

University of Trento

COVID19 Litigation: The Role of National and International Courts in Health Crisis Management

Within a joint initiative of the Faculty of Law and of the School of International Studies
29 November 2022

The COVID19 Litigation Project: the way forward



UNIVERSITÀ
DI TRENTO
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Covid-19 Litigation
OPEN-ACCESS CASE LAW DATABASE

A few questions triggered the “COVID-19 Litigation Project”

- In which circumstances and on which legal bases could governments be ever held responsible for the way they face the COVID-19 pandemic or any other comparable health emergency?
- What is the role for the courts in times of global health emergency and how do courts balance fundamental rights and freedoms when the latter are restricted by public health measures?
- Could decisions issued by a certain national or supranational court be relevant for other courts facing similar issues in other countries and contexts within a global-scale emergency?
- Can courts' decisions be a ‘guidance’ for policy makers and governments in designing their responses to the current global crisis or any other possibly occurring in the future?

The Covid19 Litigation Project

WHICH OBJECTIVES?

- Access to caselaw
- Cross-country comparative analysis
- Dialogue across and within different communities (judiciary, policy makers, scientific communities, scholars)

WITH WHOM?

- The World Health Organization
- Our Partners (U. of Externado [Colombia], NUS [Singapore], VIT School at Chennai [India], QUT [Australia], Makerere [Uganda]) and contributors (Global Pandemic Network, Solomon Center of Health Law at Yale, Georgetown University, NTH University in Taiwan)
- The COVID19 Litigation International Network of Judges and Scholars

How?

THE PROJECT METHODOLOGY

The Project methodology

- **A question-based approach**
 - **Case selection**
- **The development of common analytical tools**
- **A comparative law methodology**
 - **The COVID19 Litigation Comparative Glossary**
- **An interdisciplinary approach**

Online at <https://www.covid19litigation.org/>

Covid-19 Litigation
OPEN-ACCESS CASE LAW DATABASE

About the project | Case Law Database | News | Contacts

Open-Access Case Law Database

Among the unprecedented challenges posed by the Covid-19 crisis, countless legal issues are at the forefront. The Covid-19 Litigation Project aims to provide an overview on a worldwide scale of the case law resulting from challenges against government measures to fight the pandemic.

[ACCESS THE DATABASE](#) [ABOUT THE PROJECT](#)

All case notes available for consultation.

Latest news

Read our latest news and project announcements



Oct 11, 2023 / Case law

USA - The U.S. District Court for the Eastern District of Pennsylvania on Long Covid and disability



Oct 11, 2023 / Case law

Europe - The ECHR on the application on the French "Health Pass"



Oct 11, 2023 / Case law

India - The Gauhati High Court on the vaccination requirement

[View all the articles](#)

DB: Almost 2000 cases online today

Search by:

- World region and country
- Year
- Area of interest
- Fundamental rights involved
- Public/private parties
- Vulnerable group
- Decision's outcome

Keep up-to-date about latest new cases

Report a case from your own jurisdiction

Region

WHO Region

Country

Year

Area

Fundamental Rights involved

Nature of the parties
Claimants

Defendants

Vulnerability groups

Outcome of the decision

Quick search

[United States of America, 2:20-cv-02927-CE](#)

Area: Freedom to con
Fundamentals rights
Outcome: Claim inad

[Italy, Council of State](#)

Area: Vaccination
Fundamentals rights
self-determination)
Outcome: Claim inad

[United States of America](#)

Area: Vaccination
Fundamentals rights
Outcome: Claim inad

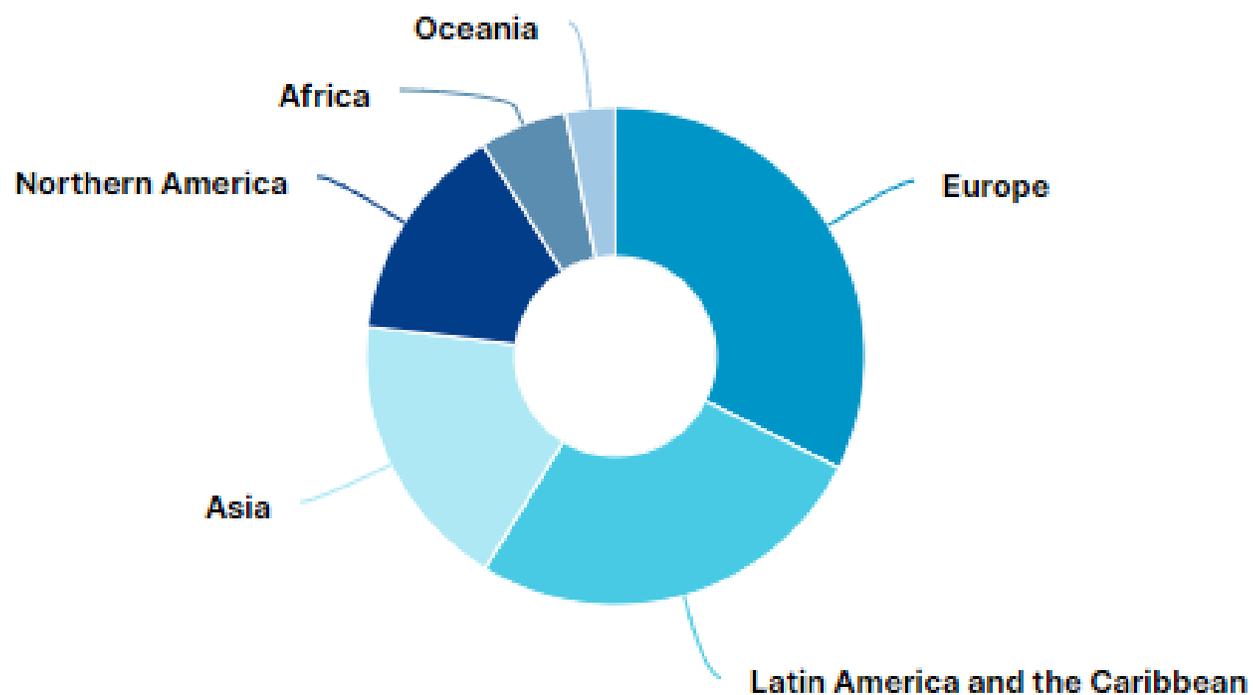
[Australia, New South Wales](#)

Area: Vaccination
Fundamentals rights
Outcome: Claim inad

[United States of America](#)

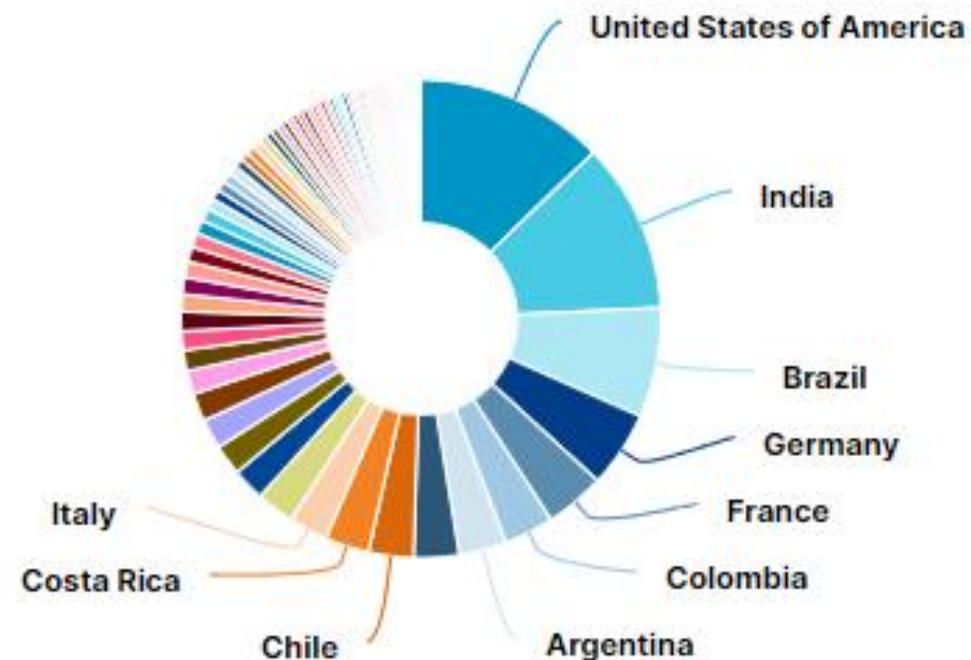
A glimpse on the cases now online

Cases by Region



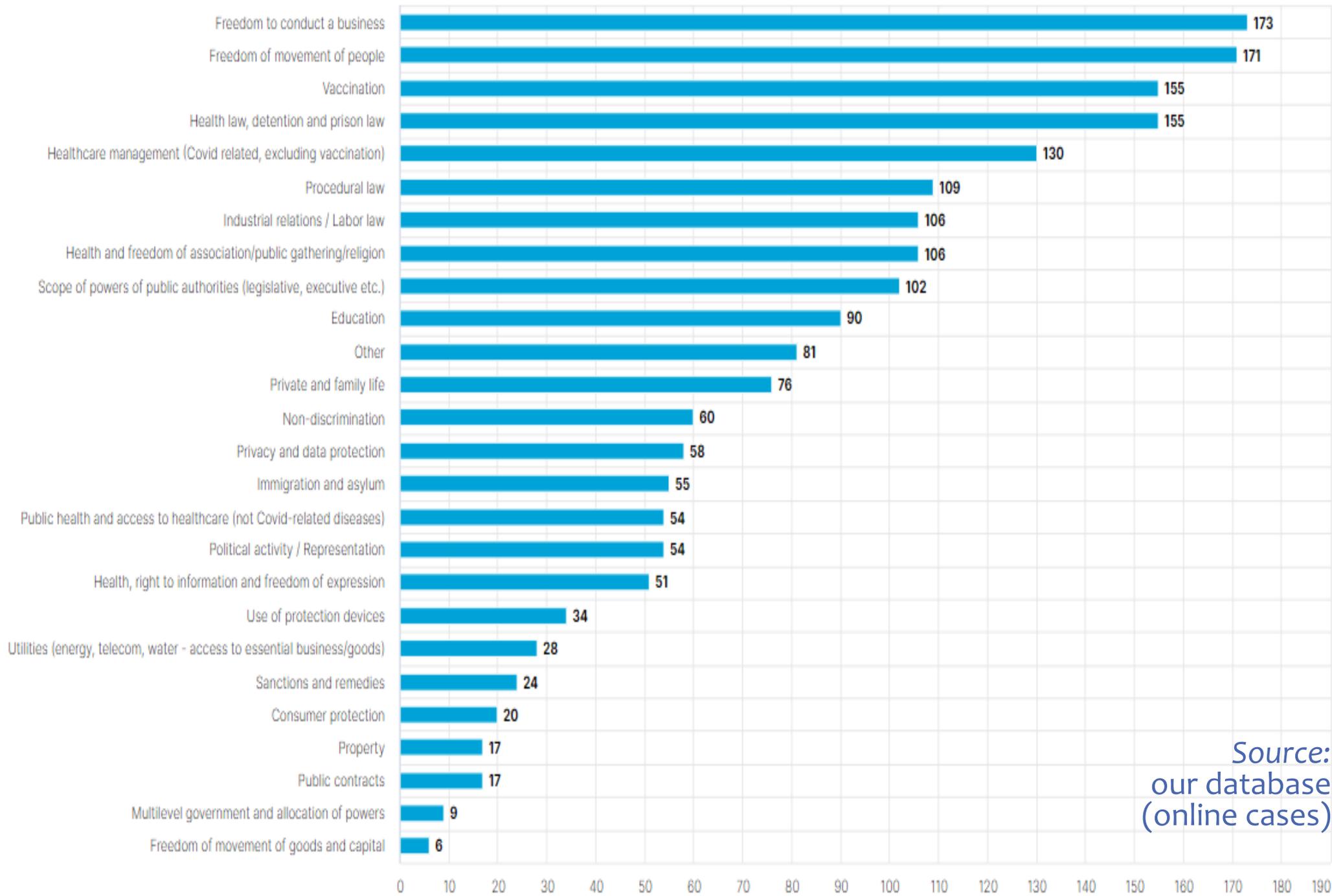
Source:
our database
(online cases)

Cases by Country



- ✓ Intensity of litigation
- ✓ Accessibility to caselaw
- ✓ No statistical analysis

In which areas has litigation mostly emerged?



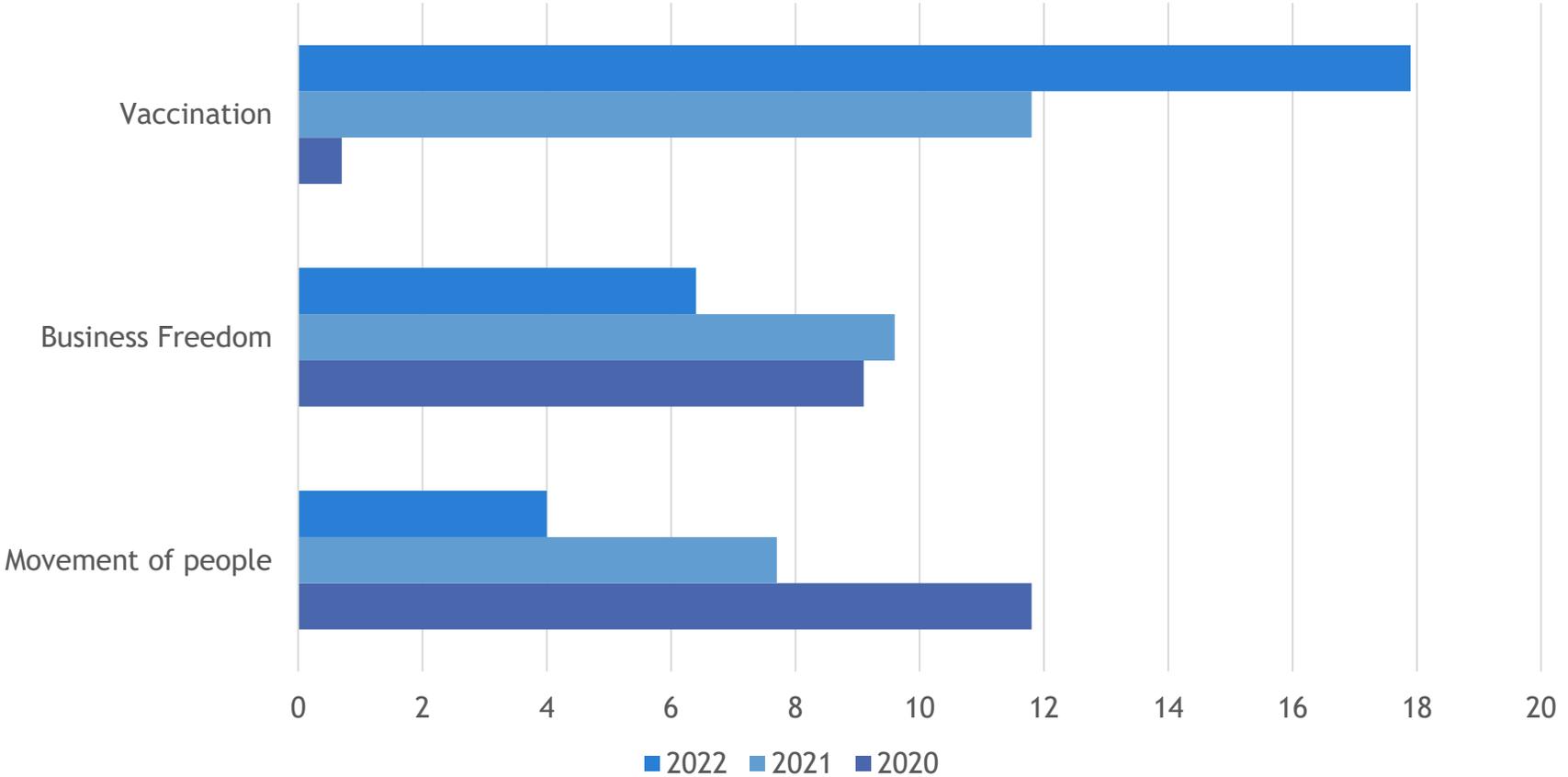
Source:
our database
(online cases)

How has litigation changed overtime?

Main areas (2020)
Movement of people
Business freedom

Main areas (2021)
Vaccination
Business freedom

Main areas (2022)
Vaccination
Employment relations



Source:
our database
(online cases)

A comparative view: the main areas of litigation across regions

AFRICA (115 cases)

Political activities (12)

Scope of powers of national authorities (10)

Judicial proceedings (9)

Healthcare mng (9)

ASIA (336 cases)

Healthcare mngm (43)

Freedom to conduct a business (31)

Education (28)

Vaccination (25)

EUROPE (670 cases)

Freedom of movement of people (92)

Freedom to conduct a business (90)

NORTH AMERICA (277 cases)

Freedom to conduct a business (45)

Freedom of association/public gathering (37)

Vaccination (31)

SOUTH AMERICA (547 cases)

Detention (69)

Vaccination (64)

Healthcare mng (51)

OCEANIA (64 cases)

Freedom of movement (13)

Employment rel (12)

ASIA (excl. India) 111

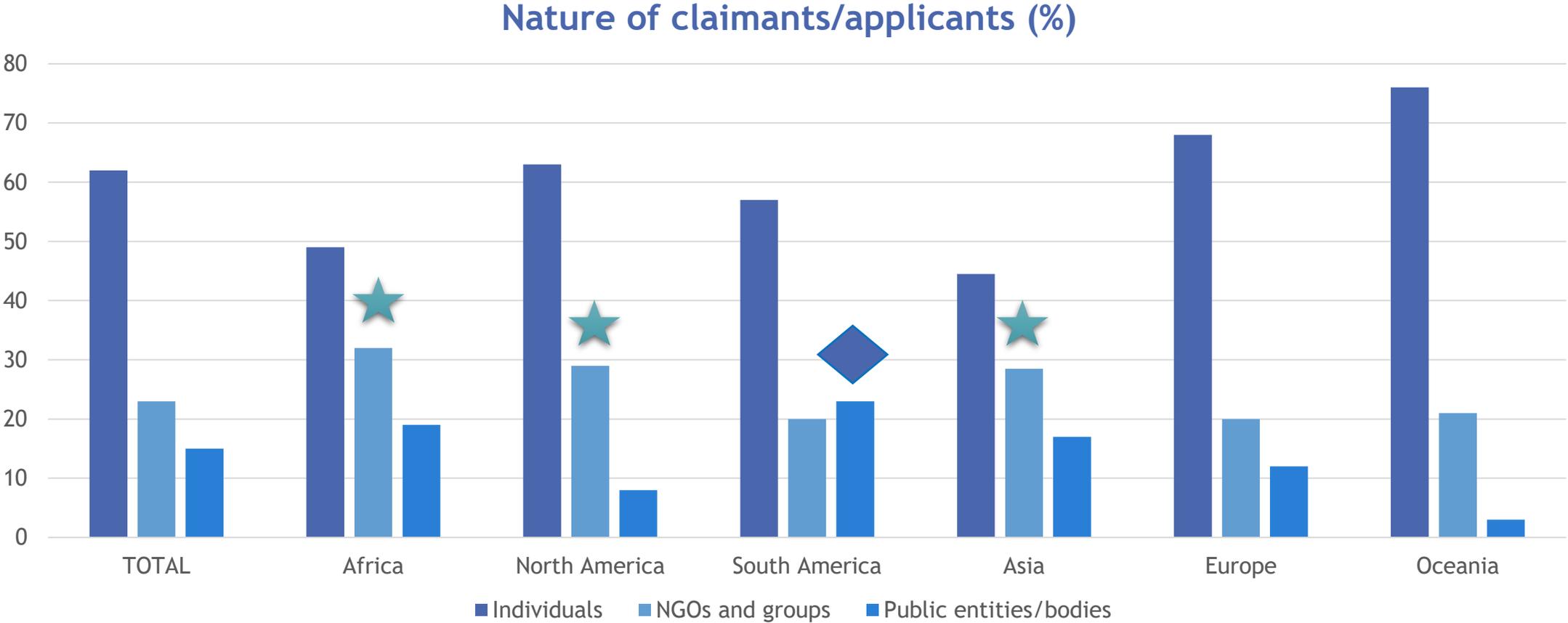
Freedom of expression and right to information (20)

Detention (12)

Sanctions (9)

Source:
our dataset
(tot. 2009 cases)

A comparative view: individual v. collective and public interest claims



A comparative view: a different litigation outcome

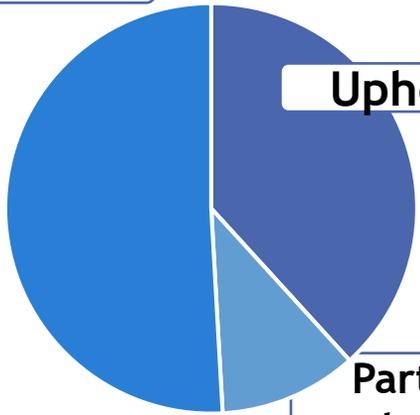
ALL Regions

Rejected

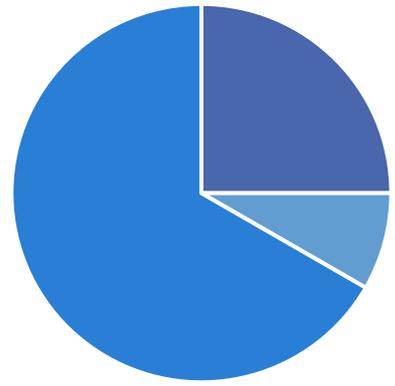
Upheld

Part.
upheld

■ Upheld ■ Part. upheld ■ Rejected ■

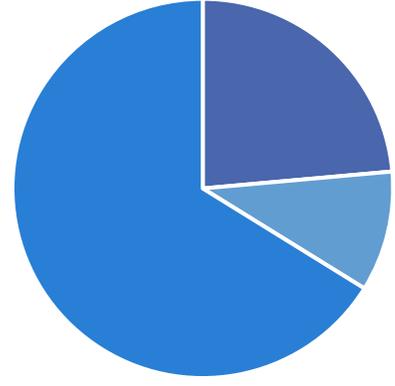


Oceania



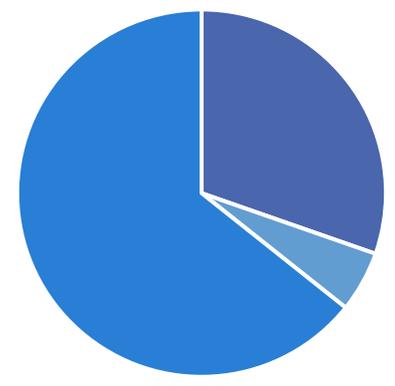
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North America



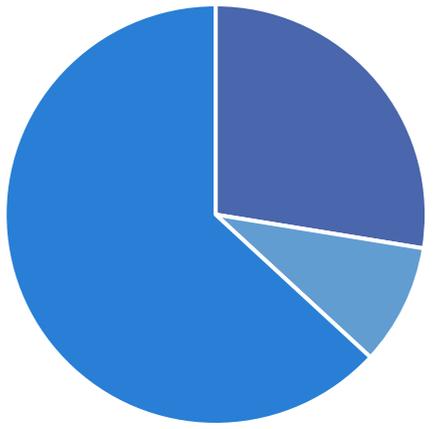
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Asia (excl India)



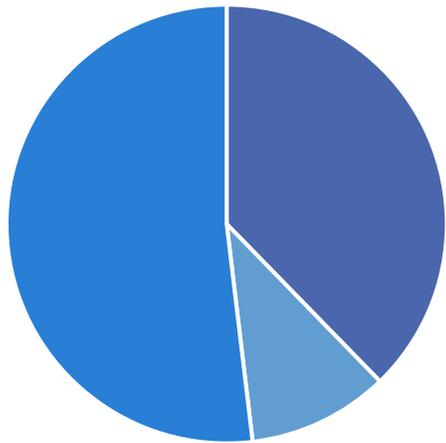
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Europe



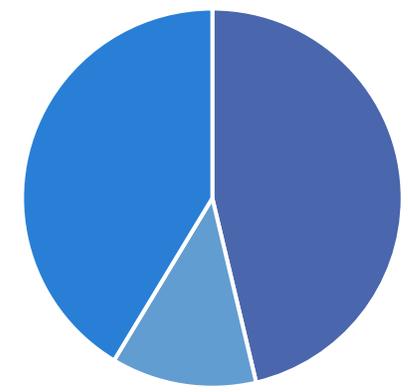
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Africa



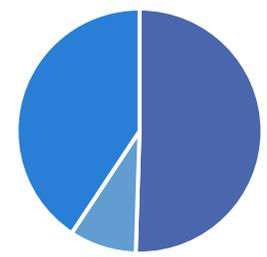
■ Upheld ■ Partially u.h. ■ Rejected ■

South America



■ ■ ■ ■

India



■ ■ ■ ■

Source:
our database
(online cases)

The role of courts in times of pandemic

- ✓ Courts as guardians of fundamental rights and of the rule of law
 - i. Constitutional review of legislative acts
 - ii. Judicial review of administrative decisions
 - i. Measures taken
 - i. Invalidity
 - ii. Modification / withdrawal
 - ii. Measures not taken (omission)
 - i. Demanded action
 - iii. Liability assessment in regard of public decision making affecting fundamental rights and claim for damages (the role of tort)
 - iv. Enforcement of compensatory and recovery measures: can fundamental rights be indemnified?
- ✓ Tasks under (i) and (ii) have prevailed in the first two years; (iii) and (iv) are growing and will be more and more relevant in the near future.

Some focal points in Covid19 litigation at global level

- The role of **general principles** and open-ended concepts
 - Proportionality and precautionary principles as means for balancing fundamental rights and freedoms (part. in European and South American litigation)
 - Reasonableness, rationality as means for judicial review of public powers (fundamental rights matter, part. in case of plain and palpable violation - US caselaw, *Jacobson*)
- The intense dialogue between **law and science**
 - To what extent should public health measures be evidence-based in times of pandemics?
 - To what extent should the shortcomings of science be borne by fundamental rights' holders in the light of the precautionary principle?
- The attention paid to the rights of **the most vulnerable** ones (children, elderly, chronic disease patients, disabled, etc.), e.g.:
 - Access to intensive care services (German Constitutional Court, 16 December 2021)
 - The duty to differentiate personal protective devices or bans against gathering at schools, based on pupils' vulnerability (Italian Council of State, 2 April 2021, no. 1804; Slovenian Constitutional Court, 3 December 2020, U-I-445/20-13)

A few highlights in COVID19 litigation

- Yesterday
 - The freedom of movement
- Today
 - The vaccinations mandates
- Tomorrow?
 - States' and health institutions' liability

Among the first freedoms to be restricted: the freedom of movement

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

Among the most critical issues: are vaccination mandates compatible with fundamental rights?

- **General scope vaccination mandates**
 - **Austria:** strict proportionality test (ref. ECtHR); individual self-determination v. public health; conform to the Constitution (Const. Court, 23 June 2022, n° G 37/2022-22); **Costa Rica:** challenge rejected; exceptions to compulsory vaccination foreseen (Supreme Court, 12 November 2021, n° 25499)
- **Vaccination as occupational requirement**
 - **Scope of power of authority mandating vaccination:** no power (USA, OSHA case, Supreme Court, 13 January 2022, n° 21A244 and 21A247); no legal basis existing (Slovenia, Constitutional Court, 29 November 2021, n° 147/21, 149/21, 152/21, 155/21, 170/21, 171/21)
 - **Healthcare workers:** need to ensure patients' safety, protect most vulnerable ones, solidarity p. (Italy, Council of State, 20 October 2021, n° 7045; Germany, Constitutional Court, 27 April 2022, n° 1 BvR 2649/21; USA, Supreme Court, 13 January 2022, n° 21A240 and 21A241)
 - **Lawfulness of dismissal:** unlawful if discriminating btw fixed term v long term contracts (France, Constitutional Council, 5 August 2021, n° 2021-824 DC); unlawful the order for vaccination if associated with dismissal (High Court of New Zealand, 25 February 2022)
- **Health passes associated with vaccination**
 - Lawful and proportionate (alternative grounds for pass available): France, Constitutional Council, 5 August 2021, n° 2021-824 DC; Access to EP: General Court of the European Union, Roos & Others v Parliament, 27 April 2022, T-710/21, T-722/21, T-723/21

The aftermath of the pandemic: States' liability and the court

- Few liability cases, a wide set of liability issues already brought before courts
 - **Adverse reaction to vaccination** (e.g., Korea, Seoul Administrative Court, Aug-Sept 2022, upheld)
 - **Poor management of public health measures** (e.g., pending case in Thailand, Civil Court, 27 September 2021, No. Por 4412/2564)
 - **Medical malpractice and hospitals' failure to provide adequate healthcare services** (e.g., Russian Federation, Shatura District Court of the Moscow Region, 19 August 2021, Decision No. 2-32/2021; India, High Court of Orissa at Cuttack, 23 March 2022; Lithuania, Regional Administrative Court 23 July 2020, case No. I1-4907-342/2020)
 - **Employers' failure to adopt health safety measures in workplaces** (e.g., Spain, Labor court of Alicante, 7 January 2022, upheld; Court of Appeal of Valparaiso, Chile, 20 June 2022, upheld)
 - **Infection contracted by employees' family members** (e.g., pending case before the Supreme Court of California, USA)
 - **Damages due to distance teaching** (e.g., Italy, Adm. Reg. Trib. Naples, 28 September 2021, n. 7351, dismissed)
 - **Disproportionate application of enforcement measures, inhuman and degrading treatments** (e.g., High Court of Kenya - Constitutional and Human Rights Division, 30 June 2021, Petition No. 8 of 2020)
- The **HOW** questions, part.: how to ascertain the fault (or strict liability?) and the causal link btw the contested behavior and the damages?
- The **IF** question (even more fundamental): is tort liability an effective, efficient and fair instrument to bring justice in the context of a pandemic?

Looking ahead: many open questions

- How will litigation evolve once the pandemic has come to an end?
- Will policy makers take judicial outcomes into account in future decision making?
- Will fundamental rights be protected to a higher extent where courts have been and are more active?

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Thank you

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