auckland, New Zealand Police v H. Auckland, [2020] NZDC 17361, 27 August 2020, the Court gave the Defendant 14 days' imprisonment for infringements of pandemic-related restrictions, taking into account the Covid-19 situation. The Court considered the imprisonment appropriate in terms of deterrence and in terms of the overall circumstances.

[29] See for an overview COVID-19 and Soft Law: Is Soft Law Pandemic-Proof? Mariolina ELIANTONIO, Emilia KORKEA-AHO, and Steven VAUGHAN, European Journal of risk regulation 2021.

[30] On the relationship between solidarity and proportionality see below text and fn p00

[31] See WHO *Covid-19 Strategic Preparedness and Response Plan*, (WHO, January 2021) <https://apps.who.int/iris/handle/10665/340073, p. 10. Last accessed 12 August 2021.

of reasonableness and proportionality, and (v) the vaccines have to be distributed universally and free of charge[32].

The approach to vaccination against Covid-19 has been in the first period soft. Very rarely vaccination has been obligatory. In some cases, only for specific categories like physicians, nurses and other operators in the domain of health. More recently the space of mandatory vaccination has increased also for the development of variants[33].

Mandatory vaccination is applied for other diseases in order to avoid free riding behaviour[34]; in these cases, too, courts have been asked to assess governmental choices, normally acknowledging a certain margin of appreciation, as the arrangements adopted by the law, having regard to the state of scientific knowledge, are not manifestly inappropriate for the objective pursued[35]. Where vaccination is voluntary, high concern is linked with the impact of freedom of choice on the most vulnerable persons. In this regard, courts have been asked to authorize nursing homes to vaccinate elderly, who, lacking capacity, did not consent to vaccination, or whose legal representatives opposed to it[36]. In the light of the interest of vulnerable groups, the governmental choice to introduce mandatory vaccination may result from acknowledging the limits of an approach exclusively based on persuasion[37].

Often individual choices may have multiple effects. Individual vaccination is a measure that at the same time protects individuals and the community from the spread of contagion. But the effects might differ. The level of individual protection might be higher than the effect of contagion reduction. Likewise, the effects of restrictions may impact on certain groups (e.g. young people) more than on others. This is particularly relevant when restrictions distinguish between vaccinated and non-vaccinated, in fact shifting on the latter, through limited accessibility to certain activities, part of the social costs generated by self-determination. As already shown in some Israeli judgments, the role of courts will be pivotal in striking the balance between self-determination, public health, and personal and economic freedoms: a challenging exercise, especially when these freedoms impact on essential needs or fundamental rights[38]. That vaccines reduce contagion is clear. What remains unsettled is the

[32] Direct Action of Unconstitutionality n. 6.586 – Federal District, ADI 6.586/DF, Federal Supreme Court – Supremo Tribunal Federal, 17th December 2020.

[33] See for example the US measures related to federal employees: "Anyone who does not attest to being fully vaccinated will be required to wear a mask on the job no matter their geographic location, physically distance from all other employees and visitors, comply with a weekly or twice weekly screening testing requirement, and be subject to restrictions on official travel." (www.whitehouse.gov).

[34]ECtHR, Vavřička and Others v. the Czech Republic, cit.: " 214. If vaccination were merely voluntary, it was clear that some would seek to benefit from the effect of herd immunity without exposure to the residual risk associated with vaccination. If such behaviour were to become widespread, it would inevitably cause a decrease in vaccination coverage and ultimately the reappearance of pathologies that were thought to be in decline".

[35] See, e.g., with regard to vaccination against poliomyelitis and other diseases, French Constitutional Council, 20 March 2015, 2015/458; see also Italian Const. Court, 18 January 2018, no 5, cit.

[36] 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 of 15 January; Court of 1st Instance No. 6 of Santiago de Compostela, Resolutions 55/2021 of 19 January and 60/2021 of 20 January.

[37] So for the Italian Constitutional Court, no 5/2018, cit.: "the choice of the state legislature cannot be censured on the level of reasonableness for having unduly and disproportionately sacrificed the free individual self-determination in view of the protection of other constitutional goods involved (...). The legislature, in fact, intervening in a situation where *the instrument of persuasion appeared to be lacking in terms of effectiveness*, has made mandatory ten vaccinations" (unofficial translation, emphasis added).

[38] See, for Israel, Labor Court (DC TA) 42405-02-21 Avishay v. Cochav Yair-Zur Igal Local Council, Nevo Legal Database (Mar. 21, 2021) (Isr.), https://www-nevo-co-il.eu1.proxy.openathens.net/psika_html/avoda/A-21-02-42405-11.htm; Labor Court (DC TA) 50749-02-21 Chen v. Netanya, Nevo Legal Database (May 2, 2021) (Isr.), https://www-nevo-co-il.eu1.proxy.openathens.net/psika_html/avoda/A-21-02-50749-33.htm; Labor Court (DC Hi) 33232-03-21 Fikstein v, Shufersal, Nevo Legal Database (Mar. 26, 2021) (Isr.), https://www-nevo-co-

extent and duration of immunity. The control over immunity and the definition of a vaccination scheme that can ensure continuous immunity is of a paramount importance. The consequences of the choice to vaccinate can impact on the exercise of fundamental freedoms and the principle of individual responsibility connected to self-determination.

3. Balancing fundamental rights in times of crises

Balancing different and potentially conflicting rights reflects a European perspective. Different balancing techniques are used in non-European jurisdictions, equally aimed at the assessment of reasonableness, proportionality, equality underlying the exercise of public powers in relation with conflicting interests[39]. In some legal systems, like in China, balancing rights is not the methodology adopted. Duties of the population is the focus[40].

Hence, we have identified two different approaches: the right based approach used in Europe, North and South America and the duty-based approach deployed, for example, in China[41].

The restrictive measure can be legislative or administrative. Constitutional rules often require that, when constitutional rights are at stake, legislation is required but legal systems vary and allow administrative authorities to limit rights within the constitutional boundaries.

The content of the restrictive measure is the outcome of balancing different rights or duties. The constitutional nature of the rights, limited by the restrictive measure, bears consequences on the balancing techniques[42]. Within the balancing of constitutional rights differences between economic

il.eu1.proxy.openathens.net/psika_html/avoda/A-21-03-33232-33.htm, where the Court ruled in favour of the employer's power to limit workers' access to workplace in case of non-vaccinated persons not willing to undergo regular testing.

[39] As an example, the US caselaw in times of pandemic has largely relied on the *Jacobson v. Massachusetts* decision, which requires a regulation instituted during a public health crisis to substantially relate to preserving public health and not plainly or palpably invade rights secured by fundamental law. See, among several, U.S. District Court for the District of Connecticut, Amato v. Elicker, 460 F.Supp.3d 202 (D. Conn. 2020), May 19, 2020; U.S. Dist. Ct., N.D. NY, Bill & Ted's Riviera, Inc. & Partition Street Project, LLC v Cuomo, 494 F.Supp.3d 238 (2020), October 13, 2020; U.S. District Court for the Southern District of Florida, 7020 Entertainment, LLC v. Miami-Dade County, Civil Action No. 20-25138-Civ-Scola, 2021 WL 516282 (S.D. Fla. Feb. 11, 2021), February 11, 2021, where the court determined that it needed to conclude whether the contested measure (curfew) served a substantial government interest, namely, protecting public health, and was narrowly tailored, which the court found that it was given that "imagined alternatives would not fully serve [Defendant's] needs" and the curfew allowed for other forms of speech.

[40] See, for example, for China, 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).

[41] Interestingly, soft law has contributed to reinforce effectiveness of measures and therefore the 'duty dimension' of the Chinese fight against Covid-19, though raising some concerns in terms of legality and legitimacy. See X. CHENG, Soft Law in the Prevention and Control of the COVID-19 Pandemic in China: Between Legality Concerns and Limited Participatory Possibilities, European Journal of Risk Regulation, 12 (2021), pp. 7–25.

[42] See Germany Thuringian High Administrative Court, Order of 29 April 2020-3 EN 254/20: The rule of law is not only intended to ensure that government and administration are regulated and limited in the law and that the courts can carry out effective judicial control, but also to enable those concerned to adapt to possible incriminating measures. The legislator is obliged to lay down its regulations in the same way as is possible according to the nature of the life-related content to be arranged with regard to the purpose of the standard. The requirements for the determination of legal regulations also depend on the intensity of the interventions of fundamental rights arising from the regulation or on the basis of the regulation. It is sufficient if, by means of the interpretation of the relevant provision, it is possible to determine, by means of the accepted rules of interpretation, whether the actual conditions for the legal consequence set out in the law are met (BVerfG, decision of 7 March 2017-1 BvR 1314/12 – juris Rdn. 125 m. w. N.; Decision of the Senate of 23 March 2018-3 EO 640/17 – juris paragraph 28).

and non-economic fundamental rights are considered by the Courts. Balancing health and education or freedom of expression differs from balancing health and property or economic activity.

Does the pandemic affect the features of balancing of constitutionally protected rights?

Yes, it does. The level of precaution required by the state of emergency shifts the balance towards health protection: restrictions of rights and freedoms that would not be justified in ordinary times can be justified by the pandemic[43].

The pandemic has posed challenging questions related to balancing conflicting rights in times of emergency.

Protection of health concerns the prevention of the contagion and the management of the pandemic. How far can governments go in limiting or suspending other fundamental rights when adopting COVID 19 related measures?

A first relevant variable is whether the measure is adopted under a State of emergency law (France) or whether the balancing occurs within the framework of ordinary laws (such as in Indonesia). In the former case, state of emergency may be either based on constitutional norms (such as in Spain[44], Portugal[45], France[46], to name a few) or, lacking a constitutional regime, on ordinary legislation on civil protection (such as in Italy[47]). Depending on the legal basis of the state of emergency declaration or on the lack of such a declaration, a different judicial oversight is carried [48]. Even when they do

[43] See, for example, for Brazil, Supreme Federal Court, ADI 6363 MC-REF, 17 April 2020, where, based on the state of calamity and emergency, the Court justified the measures adopted by the Government and providing for cuts in hours and wages of employees out of ordinary rules requesting, for such changes, an agreement between employers and employees. Without any purpose of direct comparison (given the clear specificities in respect of both legal systems and issues involved), see also, out of the pandemic context, Italian Const. Court, decision n. 85/2013 in the field of measures against the environmental disaster caused by a large steel company, where the Court excludes that the right to health shall be given absolute priority over other rights, including those related with maintenance of employment levels: "the effective scope of the regulatory intervention carried out by decree law n. 207 of 2012, through the censored provision, in relation to the crisis of industrial plants of national strategic interest, is aimed at making environmental and health protection compatible with the maintenance of employment levels, also in the presence of judicial seizure of the plants. We cannot agree, with the assumption of the referring judge for preliminary investigations, according to which the adjective "fundamental", contained in art. 32 of the Constitution, would reveal the "pre-eminent character" of the right to health with respect to all human rights. (...) The Italian Constitution, like the other contemporary democratic and pluralist Constitutions, requires a continuous and reciprocal balance between fundamental principles and rights, without any claim to absoluteness for any of them."

[44] Art. 116 of the Spanish Constitution.

[45] Art. 19, Portuguese Constitution.

[46] In fact, although the French constitution grants the President the full power to address national emergency in cases of serious and immediate threat to the institutions of the Republic, the state of emergency has been created by Statute n° 2020-290 of 23 March 2020. See E. Chambas, T. Perroud, France: Legal Response to Covid-19, available at https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e9#law-occ19-e9-note-12.

[47] In Italy the state of emergency was firstly declared by Deliberation of the Council of Ministers (31 January 2020), based on art. 12, Civil Protection Code. See S. Civitarese Matteucci et al., Italy: Legal Response to Covid-19, The Oxford Compendium of National Legal Responses to Covid-19, available at https://oxcon.ouplaw.com/page/919.

[48] See, France, Council of State, decision no. 451085 of 14 April 2021. For Spain, Supreme Court (Administrative Section) Resolution 2478/2020 of 4th May, appeal No. 99/2020, where the Court dismissed the claim challenging Royal Decree 463/2020, of 14th March, which declared the state of alarm in Spain, considering that, since the Decree was equivalent to an Act passed by Parliament, it should be appealed before the Constitutional Court. For a substantive discussion of the role of state of emergency in relation to fundamental rights limitations see Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num. 719/2021 of 24 may JUR\2021\157658,and Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num 788/2021. "la restricción de derechos fundamentales en el marco de la lucha contra la pandemia del Covid-19 no exige siempre y necesariamente la cobertura del estado de alarma.". On the distinct relevance of constitutional legal basis, as distinct from ordinary legislation, see also South Africa, High Court of South Africa, Gauteng Division, 22939/2020, 6 July 2020, cited below, fn ….*

not have constitutional basis, State of emergency laws may enable different balancing of constitutional rights from that taking place according to ordinary laws[49]. The legal basis of restrictive measures has to be found in the state of emergency legislation, if approved[50].

Explicit state of emergency declaration may have two sets of consequences: an institutional and a substantive one.

From an institutional standpoint the declarations of State of emergency have empowered governments with rule-making power, shifting the constitutional balance between legislative and executive powers[51]. Often a similar centralizing effect has taken place in federal states where coordination among states, regions or provinces conferred additional power to the central government[52]. These shifts had a serious impact on the sources of law system and the separation of power.

Did the explicit declarations of the state of emergency by legislation have also an impact on the substance of constitutional rights? In particular, did they allow to strike a different balance from the one governments could have struck without an explicit declaration? The case law suggests that the adoption of restrictive measures and the limitation of constitutional rights to protect health is considered lawful when the governmental rule making power is grounded on the state of emergency[53].

When balancing is deployed, how is the structure of balancing defined and does it differ from the balancing techniques usually deployed in ordinary times?

Health protection in times of pandemic is generally given priority but the priority over economic interests is usually stronger than the priority over the protection of non-economic interests with constitutional relevance like education, freedom of movement and freedom expression. The latter may even gain further relevance if one observes that certain freedoms (eg, of movement) are instrumental to the enjoyment of other fundamental rights (such as to private and family life)[54].

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[49] For a comparison within the same State (Spain) between balancing under state of emergency and balancing under ordinary law see Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num 788/2021,

[50] See, e.g., for Colombia, Constitutional Court, C-155/20, May 28, 2020, in which the Court concluded that the Government had resorted to the exceptional powers assigned by the state of alarm (emergency) without exhausting the ordinary powers already provided by legislation, so infringing the rule of law and the principle of legal certainty.

[51] See, for example, for South Africa, High Court of South Africa, Gauteng Division, 22939/2020, 6 July 2020, Freedom Front Plus v President of the Republic of South Africa and Others, where the Court upheld the Government's decision to declare the national state of disaster within the Disaster Management Act as distinct from the state of emergency foreseen by the Constitution and rejected the claim based on constitutional norms calling for parliamentary oversight in case of emergency state. Indeed, unlike the state of emergency, the national state of disaster does not require a derogation from the Bill of Rights and, therefore, does not require special provisions for oversight by Parliament.
The shift of power to the executive in times of pandemic is widely discussed (see The Oxford Compendium of National Legal Responses to Covid-19, available at https://oxcon.ouplaw.com/page/919; Ginsburg, Tom and Versteeg, Mila, *The Bound Executive: Emergency Powers During the Pandemic* (July 26, 2020). Virginia Public Law and Legal Theory Research Paper No. 2020-52, U of Chicago, Public Law Working Paper No. 747, Available at SSRN: https://ssrn.com/abstract=3608974 or http://dx.doi.org/10.2139/ssrn.3608974).

[52] The case of Germany is rather peculiar in this regard, since a Federal Law on the 'Emergency Brake' has been approved only in April 2021, whereas until then the 16 Lander were able to adopt local measures without too stringent restrictions at Federal level. On the need for coordination within the different policies adopted in the United Kingdom, see Jess Sargeant, Institute for Government, Co-ordination and divergence. Devolution and Coronavirus, October 2020, available at https://www.instituteforgovernment.org.uk/sites/default/files/publications/coordination-divergence-devolution-coronavirus.pdf

[53] See. e.g., for the USA, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020), Supreme Court of Pennsylvania, April 13, 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.

[54] See, for Israel, HCJ 1107/21 Oren Shemesh v. Prime Minister (March 17, 2021).

Closure of shops and restaurants is dealt with differently from closure to churches and schools. Certainly, the same protection for business must be granted to schools and churches[55]. As we shall see, an important dimension is related to indemnification[56]. When the limitation of the economic interest can be compensated via governmental indemnification, the balancing between health protection and economic activities might take such indemnification into account and prioritize rights that may not be indemnified over rights whose limitations may be indemnified[57].

A special case is the protection of job and labor regulation in relation to health protection.

The restrictive measure is usually complemented by exceptions that protect individual or collective rights. The exceptions identify those right-holders who are not bound by the restrictions (exemptions). For example, health reasons like the necessity to undertake therapies are exceptions to the restriction of movement introduced by restrictive measures. The necessity to help relatives with disability may also be a ground for exception to freedom of movement. Disability has been considered a ground for keeping schools open, given the difficulties for parents of disabled children to provide the education at home[58]. Restrictions have been challenged on equality and non-discrimination grounds before courts.

Balancing may encompass general limitations with derogations and exclusions for categories of individuals or activities whose fundamental rights cannot be limited.

A second distinction concerns not the if but the content (how) of governmental measures. Once scientific evidence exists to justify the adoption of a precautionary measure restricting fundamental rights in order to protect health, how should the balancing between rights be struck? In other words, what is the relationship between the level of scientific knowledge and the balancing of fundamental rights?

It is useful to distinguish between substantive and procedural balancing. Whether rights are or should be balanced differently depending on the level of scientific knowledge and the degree of uncertainty is a difficult question. In theory the answer is that the level of scientific knowledge should not affect balancing and uncertainty should impact on the balanced rights. That in practice is not the case. If the effect of a restrictive measure is not ex ante certain but it imposes certain costs on part of the population, for instance on economic activities, should that measure be taken? Governments have taken restrictive measures whose outcomes in terms of contagion's reduction were uncertain and courts have upheld them making reference to the precautionary principle. Courts have been more demanding and less willing to uphold measures when more scientific knowledge has become available. They did not evaluate the merits but decided to quash or not to quash the measures on the basis of insufficient scientific grounds[59]. Hence courts have asked for more accurate scientific basis

[55] See U.S. Supreme Court SOUTH BAY UNITED PENTECOSTAL CHURCH, et al., v.Gavin NEWSOM, Governor of California, et al. Supreme Ct. Feb.5.2021, 2021 WL 406258

[56] See, e.g., for South Africa, High Court of South Africa (Gauteng Division Pretoria), June 19, 2020, 21424/2020, Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening) [2020] ZAGPPHC 237; [2020] 3 All SA 747 (GP) on the application of the non-discrimination principle to the allocation of funds for businesses suffering from the pandemic-related restrictive measures.

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

[58] But also medical problems have justified exemptions of the obligation to attend school in person. See Canada, Karounis c. Procureur général du Québec, Cour Supérieure du Québec, 2020 QCCS 2817, 8 September 2020.

[59] See Italy Council of State decree 1031/2021 that decided not to quash the restrictive measure concerning school closures for lack of scientific evidence that leaving the schools open would not have had the negative results that the regional government claimed and put as the basis of the restrictive measure.

of governmental restrictive measures as scientific knowledge related to the impact of those measures became available. Then, the degree of scientific knowledge has affected how balancing was structured and the decisions taken by the executives.

4. Evidence based measures and claims in a world of uncertainty

Governmental measures limiting fundamental rights must be grounded on solid scientific evidence. This is true both for restrictive and for laxer measures. Scientific knowledge develops incrementally [60]. Hence the quality of evidence varies over time. In the case of COVID 19 the development of medical knowledge has been more rapid than for similar pandemics and characterized by an unprecedented degree of sharing and coordination between national actors at the global level, as also acknowledged by courts[61].

Evidence as ground of governmental measures concerns not only the scientific knowledge about the pandemic but also its consequences for society and the economy.

Courts have required action or inaction to be evidence based [62]. Usually while risk assessment is carried out by scientific committees, risk management is carried out by governmental bodies. Differences might arise between scientists and policy makers. The final responsibility rests on the political body but divergent routes must be explained. The need for scientific ground does not necessarily impose a strict scrutiny, where reasonably sound evidence exists[63].

A measure is usually judicially scrutinized in relation to both its actual and potential, future effectiveness. The combination of past and future effects of governmental measures differs. The concrete effects might occur after the measure has expired, e.g. the rate of contagion may decrease

See also, for Austria, Verfassungsgerichtshof Österreich, V 436/2020-15, 10.12.2020, Covid-Massnahmen in Schulen, (Covid-measures in schools), upholding the measure on school opening and mask wearing, observing that there was no official data on infection rates in school districts and no scientific evidence for negative health consequences of wearing masks in children, but only evidences on how effective masks are in mitigating the spread of covid-19.

[60] See WHO, COVID-19 Research and Innovation Achievements, 13 May 2021, available at https://www.who.int/publications/m/item/covid-19-research-and-innovation-achievements, 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.

[61] See Italian Council of State, Advice, sec. I, 850/2021: "It is also well known that the pandemic has led to a strong cooperation between States and international organizations, with a wide sharing of scientific and epidemiological data both at the European Union level and at the international level, with interventions and indications of supranational source under the World Health Organization. It is also well known that measures similar (if not identical) to those introduced in Italy and challenged here have been adopted in almost all countries, not only European, affected by the same pandemic" (unofficial translation)

[62] See, e.g., for Italy, Cons. St., sez. III, dec., 1 April 2021, n. 1776; for Slovenia, Const. Court of Slovenia, decision No. U-I-83/20, 27th August 2020, concerning the lawfulness of a Decree on the Temporary Prohibition of Movement outside Municipalities in Slovene Republic, assessed on the basis of the level of scientific knowledge at the time of its enactment. See, also, well before the current pandemic, the decision of the Hungarian Constitutional Court of 20 June 2007, no. 39/2007, where the Court stated that the provision of mandatory vaccination for children did not violate the Constitution, if the legislator demonstrated, relying on scientific knowledge, that benefits of vaccination for both the individual and society outweighed any possible harm due to side-effects.

[63] See, e.g., for South Africa, 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), where the Court pointed out that "in assessing the rationality of the regulations, a court is not required to determine whether the evidence put up by the state is so cogent and conclusive as to establish a substantive or direct link with a higher COVID-19 disease progression in smokers, when compared with non-smokers"; a sufficiently rational basis for the restrictive measure would be a valid ground.

two or three weeks after the restrictive measure has been adopted[64]. The evaluation is made at the time of the judgment and might also include the impact of the measure. The judgment issued after the expiry may factor not only the prospective but also the retrospective effects to evaluate the proportionality of the challenged measure[65]. The short duration of the measure enables courts to engage into hindsight evaluation and scrutinize the effects of the measure ex post, after it has expired[66]. The hindsight perspective might be particularly relevant to decide compensatory claims rather than injunctive relief where foresight plays a more important role[67].

Evidence of the risk to health plays a role for making the claim justiciable. Two alternatives can illustrate the content of the burden of proof: under one test a risk exists if it can be proven; under the alternative test a risk exists if it cannot be excluded. Usually the first is deployed; only claims based on actual infringements and certain harms may be brought. Potential and uncertain harm cannot be the basis for valid claims. However, in a world of scientific uncertainty, like the Covid 19, even claims based on potential harms may be considered, especially if the harm, once it materializes, is irreparable.

The allocation of the burden of proof is usually on the claimant but uncertainty may shift the burden. The burden of proof to provide the evidence of scientific foundations in Covid 19 cases is upon the administration[68]. The claimant has to prove the existence of a fundamental rights' violation and the inadequacy or insufficiency of scientific evidence; the administration has to prove that the adopted measure was based on adequate and sufficient scientific evidence and that no violation of fundamental rights occurred[69]. There has been a path of the case law related to the development of scientific knowledge. Initially mere reference to scientific advice was sufficient to ground the legitimacy of the restrictive measure[70]. Subsequently many courts have broadened the burden and required proof of more solid evidence[71]. Hence, the evolution scientific uncertainty has determined the re-allocation of the burden of proof and of its content.

[64] The expiration of the measure has not precluded the admissibility of the complaint although a difference has been made between summary judgment and decision on the merits. See for example in Italy, the Council of State, Advice 850/2021, par. 3.2.

[65] See below text and fn p. 00

[66] See, e.g., HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT), December 11, 2020, 6118/2020, British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others [2020] ZAWCHC 180, where the Court deemed unconstitutional a ban against tobacco sales despite it had been revoked before the proceedings as a way to prevent the same measure to be adopted in the future.

[67] See in Italy TAR Lazio 9343/2021.

[68] See Cons. St., sez. III, dec., 1 April 2021, n. 1776.

[69] See, e.g., Italian Council of State, decree 1006/2021, concluding that "the unjustified imposition of a device such as PPE on very young school-children implies the onus on the issuing authority to scientifically prove that its use has no harmful impact on the psycho-physical health of the recipients, except - once the Judge has ordered such a new assessment, with the ruling of the T.A.R. and today's decree - the occurrence of liability for delay, omission or otherwise harmful consequences produced in the event, which is strongly averted, a persistent lack of scientific investigation, which, however, the judge cannot replace in any case" (unofficial translation).
This element is also linked to the lack of motivation of administrative decision-making. See, e.g., for Austria, Constitutional Court V411/2020, V395/2020 et.al., V 396/2020 et.al. 14 July 2020, where the Court held that the government had failed to specify, with regard to the possible developments of Covid-19, the circumstances due to justify the different conditions for entering trading establishments.

[70] See, for Canada, Superior Court of Quebec, Entrepreneurs en action du Québec vs. Procureur général du Québec, 19 March 2021.

[71] See again for Canada, Superior Court of Quebec, Entrepreneurs en action du Québec vs. Procureur général du Québec, 19 March 2021.

The extent and intensity of the scope of judicial review reflects the evolution of scientific knowledge and the degree of uncertainty in decision making[72]. Whether the state of scientific knowledge is limited or more consolidated, whether it is homogeneous or conflicting, it affects the grounds for governmental measures and, consequently, the scope of judicial review[73].

The issue of scientific evidence is not limited to the relationship between scientific expertise and governments but it also extends to the relationship between regulators and doctors. Whether physicians are allowed to prescribe drugs on an experimental basis and what kind of liability they may incur is an open issue. Litigation has occurred over the decisions made by drug regulators in relation to the therapy[74]. In this domain, litigation is likely to occur also in relation to vaccines and their effects.

5.. Scientific evidence, balancing rights and governmental (in)action

A distinction related to the role of scientific evidence should be made between governmental action and inaction. What kind of scientific evidence must exist to oblige the adoption of a restrictive measure by governments? Does uncertainty justify governmental inaction more than action? Is the level of scientific knowledge that motivates governmental action higher than that which justifies inaction? In theory no[75]. There should be no difference between the level of scientific knowledge and the alternative action/inaction. In practice, courts have rarely reviewed inaction on the basis of scientific uncertainty, probably moved by the inertia bias driven by scientific uncertainty[76]. From another perspective, it is however worth mentioning that in several cases courts have refrained from a strict evidence-based scrutiny on the full effectiveness of adopted measures when annulment or

[72] See, for example, for Switzerland: Bundesgericht - Tribunal fédéral -Tribunale federale -Tribunal Fédéral, 1C_169/2020, 22.12.2020, Cancellation and postponement of municipal elections for the period 2020-2024. Appeal under public law against the executive decree issued on the 18th of March 2020 by the State Council of the Canton of Ticino, where the Court held that the assessment of the proportionality and necessity of a measure generally requires objective expert knowledge; however, according to the Court, the assessment of proportionality at an early stage, when it is strictly necessary to slow down the spread of the infection, may differ from the assessment made at a later stage.
For China, Tianjin Intermediate People's Court, Final Decision n. 166, 12th 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.

[73] See, e.g., French Council of State, decision no. 449081 of 5 February 2021, not considering it compulsory to vaccinate all prisoners as a priority, as the risk of developing a serious form of Covid-19 did not appear to be higher for prisoners than for the average population. More particularly, the Court considered also that, while the applicant invoked the particular risks of the virus spreading in prisons in view of the conditions of detention, there is no certainty, in the current state of scientific knowledge, as to the possible effectiveness of the vaccine against Covid-19 in reducing the risks of transmission of the disease. Of course, such current state of scientific knowledge may evolve over time, as specifically occurs with regard to the correlation between vaccination and risk of transmission.
On these aspects, see also Jan Petrov (2020) The COVID-19 emergency in the age of executive aggrandizement, cit., 81 f.: "In the initial phase of the pandemic, when the stakes are high, the information lacking and fast actions required, excessive judicial or legislative oversight could damage the effectiveness of emergency measures. Courts and legislators should thus focus on critical flaws that would significantly impair the legitimacy or feasibility of the emergency measures (...). As the crisis unfolds and the executive has more information and resources available, more intensive review may be justifiable".

[74] See Italian Council of State sez. III, 7097/2020 on the use of hydrossichlorochine.

[75] See Jonathan B. Wiener, Precaution, The Oxford Handbook of International Environmental Law (*edited by Daniel Bodansky, Jutta Brunnée, and Ellen Hey) , Oxford 2008,* Wiener, Rogers, Hammits, and Sands The Reality of Precaution, Comparing Risk Regulation in the United States and Europe, Routledge, 2011.

[76] This is not to say that when inaction was challenged courts have not required governments to show scientific evidence that no action was the most effective and proportionate course of action. On the status quo bias see Samuelson and Zeckhauser, Status Quo Bias in Decision Making, Journal of risk and uncertainty, 1988, pp. 7-59.

suspension were sought[77]. Though not expressly recalled, the principle of precaution might play a role in this latter regard.

A potential rough measure of the distinction between action and inaction is the ratio between the number of cases brought against governmental action and those against governmental inaction. The number of cases related to governmental measures (action) is much higher than that for failure to adopt them (inaction) [78]. Legal hurdles concerning the enforceability of a right to enact a governmental measure versus the right to quash an existing one can obviously affect the relationship between the level of scientific knowledge and the action/inaction alternative[79]. Whereas in some jurisdictions the possibility to seek administrative action through judicial injunction is either non-existing or limited to well defined areas of law, other jurisdictions allow these claims and permit the judge to order the administration to act[80]. Therein courts have played an important role, especially where governments have been more reluctant to take action, like in South America[81], India[82] and some African countries[83]. Similar patterns may be observed in other world regions, such as Oceania

[77] See, e.g., for Kenya, High Court of Kenya, Nairobi, PETITION NO. 120 OF 2020 (COVID 025), April 16, 2020, Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties) [2020] eKLR, where the Court confirmed the curfew despite the lack of evidence on its effects. For Italy: Council of State decree 1031/2021, cit., that decided not to quash the restrictive measure concerning school closures for lack of scientific evidence that leaving the schools open would not have had the negative results that the regional government claimed and put as the basis of the restrictive measure. See also, for Austria, Verfassungsgerichtshof Österreich, V 436/2020-15, 10.12.2020, Covid-Massnahmen in Schulen, (Covid-measures in schools), upholding the measure on school opening and mask wearing, observing that there was no official data on infection rates in school districts and no scientific evidence for negative health consequences of wearing masks in children, but only evidences on how effective masks are in mitigating the spread of covid-19."

[78] See WHO database, forthcoming.

[79] See WHO database, forthcoming.

[80] On these aspects see also T. Ginsburg – M. Versteeg, The Bound Executive: Emergency Power during the Pandemic, cit. See, for an example of inaction reviewed by courts in 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 the Court ordered the government to take action to ensure students' transportation from home to school and back. For an example of review of governmental action see e.g., Kataas-taasang Hukuman ng Pilipinas Supreme Court of the Philippines, September 1, 2020, where the Court rejects the claim since "Mandamus is an appropriate remedy only where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. The job of the Court is to say what the law is, not dictate how another branch of government should do its job.".

[81] See., e.g., Brazil, Federal Supreme Court – Supremo Tribunal Federal, 17th December 2020, Direct Action of Unconstitutionality n. 6.586; for Argentina, Suprema Corte de Justicia de la Nación, Lee Carlos y otro c/Provincia de Formosa s/Amparo Colectivo, 19 November 2020, in which the Argentinian Supreme Court orders the Province of Formosa to grant access to its territory to all applicants within a maximum period of fifteen working days from the date of the judgment.

[82] See, e.g., Abhijeet Kumar Pandey vs Union of India and Ors – W.P. (C) 5101/2021, CM APPL. 15624/2021 – Order dated 03.05.2021, in which the Delhi High Court directs the Chief Secretary, Government of NCT of Delhi to frame a scheme to register all migrant workers of Delhi under Section 10 of The Unorganised Workers' Social Security Act, 2008 and to provide free medicines and medical facilities to the migrant workers.

[83] See., e.g., High Court of South Africa (Gauteng Division, Pretoria), July 17, 2020, 22588/2020, Equal Education and Others v Minister of Basic Education and Others (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP), where the Court deemed unconstitutional the suspension of the nutrition programme by schools, that had to resume the programme and report about the programme's implementation; 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 Court applies art. 23, Const., on the right to an appropriate remedy as means for identifying measures that would not otherwise be available under existing law. 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

and Europe[84]. In some cases, the level of (dis)trust towards government has discouraged courts from ordering measures whose enactment could raise high risk of abuse or corruption[85]. Even more critical have been claims aimed at ordering governments to take a different action from that adopted[86].

Conclusively, taking a restrictive measure with a high level of uncertainty may be scrutinised differently from not taking action with the same level of uncertainty. As a result, high levels of scientific uncertainty may more likely lead to governmental inaction than to action.

6. The principle of proportionality in conditions of uncertainty

The balancing between rights is often carried on the basis of the principle of proportionality or some functional equivalents[87]. Both the principle of precaution and that of solidarity have to be applied in light of proportionality[88]. The principle of proportionality has been a cornerstone of judicial review across legal systems embedded in very different legal traditions[89].

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). In other cases, Kenyan courts have been less prone to ensure the adoption of safety protection measures in favour of vulnerable groups such as workers operating in the private security services (see The Employment & Labour Relations Court of Kenya, Petition 122 of 2020, 17 March 2021, Kenya National Private Security Workers Union &44 Others v. The Cabinet Secretary Ministry of Health & & Others).

[84]See, for example, Federal Court of Australia, BNL20 v Minister for Home Affairs [2020] FCA 1180, VID 239 2020 August 10, 2020, in which the Federal Court ordered the Minister for Home Affairs to urgently remove an elderly Pakistani man with multiple health conditions from a Melbourne immigration detention center to guard against the serious risk of COVID-19 infection, at the same time observing that it was beyond the Court's power to compel his release from detention altogether; and, in Europe: French Council of State, order n. 439693 of March 28, 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).

[85] See, for Kenya, The Employment & Labour Relations Court of Kenya, Petition 122 of 2020, 17 March 2021, Kenya National Private Security Workers Union &44 Others v. The Cabinet Secretary Ministry of Health & & Others, where the Court so justified the dismissal of a claim seeking an injunction for individual protection equipment for workers of the private security sector.

[86] These claims have been successful in some contexts (e.g., 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), but not in others. See, e.g., Kataas-taasang Hukuman ng Pilipinas Supreme Court of the Philippines, September 1, 2020, where the Court rejects the claim since "Mandamus is an appropriate remedy only where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. The job of the Court is to say what the law is, not dictate how another branch of government should do its job.".

[87] See, eg, THE SUPREME COURT OF VICTORIA AT MELBOURNE, Australia - Loielo v Giles [2020] VSC 722, where the Court referred to both proportionality and reasonableness, concluding that the Curfew Direction was reasonably necessary to protect public health and there were no less restrictive means available to reduce infection rates, as well as proportionate to the circumstances

[88] On the relationship between the precautionary principle and proportionality see Italian Council of State, Advice, sec. I, 850/2021.

[89] See, for Colombia: Colombia - Constitutional Court, 25 June 2020, n. 201, in which the Court observed 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;

Proportionality concerns the choice between action and inaction and once the choice is made it refers to the measure. Proportionality permits evaluating the restrictive measure on the basis of its necessity, adequacy, suitability for the purpose[90]. Although a more specific comparative legal analysis would be necessary to highlight the different approaches taken by courts throughout different legal families, comparable criteria are applied by courts when the principle of proportionality is not mentioned[91].

The test of proportionality usually requires three steps: the necessity, the adequacy and the strict proportionality of the restrictive measure. These three dimensions have been adapted to the specificity of the pandemic and to the uncertainty characterizing decision making.

Necessity is usually featured as the lack of alternative less intrusive measures. In the case of pandemic, there exists a correlation between the state of emergency and the necessity to adopt preventive measures[92]. The necessity requirement is partially covered by the general legislation that has declared the state of emergency but an analysis concerning the necessity of the specific measure requires investigating the objectives of the measure in light of emergency[93]. Hence, the metric of necessity in relation to the proportionality principle concerning COVID 19 restrictive measures should be different from the ordinary metric due to the magnitude of health alert, the need

(ii) its necessity in the absence of other less harmful but equally suitable means; and (iii) its proportionality in the strict sense.

See also, for the Asian region, High Court of the Hong Kong Special Administrative Region (First Instance) – HCAL 952/2020 [2020] HKCFI 903 – 20th May 2020, on the quarantine imposed to travellers from South Africa; in this decision the Court that the challenged measure serves a legitimate aim (protection of public health), is rationally connected to such aim, does not impose excessive restrictions to personal liberty («no more than what is necessary») and strikes a reasonable balance between the social benefit coming from application of the measure and the restriction to personal liberty.

[90] See footnote no. 116* above.

[91] See, e.g., in US case law: United States District Court for the Central District of California, McDougall v. County of Ventura, No. 2:20-cv-02927-CBM-AS, 2020 WL 6532871 (C.D. Cal. Oct. 21, 2020), where the Court refers to the standard applied in Jacobson v. Massachusetts (197 U.S. 11, 31 (1905)), in order to examine "(1) whether the County's orders 'ha[ve] no real or substantial relation' to the County's objective of preventing the spread of COVID-19; or (2) whether the County of Ventura's orders affect 'beyond all question, a plain, palpable invasion of rights secured by' the Constitution.", and, based on it, concludes that: "The stay well at home orders meet the first test under Jacobson. The stated objective of the stay well at home orders 'is to ensure that the maximum number of persons stay in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the maximum extent possible…. The County elected to achieve this goal by deeming certain businesses, travel, and services "essential" and restricting businesses, travel, and services that were not deemed essential. Because those limitations restrict in-person contact, they are substantially related to the objective of preventing the spread of COVID-19. … Under the second test of Jacobson, the stay well at home orders must not affect 'beyond all question, a plain, palpable invasion of" the Second Amendment.'" Id. at *6-7. "Here, the Court finds the stay well at home orders did not amount to a plain and palpable violation of the Second Amendment, as required by Jacobson. Unlike the total prohibition of handguns at issue in Heller, the stay well at home orders are temporary and do not violate the Second Amendment… [T]he effect of the stay well at home orders was to delay Plaintiffs' ability to acquire and practice with firearms and ammunition and not to prohibit those activities. Thus, Plaintiffs have not demonstrated that the temporary closure of firearms retailers constitutes a plain and palpable violation of their Second Amendment right." Id. at *7-8.

[92] See, e.g., High Court of the Hong Kong Special Administrative Region – Court of First Instance, HCAL 2007/2020, 12th October 2020, where the Court notes that, considering the state of emergency in place and the necessity to ensure the health of the society, the mask wearing requirement is reasonable and proportional, since it strikes a balance between the societal benefits and the restriction to individual liberty. It does not, moreover, require more than what is necessary to ensure the protection of public health.

[93] See Spain, Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num 788/2021,

to provide quick response, and the high level of uncertainty[94]. A flexible metric for necessity assessment has been invoked by some courts in this context[95].

In the perspective of some legal traditions, the necessity requirement also refers to the choice of the measure, comparing alternative options that can achieve the same or similar outcomes [96]. The administration is usually bound to show that alternative measures were identified and that the choice fell on the least restrictive. However, often during the emergency, the courts have usually not asked for the identification of alternative measures and have been satisfied by the requirements of mere necessity and adequacy[97]. In some cases, courts have looked at alternative means to exercise rights and freedoms limited by the contested measure in order to ascertain its proportionality or reasonableness[98].

Adequacy requires a functional correlation between the restriction and its expected effects: whether that measure is likely to produce the expected effects. Alternatively, the test evaluates the correlation between the instrument (the measure) and its expected objectives (including outputs and outcomes). But what are the expected effects of a covid 19 restrictive measure? What is the metric to measure the relevant effects? With high scientific uncertainty the adequacy metric differs from the evaluation based on customary probabilistic evaluation of administrative measures usually deployed .

What should specifically adequacy require to consider? The reduction of contagion rather than saved lives should be the metric deployed to evaluate proportionality of a measure[99]. But clearly the correlation between the rate of contagion measured in terms of Rt and the number of deaths must be taken into account. Whereas scientific analysis makes predictions over the impact of measures in

[94] In some cases, this deviation has been made clear in court's reasoning; see, e.g., for Kenya, High Court of Kenya, Mombasa, PETITION NO. E009 OF 2020, 17 December 2020, Margaret Kisingo Muga & 21 others v County Government of Mombasa & 2 others [2020] eKLR, where the Court applied the doctrine of necessity to justify the conversion of a clinic in a Covid isolation centre as a situation which under ordinary conditions cannot be allowed on the basis of "normal constitutional requirements".

[95] See, e.g., 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), where the Court observes that the necessity requirement is met once it is shown that there is a rational connection between the restrictive measure (ban on tobacco sales) and curbing the scourge of the COVID-19 virus without 'strict necessity' been necessarily proved. A similar measure was later deemed unconstitutional due to lack of necessity (HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT), December 11, 2020, 6118/2020, British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others [2020] ZAWCHC 180).

[96] This facet of the proportionality principle particularly reflects the German approach then inherited by European law. See F.G. Jacobs, Recent developments in the Principle of Proportionality in European Community Law, in The Principle of Proportionality in the Laws of Europe, edited by E. Ellis, Hart Publishing, 1999, p. 1 seq. The same facet also appears in some non-European caselaw (see, e.g., High Court of Zimbabwe, Harare, ZWHHC 334, 26 May 2020, Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others).

[97] See, e.g., for an examination of the application of proportionality by Belgian administrative courts, Popelier et . al, The role of the courts in times of crisis, cit. p. 00

See also, along the lines described in the text, European Court of Human Rights, judgement of 8 April 2021, Vavřička and Others v. the Czech Republic [GC], no. 47621/13, ECLI:CE:ECHR:2021:0408JUD004762113: "the Court must assess the proportionality of the interferences complained of, in light of the aim pursued. (....) ultimately, the issue to be determined is not whether a different, less prescriptive policy might have been adopted, as has been done in some other European States. Rather, it is whether, in striking the particular balance that they did, the Czech authorities remained within their wide margin of appreciation in this area". (emphasis added)

[98] Supreme Court of Pennsylvania, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020), April 13, 2020 about the alternative means of communication mitigating the consequences of the limited right of assembly. See Spain Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num 788/2021, Italy, Council of State, advice 850/2021,

[99] On the methodology to evaluate expected effects see Manica et al., Impact of tiered restrictions on human activities and the epidemiology of the second wave of COVID-19 in Italy, Nature communications 12, n. 4570 (2021)

relation to contagion, very rarely such an analysis has so far become the subject of judicial review. Proportionality has been used to review the measures related to the limitations of individual and collective freedoms[100]

Three aspects of proportionality may be further highlighted.

I) Proportionality may affect both the nature and the content of governmental measures[101]. Proportionality may influence the choice between hard and soft law. Soft law should be chosen if a soft law instrument can achieve the objectives as effectively as hard law. Hard law should be chosen only when it is clear that it is a better instrument or the only one capable of achieving the objective. The pandemic has had an impact on these considerations, leading some countries to explore the role for soft law to a higher extent than before[102]. Once it became clear that the soft measure could not reach the desired objective then governments moved to hard measures.

Proportionality affects the spatial and temporal scope of the restrictive measure. A generalized ban is disproportionate if the target population is only limited to a town and the entire region or state is affected. The measure should target the specific administrative entity if the problem is circumscribed. Zoning with different colours has been an answer to the necessity of grading and tailoring the effects and in particular the limitations of fundamental rights. The scope of judicial review over the spatial impact has been different across countries[103].

II) Proportionality depends on the nature and content of the balanced rights[104]. The principle of proportionality may translate into a cost-benefit analysis between the risks of contagion and costs of the limitation caused by the restrictive measure[105]. Developing such a metric in emergency situations

[100] See for example the French Constitutional Council's decision 2021/824, august 5 2021 holding unconstitutional quarantine whose violations was associated with criminal sanctions, par. 116-117.

[101] See, for Germany, Federal Constitutional Court, 10 April 2020, 1 BvQ 28/20 on religious services; Federal Constitutional Court, 15 July 2020, 1 BvR 1630/20 on education.

[102] COVID-19 and Soft Law: Is Soft Law Pandemic-Proof? Mariolina ELIANTONIO, Emilia KORKEA-AHO, and Steven VAUGHAN, European Journal of risk regulation 2021, p. 4; PL Láncos and L Christián, "Domestic Soft Law Regulation During the COVID-19 Lockdown in Hungary: A Novel Regulatory Approach to a Unique Global Challenge" (2021) European Journal of Risk Regulation <DOI:10.1017/err.2020.115.

[103] In Italy the Council of State has been very deferential to the administration. 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.

[104] See, e.g., High Court of Zimbabwe, Harare, ZWHHC 334, 26 May 2020, Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others, where the restrictive measures have been deemed proportionate since necessary in the interests of public safety, public order, public morality, public health and the general public interest.

[105] On benefit assessment, see, e.g., High Court of the Hong Kong Special Administrative Region (First Instance) – HCAL 952/2020 [2020] HKCFI 903 – 20th May 2020, on the quarantine imposed to travellers from South Africa, where the Court reminds that the public authority explained the benefits of quarantine at a designated centre rather than home in the specific circumstances of the case, in particular in light of the health safety measures implemented in such centres. On cost assessment, see, e.g., High Court of the Hong Kong Special Administrative Region – Court of First Instance, HCAL 2007/2020, 12th October 2020, in which, in relation to the mask wearing requirement, the Court, after considering the specific situation described by the plaintiff, i.e. refugees who do not earn incomes to buy masks, concludes that such a situation does not constitute a reasonable ground to challenge the constitutionality of the measure concerned.

Cost-benefit analysis does not imply that all effects produced by restrictive measures are easily monetized. See, for example: Higher Administrative Court of the Land of Nordrhein-Westfalen, 13 B 2046/20.NE, 07.01.2021, 13. Senat., where the Court observes that the possibility to avoid quarantine by undergoing a rapid test (which are reliable only to some extent) did not frustrate the suitability of the measures, because it nevertheless could enable the identification of a considerable amount of infections. Furthermore, the burden on one's freedom of movement represented by an isolation obligation could be avoided through a rapid test, which has almost no inconvenient consequences and costs between 30 and 40 euros, a negligible amount of money if compared to the costs of travelling.

could be quite challenging, but courts have made interesting attempts primarily based on qualitative more than quantitative comparative analysis[106]. The benefits are the consequences related to the reduction of the contagion's risks and the effectiveness of the restrictive measure in this regard[107]. Costs include those imposed on the different groups targeted by the restrictive measures; their assessment should take compensation or mitigation into account[108]. Proportionality has to weigh a measure that limits fundamental freedoms to protect collective health. The intensity of the measure should be linked to the principle of solidarity.

III) Proportionality is connected with the state of scientific knowledge and the level of uncertainty[109]. Some case law suggests that the proportionality evaluation of a restrictive measure should be influenced by the state of scientific knowledge[110]. What varies is not the intensity of proportionality

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On the cost-benefit analysis applied to Covid measures, see OECD Cost-benefit analysis of COVID 19 related measures, distinguishing between the output and the spending approach, available at www.oecd.org. last visited … See also: Rowthorn, R. (2020), 'A Cost–Benefit Analysis of the Covid-19 Disease', Covid Economics, 9, 24 April, London, CEPR., Rowthorn Maciejowsky, A cost–benefit analysis of the COVID-19 disease, Oxford review of economic policy, 2020, 33 ff.

[106] See, e.g., Supreme Court of Pennsylvania, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020), April 13, 2020: "While the private interest, the closure of the business, is important, the risk of erroneous temporary deprivation does not outweigh the value of additional or substitute safeguards which could not be provided within a realistic timeframe. The government interest in focusing on mitigation and suppression of the disaster outweighs the massive administrative burden of the additional procedural requirements demanded by Petitioners." Id. at 900.

[107] Scientific literature on the effectiveness of adopted measures is extremely rich. See, e.g.: J.M. Brauner, J. Kulveit, et al., Inferring the effectiveness of government interventions against COVID-19, Science, 19 Feb 2021, Vol. 371, Issue 6531, DOI: 10.1126/science.abd9338; J. Dehning, V. Priesemann, Inferring change points in the spread of COVID-19 reveals the effectiveness of interventions, Science, 10 Jul 2020, Vol. 369, Issue 6500, DOI: 10.1126/science.abb9789.

[108] See, e.g., for Latvia, Constitutional Court, No. 2020-26-0106, of 11 December 2020, concerning the prohibition of gambling, where, in assessing the lawfulness of the restrictive provision, the Court considered the existence of compensation and of mechanisms aimed at mitigating the consequences of the restrictions imposed in an emergency; for the USA, Supreme Court of Pennsylvania, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020), April 13, 2020, about the alternative means of communication mitigating the consequences of the limited right of assembly; for Chile, Supreme Court Judgment Rol. No. 143.937-2020 of 10th December 2020 confirming Judgment 13.915 of 23rd November 2020 of the Court of Appeals of Concepción, where the Court applied reasonableness in combination with the principles of rule of law and the situation of state of emergency to conclude that it is not reasonable to request that a mitigating action (changing educational programs), that is lawful in the context of the Covid-19 pandemic, be declared illegal.
A related issue is whether, since mitigation leaves part of the consequences of the restrictive measures on individuals, the latter may claim partial restitution from the institution providing the service, e.g. distance teaching instead of face-to-face. A similar claim has been rejected by the Punjab – Haryana High Court (Independent Schools Association ... vs State of Punjab and Ors, 30th June 2020, Writ Petition no. 7409/2020, in which the Court emphasizes the role played by schools during the lockdown and the relevant expenses borne by them despite and due to the restrictions, then concluding that private schools may collect both admission and tuition fees, without however raising fees for the year 2020-2021.

[109] See, e.g., European Court of Human Rights, judgement of 8 April 2021, Vavřička and Others v. the Czech Republic [GC], no. 47621/13, ECLI:CE:ECHR:2021:0408JUD004762113, referring to a Hungarian constitutional judgment of 20 June 2007 in case no. 39/2007: "The court found, inter alia, that the protection of children's health justified compulsory vaccination at certain ages and accepted the legislature's position, based on scientific knowledge, that the benefits of vaccination for both the individual and society outweighed any possible harm due to side-effects." (emphasis added). See also, for Switzerland: Bundesgericht - Tribunal fédéral -Tribunale federale -Tribunal Fédéral, 1C_169/2020, 22.12.2020; for China, Tianjin Intermediate People's Court, Final Decision n. 166, 12th May 2020, both cited above (see fn …96*, and corresponding text).

[110] See, e.g., Italian Council of State decree 1034/2021; Italian Council of State decree 1031/2021 ("the criterion of proportionality […] requires that any restriction of constitutionally guaranteed rights be linked to certain assumptions, transparent and ostensible data, as well as periods strictly necessary for the protection of the protected good"); Italian Council of State, Advice, sec. I, 2021 ("The prevalence of the precautionary principle (…) is therefore reasonably motivated in relation to the present context of health emergency, characterized by the circulation of a virus on the behaviour of which there are no certainties in the same scientific community, with the logical consequence that, not being known, nor predictable with certainty the risks induced by potentially dangerous work and commercial activities, the action of the public authorities can and must result in a prevention in advance of the consolidation of scientific knowledge, to protect the primary value of health", unofficial translation).

but the quality of the analysis. As it was underlined both necessity and adequacy are influenced by uncertainty.

Scientific knowledge allows predictions on the effects of measures[111]. Limited knowledge prevents accurate predictions. Broad and deep knowledge allows to make better predictions on both the causal relationship between the measure and its effects. How should different degrees of scientific knowledge influence the proportionality analysis? The knowledge affects necessity and adequacy; the scrutiny should be stricter when available knowledge increases and the administration can decide on the basis of scientific evidence[112].

Two preliminary conclusions can then be drawn. Firstly, proportionality depends on the nature of the balancing and the content of the balanced rights. Secondly, proportionality should incorporate in the cost benefit analysis the loss and the possibility to get some kind of compensation or mitigation of the loss resulting from the limitation of constitutional rights. Whether or not a loss can be compensated will be a factor to determine the proportionality of the restrictive measure. When compensation is not available, mitigation should be a factor in the proportionality analysis.

7. Linking uncertainty and trust in compliance monitoring

Monitoring is necessary for governments to decide whether and what measures should be adopted. Once protective governmental measures have been adopted compliance has to be monitored to evaluate their effectiveness. The measures are designed with a high level of uncertainty, partly determined by lack of knowledge on how the addressees will react. Uncertainty may determine distrust and increase non-compliance. A common denominator to examine compliance monitoring with Covid related measures is trust. The necessity to involve the population makes trust an essential component of monitoring and a determinant of instruments' choice. The primary goal of compliance is not to punish the violation but to persuade the addressees to comply[113].

The pandemic has stimulated the use of innovative compliance instruments and the involvement of private actors.

Monitoring compliance with restrictive measures has triggered a variety of responses. A mix between legal and technological responses and, within the former, a combination of hard and soft law. The use of contact tracing has been scrutinised by courts for violation of the right to privacy and data protection[114]. In some countries, like Israel, technology was used to monitor compliance with

[111] For a review the 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 Haug, N., Geyrhofer, L., Londei, A., Dervic, E., Desvars-Larrive, A. & Loreto, V. et al. Ranking the effectiveness of worldwide COVID-19 government interventions. Nat. Hum. Behav. 4, 1303–1312 (2020). 15. Brauner, J. M., Mindermann, S., Sharma, M., Johnston, D., Salvatier, J. & Gavenčiak, T. et al. Inferring the effectiveness of government interventions against COVID-19. Science 371, eabd9338 (2020).

[112] See Austrian Constitutional Court., 10 March 2021, V 573/2020.

[113] See B. van Rooj and D. Sokol, The Cambridge handbook of compliance, Cambridge, 2021, part. van Rooj and Sokol, Compliance as the interaction between rules and behaviour. See also Jan Petrov (2020) The COVID-19 emergency in the age of executive aggrandizement, 77, holding that "many of the measures necessary for fighting the pandemic are not enforceable in the standard top-down way of law enforcement, definitely not on the scale required" and that "the key is voluntary compliance with emergency measures".

[114] See, for example, for India, Ananga Kumar Otta v. Union of India & Others Writ Petition (PIL) No.12430 of 2020; Nagrik Upbhokta Margdarshak Manch v. State of M.P. WRIT PETITION NO. 7596/2020 (PIL).
On these issues see C. Angiolini, Covid-19 and data protection. A case law survey of the "Covid-19 Litigation Project", forthcoming in Global Pandemic Network Journal.

restrictive measures[115]. In other countries the use of technology to monitor contacts and detect contagion was voluntary (Italy). In Israel the Supreme Court has declared contract tracing unconstitutional stating that it can be used only in very limited contexts determined by the Supreme Court[116].

Complementary monitoring strategies for governmental precautionary measures include: (1) the combination between hard and soft law compliance monitoring; (2) The use of community or societal in addition to state officials' monitoring; (3) the combination between legal and technological instruments. Choices by governments have been different and the role of social norms and community responsiveness has determined changes of strategy over time.

Compliance by businesses and other organizations to ensure respect of the precautionary measures and compliance by individuals may require different technologies and the observance of different proportionality thresholds. The conventional administrative instruments to monitor compliance have proven to be inadequate to say the least. The necessity to induce compliance has pushed towards nudging and steering rather than sanctioning and punishing[117]. Behavioural sciences can contribute to identify the reasons of non-compliance and the best responses. The analysis of the responses contributes to understanding whether the effects of the measure might drive change or persistence in non-compliance.

Monitoring concerns people behaviour aimed at limiting the spread of contagion and to comply with the precautionary measures[118]. The former is related to contact tracing, vaccination, the latter concerns compliance with precautionary measures by businesses, employers, schools, churches, municipalities. Clearly both hard and soft law measures require compliance monitoring, but instruments and effects differ. An example is represented by the Pass for vaccine[119].

Limited resources have forced to deploy to a larger extent private and collective societal monitoring. Often businesses like restaurants but also transport companies have been asked to collect data related to the conducts of individuals for the purpose of contact tracing. This delegation of monitoring compliance has been scrutinized by the courts primarily in relation to the means and scope of control. Empowering private actors to monitor compliance is subject to limitations related to the scope of delegation.

Private actors have been involved in the compliance monitoring of individuals with governmental measures and, more recently, in monitoring vaccination. The legality of such involvement has been challenged also because failure to monitor has been accompanied by administrative sanctions[120].

The introduction of new monitoring techniques has been under judicial scrutiny. As the French case law on drones suggests the surveillance by public authorities is limited by the necessity to respect

[115] See High Court of Justice, 2109/20 *Ben Meir v. Prime Minister*, April 26, 2020.
[116] High Court of Justice, 2109/20 *Ben Meir v. Prime Minister*, April 26, 2020.
[117] See Dai, H. et al. Behavioral Nudges Increase COVID-19 Vaccinations. Nature https://doi.org/10.1038/s41586-021-03843-2 (2021).
[118] See WHO Interim Guidance, 16 December 2020, Public health surveillance for COVID-19 stating the objectives of surveillance.
[119] See, for the EU, Regulation (EU) 2021/953, 14 June 2021, on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic.
[120] See the French Constitutional Council, 2021/824, par. 66.

fundamental rights and the principle of proportionality[121]. The collection and use of data concerning individuals and organizations interferes with the limits of fundamental rights.

Not only has the pandemic introduced restrictive measures in order to enhance prevention and control of the pandemic. It has also introduced new forms of compliance monitoring using technologies that have to comply with the right to privacy and data protection.

Monitoring compliance also reflects a combination of hard and soft law instruments. The importance of social norms has been highlighted to deploy soft law monitoring mechanisms to ensure collective compliance. Hence, within legal instruments a distinction between hard and soft law monitoring devices may be drawn.

Individual and collective compliance is a key factor to reduce contagion. Governments have used different combinations of recommendations and orders. Some countries choose command and control. Other countries choose only persuasion and soft law. Most countries choose a combination of both.

The use of technology as a means of control is partly dependent upon collective action. Technological control works if a large number of people uses the technological devices.

It is very difficult for instance to monitor compliance with quarantine obligations but control over people position through their phones and computers can contribute to locate them and to detect violations.

In terms of enforcement administrative fines have been the most used instrument whereas a limited role was played by civil liability.

The role of administrative fines has been so far paramount whereas civil liability has not so far been used but for the liability of public institutions where no adequate precautions were taken.

The key for fines to work is to fine both those who manage the activities and the individuals who take part in them. In the case of restaurants, lack of compliance of rules concerning distancing and mask wearing will result into fines for both the restaurant and the customers. In this way there is a mutual incentive to reciprocal monitoring.

It is likely that civil liability litigation will develop in the near future if individual and collective behaviour violating the rules will cause contamination and pandemic spread.

7.1 Compliance with voluntary measures: vaccines

Vaccination is still for the most voluntary, but the sanitary pass has become mandatory in many countries to enable individuals to engage in many activities[122]. If individuals want to engage in certain activities they must have a valid Pass; for example, access to transportation, leisure, cultural shows may be conditioned to a pass that shows vaccination or absence of Covid 19[123]. It is important to

[121] See the French Council of State 18 May 2020, nn. 440442, 440445, stating that drone surveillance might violate the principle of proportionality; and later Council 22 December 2020.
[122] See the French Constitutional Council, 2021/824.
[123] See, for the EU, art. 11, Reg. (EU) 2021/953, cit., acknowledging MSs' competence in this regard within the limitations posed by the freedom of movement to be balanced against public health under the principle of proportionality and taking into account scientific evidence, including epidemiological data published by the ECDC (European Centre for Disease Control).

point out the choice of vaccination remains free but the chooser has to bear the consequences of the choice.

In France, the law regulating mandatory access with the pass has been scrutinized by the Constitutional Council[124]. The French Council has highlighted the judges' role to ensure that the limitations associated to the pass are adequate, necessary and proportionate. The pass subjects access to activities to vaccination or to the proof that the person is Covid 19 free. The French law tasks private actors to check the valid pass and sanctions failure to monitor by private actors. According to the French Council, charging private actors of the task of monitoring the possession of a valid pass does not constitute a disproportionate limitation of the freedom of enterprise[125]. Furthermore, it has clarified that the pass is not a surreptitious way to introduce mandatory vaccination[126].

8. The scope of judicial review in times of pandemic

Courts have played an important role in reviewing administrative measures and ensuring respect for fundamental rights. At times they have aligned with governmental policies, at times they have annulled the measures, limiting fundamental freedoms to protect health. Effective judicial protection of fundamental, individual and collective, rights has been at the core of judicial review by ordinary and constitutional courts.

In some jurisdictions courts play not only the conventional role of ex post reviewers but also that of ex ante monitors. However, the scope of such authorization is limited to the potential violation of fundamental rights. At least in one jurisdiction, Spain, ex ante ratification has been deployed. With the *ex ante* ratification (auto de ratification) Spanish courts are tasked to verify the legality and proportionality of the governmental measure limiting fundamental rights[127]. The governmental measure is subject to judicial ratification before becoming effective, to verify the compatibility with fundamental rights according to the principle of proportionality and legality[128]. If legality is denied the government can appeal before the Supreme Court[129]. The *ex ante* ratification does not eliminate *ex post* control since only some aspects of legal conformity can be considered in the *ex ante* control[130].

The scope of judicial review is manifold:

a) To ensure that the collective right to health is protected and action by the government is promptly and effectively taken ;
b) to ensure that the interests and the rights of those negatively affected by the measures are duly considered when restrictive measures of freedoms are adopted.

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[124] See French Constitutional Council decision 2021/824 august 5 2021.
[125] See French Constitutional Council decision 2021/824 august 5 2021.
[126] See French Constitutional Council decision 2021/824 august 5 2021, par. 44.
[127] See Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num 788/2021, 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 mayo JUR\2021\142006.
[128] See See Tribunal Superior de Justicia TSJ de Madrid (Sala de lo Contencioso-Administrativo Sentencia n° 594/2020, de 28 de agosto de 2020, Tribunal superior de Justicia TSJ de Madrid, (Sala de lo Contencioso-Administrativo, Sección 8ª) Auto num. 93/2021 de 7 mayo JUR\2021\142006.
[129] See Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num 788/2021, where the government lodged the recurso de casación al amparo regulated by art. 87 ter de la Ley de la Jurisdicción Contencioso Administrativo, introduced by the Royal Law Decree 8/2021.
[130] On the relationship between *ex ante* and *ex post* control see Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num 788/2021.

c) to ensure that when governments refrain from acting the protection of health is duly taken into account.

Different legal traditions over the scope of judicial review exist, going well beyond the common/civil law traditional distinction. Both at common law and at civil law different approaches have developed. The differences between French and German courts highlight the broader scope of judicial review in Germany than in France. Similarly, within common law, the scope of judicial review between the UK and the US differs quite significantly. Outside of Europe and North America the role of courts has been more pronounced in Latin America and less in Asia, with the exception of India[131].
It is not within the scope of this article to describe if and how the pandemic has changed these approaches and, when changes have occurred whether they have increased or decreased convergence among legal systems. But it is important in the analysis of courts' review to consider the different 'attitudes' to scrutinise governmental measures.
The scope and intensity of judicial review in times of pandemic is different from ordinary times[132]. The scrutiny has been at the same time deferential, if compared to ordinary times, and stricter, given the relevance of fundamental freedoms and rights limited by the protective measures[133].

The quality and intensity of judicial review accounts for the emergency and the fact that governments act in a condition of urgency, often combined with uncertainty about scientific knowledge and sanitary crisis management[134]. Clearly the scope of review differs depending on whether there is a summary judgment or a final judgment[135]. However, the pandemic has broadened the scope of review in urgency procedures.

The different context, created by emergency, does not necessarily reduce the intensity of review by increasing the level of judicial deference. It simply changes the perspective of review and that of balancing, allowing the limitations or suspensions of rights to protect individual and collective health[136]. It is the quality, not the intensity of review that varies, depending on the uncertainty and the evolution of scientific knowledge related to the pandemic[137]. Courts have become more demanding as scientific knowledge increases and stabilizes. The exercise of legislative and administrative discretion is correlated to the level of scientific knowledge. The short duration of governmental measures often imposes a different approach to judicial review. Courts are asked to engage in continuous review of measures that succeed over time. Continuous judicial review does not increase legal uncertainty but indirectly contributes to ensure policy control rather than segmenting control over single acts.

[131] Indian courts, both state and federal, have played a significant role not only in the control of contagion but also in relation to the distributional aspects of the pandemic often overlooked by other courts. On these issues see G. Sabatino, Covid-19 and freedom to conduct a business. A case law survey of the "Covid-19 Litigation Project", forthcoming in, Global Pandemic Network Journal.
[132] See F. Patroni Griffi, B. Lasserre, supra note **19.
[133] See, for example, the US experience, where the control over the governmental police power has been rather deferential making reference to Jacobson jurisprudence. Some European countries, Latin American and African countries on the contrary have taken a less deferential attitude and have pressed government to engage in evidence based decision-making using the principle of proportionality to choose among alternative measures. See above, fnn…107 ff.* and corresponding text.
[134] See for Spain Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num. 719/2021 of 24 may JUR\2021\157658
[135] The scope of urgency procedures and summary judgments has been broadened and the intensity of review usually very limited has been expanded in order to ensure effective judicial protection.
[136] See Italian Council of State sez. III, 7097/2020.
[137] See Tribunal Supremo TS (Sala de lo Contencioso-Administrativo, Sección 4ª) Sentencia num 788/2021.

The case law reveals that courts are willing to admit claims even when the challenged measure has expired but its effects continue[138]. This is true not only when, for example, a temporary closure of business for part of the day becomes a total closure but also when parties, forbidden from engaging in a certain activity, are allowed to engage in that activity only upon certain conditions.

Reviewing the scientific foundations of governmental measures has been a daunting challenge for national courts. We observe a less strict scrutiny when scientific knowledge is limited whereas judicial scrutiny becomes less deferential when scientific knowledge increases and consolidates[139]. Uncertainty and divergences within the medical world must be considered by the administrations and by the courts when they exercise judicial review. Usually, the task of integrating divergent scientific opinions is attributed to scientific advisory bodies that support governmental decision making. However, courts may have to decide about divergences when claimants provide scientific evidence contrasting that which was the foundation of the challenged administrative measure. In some countries, courts have scrutinised the level of convergence and divergence of scientific opinions and their reliability within a wider scrutiny on coherence, rationality and logical reasoning of the motivation sustaining the administrative decision[140].

Whereas courts have been careful to ensure separation of powers and not replacing governmental and scientific decisions concerning restrictive measures, they have certainly closely scrutinised the limitations of fundamental freedoms by restrictive measures since the outset[141].

Courts have scrutinised the choice to intervene and that of regulatory instruments. One distinction that has emerged, albeit with different intensity among legal systems, is that between judicial review of administrative action and inaction. Courts seem more willing to scrutinise action than inaction[142]. They examine administrative measures and evaluate their proportionality. When the administration does not act, courts have been less willing to order action and to define the suitable measure necessary to ensure effective judicial protection of the rights violated by inaction[143].

Similarly, when the claim was to harden the measures, courts have been less willing to order governments more radical actions than when the claim sought to soften the existing measures.

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[138] See, e.g., HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT), December 11, 2020, 6118/2020, British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others [2020] ZAWCHC 180 (see fn 93*** above).

[139] Compare for example in Italy the decisions of the Council of state concerning school closures in the first, the second and the third stage of the pandemic.

See, also, as cited above for Switzerland: Bundesgericht - Tribunal fédéral -Tribunale federale -Tribunal fédéral, 1C_169/2020, 22.12.2020, Appeal under public law against the executive decree issued on the 18th of March 2020 by the State Council of the Canton of Ticino, cited above, fn….**

[140]See Italian Council of State 7097/2020 "9. Without wishing to retrace the long evolutionary path that has led to the guarantee of a more intense and effective judicial protection, according to the consolidated jurisprudence of this Council (see, ex plurimis, Cons. St.., sez. VI, July 6, 2020, no. 4322), the judicial review of the technical assessments of the administration may nowadays be carried out not on the basis of a mere formal and extrinsic control of the logical process followed by the administrative authority, but on the basis of a direct verification of the reliability of the technical operations from the point of view of their consistency and correctness, as regards the technical criteria and the application procedure" (unofficial translation). See also, Italy, First instance TAR ABRUZZO decree 48/2021.

[141] On limits of judicial review see Supreme Court of India, Small Scale Industrial Manufactures Association v. Union of India, 23 March 2021.

See, in the USA, the limitations to judicial review linked with the doctrine established in *Jacobson* allowing for administration's discretionary power to take measures in order to protect public health; see fnn*** 21 and 49 above.

[142] See in Italy Council of State 7097/2020, cited above (see fn*).

[143] See above, par. 5.

Less active role Courts have played in the choice between hard and soft law instruments. The use of soft law and recommendations has been significant but not the subject of review[144]. Very limited litigation has emerged on the choice to use soft instead of hard law instruments or viceversa[145].

Clearly there is more space for limited judicial review concerning the 'if question' (e.g. whether the administration should act) than the 'how question' (which protective measure should be adopted to protect the fundamental right).

The distributional question concerning access to testing, treatment and vaccine has been dealt mainly by countries with a weak welfare system[146]. The collective nature of prevention has driven courts to stimulate governments to device access policies favouring the most vulnerable and the least resourceful[147]. In countries with stronger welfare systems, courts have been generally more deferential towards governments' prioritization schemes[148].

A second non legal factor influencing judicial review is the level of citizens' trust for governmental expectations. Both limited empirical and experimental evidence show that there is an inverse

[144] See E. KORKEA-AHO and M. SCHEININ, "Could You, Would You, Should You?" Regulating Cross-Border Travel Through COVID-19 Soft Law in Finland, European Journal of Risk Regulation, 12 (2021), pp. 26–44, where the lack of judicial oversight is highlighted although complaints are possible to the Chancellor of Justice and the Parliamentary Ombudsman, both in charge of reviewing the legality of actions by the Government and administrative authorities. See also H. WENANDER, Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism, European Journal of Risk Regulation, 12 (2021), pp. 127–142, emphasising that General Recommendations may not only summarise case law by the Supreme Administrative Court but also be subject to judicial review by such court to the extent that the decision has factual effects on individuals. Moreover, the use of General Recommendations may also be scrutinised by an administrative court after appeal of a decision where the decision involves the use of non-binding rules (indirect review) since, generally, the review of the administrative court also covers matters of suitability and the administrative agency's use of discretion (pp. 137-8).

[145] On the general concern inherent to the lack of judicial oversight on soft law, see M. Eliantonio et al., Covid-19, cit., p. 6; Flaminia APERIO BELLA, Cristiana LAURI, Giorgio CAPRA, The Role of COVID-19 Soft Law Measures in Italy: Much Ado about Nothing?, EJRR, 2021, pp. 93-110; D. UTRILLA FERNÁNDEZ-BERMEJO, Soft Law Governance in Times of Coronavirus in Spain, European Journal of Risk Regulation, 12 (2021), pp. 111–126.

[146] See, for India, Supreme Court, 18 March 2021, *Bharat Biotech International v Union of India*, Special Leave to Appeal (C) No. 4327/2021 (for additional references, see fn *** 189 below; Supreme Court, In Re Distribution Essential Supplies And Services During Pandemic, SOU MOTO WP (C) no.3 of 2021; High Court of Madras, M. Murgantham v. State of Tamil Nadu & Ors., W.P.No.34315 of 2021; for Brazil, the question of access to vaccine has been dealt by judges in relation to claims aimed at overcoming the Federal Government's inaction on vaccination campaign (see 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, on the shared competence of local municipalities, and, on the union's right to import vaccines, André Richter, "Juiz autoriza mais entidades privadas a importar vacinas contra covid", *Agência Brasil*, 30 March 2021, available at: https://agenciabrasil.ebc.com.br/justica/noticia/2021-03/juiz-autoriza-mais-entidades-privadas-importar-vacinas-contra-covid); in Mexico, that has been the first country starting the vaccination campaign in Latin America in late December 2020, see the case decided by a Federal judge in favour of a woman seeking for prioritization in access to vaccine due to comorbidity and high risk in relation to Covid19 (see M. González Vargas, "Una mujer demandó para obtener vacuna contra COVID-19 y juez le dio la razón", *Infobae*, 11 January 2021, https://perma.cc/BDX5-KBBJ). For a wider analysis, see S. Fassiaux, Covid-19 and vaccination. A case law survey of the "Covid-19 Litigation Project", forthcoming in Global Pandemic Network Journal.

[147] See for example the Supreme Court of India *Shashank Deo Sudhi v. Union of India and Ors.* Writ Petition No. 000912 of 2020 (D. No. 10816/2020) (I.A. Nos. 48265 and 48266/2020): "(i) Free testing for COVID-19 shall be available to persons eligible under Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana as already implemented by the Government of India, and any other category of economically weaker sections of the society as notified by the Government for free testing for COVID-19".

[148] See, for example, in Germany: Administrative Court of Frankfurt am Main, 12 February 2021, n°5 L 219/21.F; Administrative Court of Gelsenkirchen, 18 February 2021, n°20 L 182/21; Administrative Court of Schleswig-Holstein, 17 February 2021, n°1 B 12/21.

proportion between the level of trust and the intensity of judicial review[149]. However, there are examples where the courts have tried to increase trust and certainty, when governments did not manage to preserve institutional trust, and cases in which the courts have referred to the lack of trust as a ground for rejecting claims for injunction concerning measures whose enactment would have raised risk of abuse or corruption[150].

9.. Concluding remarks

The role of courts has been quite significant in the COVID 19 pandemic, weakening the theory that the judiciary is not equipped to manage emergencies and contribute to govern sanitary crisis management. Not only courts have been the guardians and custodians of fundamental rights and the rule of law but they have also contributed to govern uncertainty and adapted to the evolution of scientific knowledge by reducing arbitrariness and imposing national governments evidence based decision making. Innovative use of the precautionary principle, connected to proportionality, has enabled courts to scrutinize past decisions and to steer future governmental behaviour.

The experience of COVID-19 has shown that even in times of emergency, when rapid and effective action is required, courts can adapt, and provide the necessary balance to the power shift towards the executives. Creative interpretations of procedural rules have permitted continuous and effective oversight of governmental decisions.

Courts' involvement has varied across countries. It has been much more intense in democratic regimes, where both the protection of fundamental rights and the oversight on the executive's use of emergency power have permitted the control on the rule of law compliance. Much less in non-democratic countries, where the concentration of decision-making power on the executive has not been balanced by judicial oversight.

The quality of judicial review has been influenced by the emergency, but its scope and intensity have not been reduced. The protection of fundamental rights and freedoms has been a primary objective of judicial oversight in democratic countries and differences in the balancing have emerged compared to ordinary times. The necessity to protect collective health through preventive and reactive measures has justified the limitations of freedom to a larger extent than usually permitted under national constitutional traditions in ordinary times. Proportionality and reasonableness with multiple conceptual variants, partly associated with the different national legal traditions, have been used to scrutinise the legality of restrictive governmental measures.

Courts have been deferential to the increased role of science in providing guidance to decisions related to governmental measures. But they have modified their review, including the use of proportionality, as the medical and scientific knowledge increased over time. They have required transparency and ensured procedural accountability of the process through which scientific committees and governments interacted to ensure that measures were evidence-based. Both action and inaction affecting fundamental rights have been scrutinised to ensure that governments took the necessary

[149] Popelier et al., The Role of courts in time of crisis: a matter of trust, legitimacy and expertise, EJRR, cit. p. 00 distinguishing two phases: "In the first phase, the assumption is that the public expects the government to firmly respond to the crisis, no matter what, which leaves little room for judicial scrutiny of health crisis measures. In the second phase, when trust starts to wane, the assumption is made that the public expects the government to balance safety against fundamental rights and social needs".

[150] See Employment & Labour Relations Court of Kenya, Petition 122 of 2020, 17 March 2021, Kenya National Private Security Workers Union &44 Others v. The Cabinet Secretary Ministry of Health & & Others, cited in fn…***109 above.

measures to contrast the pandemic and protect health. Courts have been responsive to the evolution of the crisis and their review has usually reflected both the level of knowledge and the necessity to decide under uncertainty by national governments. More deference has characterized the choice of the regulatory instruments. Very limited litigation has so far addressed the choice between hard and soft law. More intense has been the scrutiny over the compliance with the principle of legality, especially when fundamental rights were at stake.

The consequences of the crisis will survive the end of the pandemic and courts are likely to continue playing a significant but different role in the years to come. The subject matter of litigation will change and the issue of liability and the allocation of losses from the pandemic will eventually overcome the crisis management questions that have engaged the courts so far.