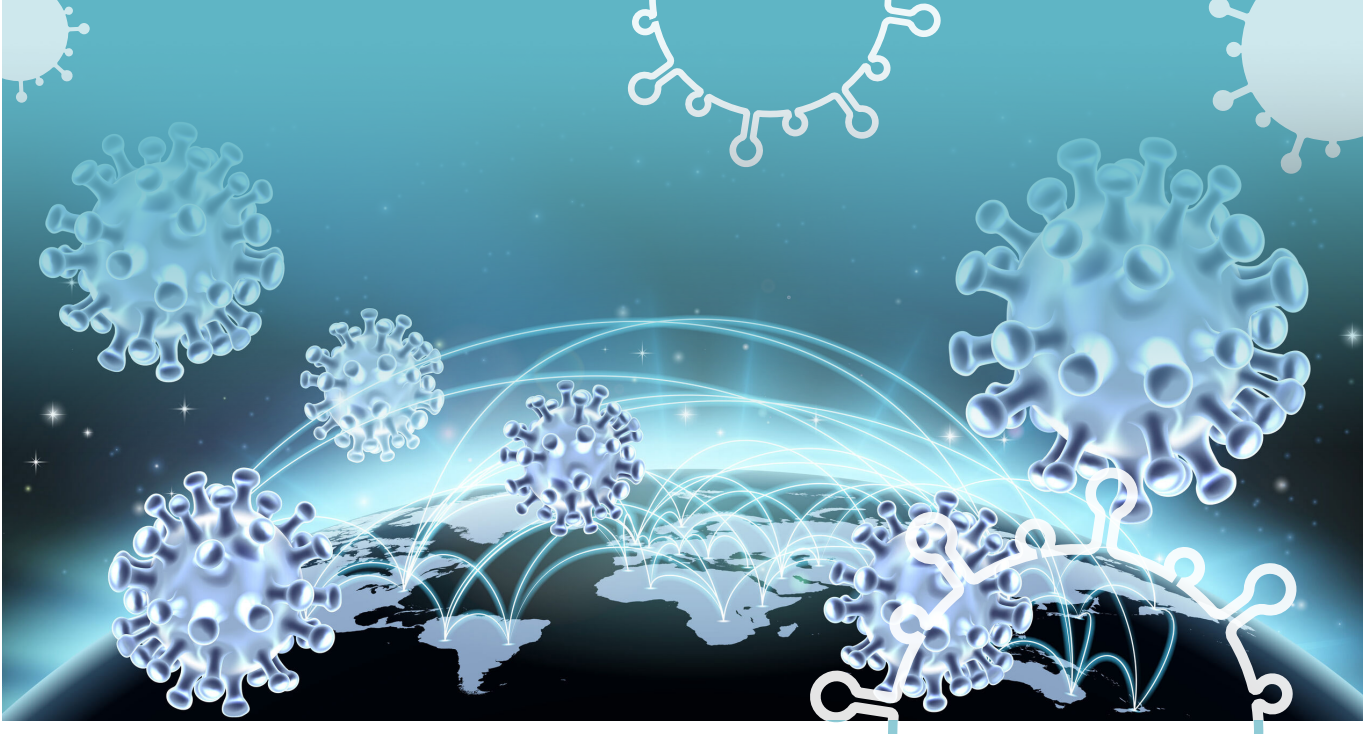

JUDICIAL REVIEW IN THE PANDEMIC

THE ROLE OF COURTS IN THE SARS-COV-2 PANDEMIC IN ASIA AND THE PACIFIC

Edited by

Anton Ming-Zhi Gao
Stefan Samse

KONRAD ADENAUER STIFTUNG

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Preface

The outbreak of the COVID-19 pandemic in 2020 posed an unprecedented threat to the sustainable development of mankind of this century. It has upended lives across all countries, societies and communities in the last two years. Devastating the world, it has led to more than 532,804,371 infections, and more than 6 million deaths globally (as of June 1, 2022). Despite a decrease in confirmed cases in mid-2020, the subsequent second, third, and fourth waves worsened the situation, due to new variants including Delta and Omicron.

To tackle such a severe spread and threat to human health and life, emergency administrative power and unprecedented legal measures affecting citizens' fundamental rights have been introduced and implemented worldwide that ended up curbing civil liberties. For instance, large-scale lockdowns were implemented in numerous countries to reduce the spread of COVID-19. Moreover, unprecedented quarantine measures in airports and for locally confirmed cases, compulsory wearing of face masks, rigid gathering rules, and perhaps more worryingly, the wide adoption of privacy-intrusive technology or name-based systems to monitor and track the spread of the virus, and suppressing media freedom in the name of combating COVID-19 have been observed.

To monitor rule of law issues arising from the implementation of these measures, intensive global collaborations are tracking and collecting information on these legal measures. For instance, the Max Planck Institute for Comparative Public Law and International Law in Germany, University College London, and King's College London have initiated the Lex-Atlas: A COVID-19 project to map legal responses to the pandemic in more than 80 jurisdictions, and publish the findings in the Oxford Compendium of National Legal Responses to COVID-19. Other important initiatives of this kind include the ACAPS COVID-19 Government Measures Dataset, the COVID-19 Law Lab, the International Center for Not-for-Profit Law's COVID-19 Civic Freedom Tracker, the IMF Policy Responses to COVID-19 Policy Tracker, CCCSL: CSH COVID-19 Control Strategies List, COVID Analysis and Mapping of Policies, and the CoronaNet Research Project These initiatives are very helpful for legal researchers to obtain a primary overview of COVID-19-related legal policies in different countries and jurisdictions.

The lack of scrutiny of the parliament's role in measures noted above could also pose a threat to constitutionalism, even in matured democracies. The Konrad Adenauer Stiftung (KAS), whose long mission has been to promote freedom, liberty, peace, and justice, and deepen development cooperation, identified such potential issues early on, and quickly launched a research and book project to investigate the missing role of parliament during the pandemic in Asian and Pacific countries, titled "Parliaments in the Pandemic: Between Crisis, Civic Rights and Proportionality," in early February 2020. The research findings from nine countries were published in one book, available for public access. (Eisma-Osorio, R. L, Grabow, K., Hefele, A., & Smase, S. (2021), *Parliaments in the Covid-19 Pandemic: Between Crisis Management, Civil Rights and Proportionality*, Konrad Adenaur Stiftung, viewed date, <https://www.kas.de/en/web/rspa/single-title/-/content/parliaments-in-the-covid-19-pandemic-between-crisis-management-civil-rights-and-proportionality>.) This was one of the very first printed publications to provide a critical and balanced review of rule of law issues, with particular focus on the legal situation in Asia-Pacific countries.

In addition to its research project and book publication, the Rule of Law Programme

Asia, KAS hosted several events to follow up and observe the legal developments covering more than 10 jurisdictions in the Asia-Pacific region. Due to difficulties in hosting physical conferences, KAS undertook immense effort to use webinars or hybrid methods to mobilize its long cultivated regional rule of law and fundamental rights expert network to timely update the legal status and critical analysis of country situations, particularly on the likely institutional failure of the three powers (administrative, legislative, and judicial powers) inside the government. The conferences include:

- International Round Table Discussion on "COVID-19 Pandemic and Rule of Law," Webinar, April 15-16, 2021
- International Conference on "The Role of Parliament and Judicial Review during COVID-19 Pandemic," July 28-29, 2021
- International Conference on "New Constitutionalism and Rule of Law during the COVID-19 Pandemic," Hybrid, November 23-24, 2021

Even though the pandemic continues to persist, most types of policy and legal measures pertaining to pandemic control have already been adopted worldwide in the last two years. The time is right to assess the potential issues arising from the "implementation" of these policy and legal measures, most of which may have been adopted under the auspices of emergency or non-emergency powers of the executive and administrative arms of government to protect citizens. With the emergence of cases and disputes over the implementation of such measures, it is timely to investigate issues related to checks and balances. From the rule of law perspective, a matured legal and democratic society is highly reliant on the judicial branch to play the role of guarantor or gate keeper of fundamental rights, civil liberties and rule of law. This has motivated us to publish this edited book titled, *Judicial Review in the Pandemic: The Role of Courts in the SARS-CoV-2 Pandemic in Asia and the Pacific*.

This book intends to provide a critical overview and review of the court's role during the pandemic in India, Mainland China, Indonesia, Malaysia, New Zealand, the Philippines, South Korea, Taiwan, and Vietnam. From our preliminary findings, the judicial branch has played a wide spectrum of roles, from activism to inactivism. While the court in India has been very active in challenging the administrative actions and even intervening in many policy measures, courts in Indonesia, Malaysia, Taiwan, and Vietnam have placed public health as the priority, favoring the measures adopted by their governments to different extents.

The findings send out a worrying message that go beyond the concerns expressed by International Institute for Democracy and Electoral Assistance that "Many democratic governments are increasingly adopting authoritarian tactics, accentuated by the Covid-19 pandemic, while autocratic regimes are consolidating their power."[1] These unprecedented rigid pandemic rules and measures largely stem from relatively weak or insubstantial legal basis the lack of sufficient deliberative process, and even insufficient due process during implementation. Furthermore, they are usually reinforced with higher criminal or

[1] See International IDEA, Democracy faces perfect storm as the world becomes more authoritarian, available at: https://www.idea.int/news-media/news/democracy-faces-perfect-storm-world-becomes-more-authoritarian.

administrative penalties or fines. Some Asian countries have also seen governments that sought to expand the scope of pandemic-related measures to other non-pandemic issues, such as fake news regulations. If these measures can be justified and passed by judicial review, this phenomenon would pose serious threats to the post-COVID-19 recovery of rule of law and legal order.

This book is groundbreaking in that it is one of the very first and few books to focus on the critical review of role of courts in the Asian region,[2] rather than focusing on pandemic policies and measures that have been extensively covered.[3] It must be noted however, the study is a mere snapshot; at this moment, a global initiative[4] that has been developed by the World Health Organization (WHO) to investigate court cases around the world, which is likely to provide further interesting research topics, including comparing court attitudes in different countries and continents. We hope this book will inspire legal researchers to face this serious rule of law issue, and influence the post-recovery of the world legal order by getting involved and actively contributing through their networks.

We are thankful to the authors for the intense discussions and their highly informative and well-founded contributions. Moreover, we would like to thank all our supporters who made the study possible in the first place – with special thanks to Ms. Susan Chan, on KAS's side.

Anton Ming-Zhi Gao
Stefan Samse
Taipei City and Singapore, June 2022

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2 Book focusing European countries, see e.g., Hondius, E. H., Silva, M. S., Nicolussi, A., Coderch, P. S., Wendehorst, C., & Zoll, F. (eds.) (2021), *Coronavirus and the Law in Europe*. Intersentia..

3 See e.g., Kirchner, S. (2021), *Governing the Crisis: Law, Human Rights and COVID-19*. LIT Verlag Münster.

4 COVID-19 Litigation (no date), *Open-Access Case Law Database*, viewed date, https://www.covid19litigation.org/.

1. The Role of Courts in COVID-19 Prevention and Control in China Mainland

Jiajia Jiang

1. Introduction

According to Fighting COVID-19 China mainland in Action released by The State Council Information Office of the People's Republic of China (SCIO) in June 2020, the COVID-19 epidemic is a major public health emergency, spreading faster and wider than any other in a century, and has proven to be the most difficult to contain. For fighting against COVID-19, China put in place a tight prevention and control system involving all sectors of society. The government took measures to break the chains of transmission through early intervention, such as preventing public gatherings and cross-infection, closing some public places, delaying the spring semester in schools, and so on (SCIO, 2020). And, residents strengthened personal protection, consciously implemented prevention and control requirements such as observing self-quarantine at home and 14-day self-isolation after cross-region travel, maintaining social distance, reducing gathering, wearing a mask and washing hands frequently when going out (SCIO, 2020). Throughout the fierce battle against COVID-19, China put protecting the people and human life above everything else, made well-timed adjustments in response to COVID-19. 1.4 billion Chinese people have exhibited enormous tenacity and solidarity.

During the COVID-19, a large number of various cases related to the epidemic have emerged across the country. The courts have given full play to their functions, properly handled various disputes concerning epidemic by the law, severely punished all types of illegal and criminal acts that hinder epidemic prevention and control, and actively assumed the responsibility of maintaining social order. The article will sort out different kinds of judicial interpretations and cases since the outbreak of the epidemic, analyze the role of courts in epidemic prevention and control, further discuss the legal issues existing in the trial.

2. The Court: Essential Part of the Judicial Safeguard during the COVID-19

In this fierce process, it is the joint efforts of many parties that bring the major strategic success in response to COVID-19. The orderly prevention and control of the COVID-19 cannot be separated from the legal protection. The court is an essential part of Chinese judicial organs, and due to the complexity and diversity of disputes, there are different levels within the Chinese court system. The courts are divided into different divisions which have different jurisdiction over cases according to the Constitution of the People's Republic of China and the Organic Law of the People's Courts. The people's courts are divided into the Supreme People's Court (Hereinafter referred to as SPC), the local people's courts at all levels, and the special people's courts which include military

courts, maritime courts, intellectual property courts, and financial courts, among others. The courts shall establish criminal, civil and administrative divisions, and the courts at or above the intermediate level shall also establish other divisions when necessary. The courts at various levels set enforcement organs that are responsible for the enforcement of judgments and orders in civil and economic cases requiring enforcement by the courts. During the COVID-19, the court has played an important role in COVID-19 prevention and control and made a major contribution which includes issuing judicial policies, punishing crimes, and resolving conflicts related to COVID-19. Next, we will introduce the performance of the courts in trials and judicial interpretation through typical civil law, criminal law and administrative law cases during the COVID-19.

2.1 Civil Law Case

Civil and commercial trials serve as a barometer of Chinese economic and social development and the main battlefield of judicial service for economic development (SPC, 2020). Searching the COVID-19 in civil cases as the keyword on the causes of the cases were focused on contract disputes, mainly including disputes over the sale and purchase contracts, loan contracts, lease contracts, construction contracts, and service contracts, etc. (Laws & Regulations Database-Chinalawinfo, 2020). The outbreak of COVID-19 and the prevention and control measures have affected normal life in many aspects, and a large number of civil and commercial contracts have been obstructed in their performance, resulting in many civil disputes. The rules of change of circumstances and force majeure set up to solve the obstacles to contract performance have become the focus of the practical and academic circles (Wang, 2021).

Table 1-1: Typical Cases of Contract Disputes during the COVID-19

Civil Case Ⅰ: Travel Service Contract Dispute (Chengdu Court, 2020)	
Facts	The plaintiff signed a travel service contract with the defendant, a travel agency, on December 31, 2019, to agree that the defendant would provide travel services for the 2020 Tokyo Olympics. However, due to the global spread of the COVID-19, the Tokyo Olympics Organizing Committee of Japan issued an official postponement announcement on March 30, 2020. The plaintiff claimed that the contract was terminated and that the defendant should pay damages and bear the attorney's fees.
Rule Application	The court actively organized communication between the two parties, informing the plaintiff that the termination of the contract due to force majeure did not involve the pursuit of liability for breach of contract. The two sides finally reached a mediation agreement: the defendant refunded the plaintiff in installments for the unfulfilled contract; the plaintiff voluntarily abandoned the compensation for damages, attorney fees, and other litigation requests.
Civil case Ⅱ: Partnership Agreement Dispute (Chongqing Rongchang District People's Court, 2020)	
Facts	The defendant, a pig farm, was affected by the COVID-19, and the number of pigs owned was greatly reduced, and its production and operation were in difficulties. The plaintiff still requested it to pay the original partnership operation fee.

Rule Application	The court held COVID-19 as a force majeure event under the law, and it would be unfair to require the defendant to pay the original cooperative fee, so the rule of change of circumstances should be applied and the risk should be shared by both parties.
Civil case Ⅲ: Sale and Purchase Contract Dispute (Anhui Province Changfeng County People's Court, 2020)	
Facts	On June 10, 2019, the plaintiff and the defendant signed a residual material sales and recycling contract, which provided that the defendant should recover the plaintiff's output of residual material and pay a fixed price. Because the production volume dropped under the influence of the epidemic, the residual material produced was reduced and lower than the contracted price. However, the plaintiff still requested the defendant to pay the purchase price of the residual material according to the original contract.
Rule Application	The court changed and reduced the amount to be paid by the defendant according to the principle of equity and change of circumstances.

(Source: Compiled by this author.)

In April 2020, the SPC issued the Guiding Opinions (Part I) on Several Issues of Properly Hearing Civil Cases concerning the COVID-19 Pandemic (Civil Cases Opinion). Its content focuses precisely on the application of force majeure rules in contract disputes, making detailed provisions to guide the courts at all levels to properly hear civil cases involving the epidemic in accordance with the law, but there is also a certain amount of discussion: Why the Civil Cases Opinion qualifies the COVID-19 and the prevention and control measures as force majeure? In the event of obstacles to contract performance, some courts apply the rules of force majeure and some apply the rules of change of circumstances, how to connect between force majeure and change of circumstances when the rules are applied? The role played by the force majeure rule can be seen in the above three typical cases of contract disputes during the COVID-19, but the ambiguity of the application of the force majeure rule and the change of circumstances rule in practice can also be seen.

2.2 Criminal Law Case

After the outbreak of the COVID-19, illegal and criminal acts such as resistance to prevention and control measures, production and sale of counterfeits, price inflation, and fraudulent seriously disrupted the order of prevention and control, market order, and social order, requiring criminal justice to take on an urgent, professional, and regulatory role (Lin, 2020). On February 6, 2020, China issued the Opinions on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia (the Opinion on Criminal and Illegal Activities), in which the criminal policy is clearly defined, including 9 types, 35 kinds of acts and 33 crimes (SPC, 2020).

Table 1-2: Crimes Types in the Notice by the SPC, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice of Issuing the Opinions on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia

Types	Crimes
Crimes that resist the epidemic prevention and control	The crime of endangering public security by dangerous means
	The crime of impairing the prevention and treatment of infectious diseases
	The crime of obstructing public services
Crimes of hurting doctors by violence	The crime of intentional injury
	The crime of picking quarrels and provoking trouble
	The crime of insulting other people or the crime of picking quarrels and provoking trouble
	The crime of illegal detention
Crimes of producing or selling fake goods	The crime of producing or selling fake medicines, or the crime of producing or selling inferior medicines
	The crime of producing or selling medical equipment that do not meet the relevant standards
Crimes of price gouging	The crime of illegal business operation
Crimes of frauds or assembling a crowd for robbing	The crime of fraud
	The crime of false advertisement
	The crime of assembling a crowd for robbing
Crimes of creating and spreading rumors	The crime of making up or intentionally spreading false information
	The crime of picking quarrels and provoking trouble
	The crime of inciting subversion of state power
	The crime of refusing to perform the information network security management obligation
Crimes of breach of duty, dereliction of duty, corruption or misappropriation in the epidemic prevention and control	The crime of abusing power or the crime of neglecting duties
	The crime of malfeasance in the prevention and treatment of infectious diseases
	The crime of spreading infectious diseases' viral strains
	The crime of embezzlement, the crime of duty-related encroachment, the crime of misappropriate of public funds, or the crime of misappropriation of funds
	The crime of misappropriating specific funds or materials
Crimes of damaging transportation facilities	The crime of sabotaging transportation facilities
Crimes of destroying wildlife resources	The crime of illegally hunting and killing rare and endangered wild animals or the crime of illegally purchasing, transporting or selling rare and endangered wild animals and their products
	The crime of illegal hunting
	The crime of illegal business operations
	The crime of illegally purchasing rare and endangered wild animals and their products
	The crime of covering up or concealing crime-related income

(Source: Compiled by this author.)

Uphold the principle of strict and speedy disposal in the trial, and the court has provided judicial guarantee to combat illegal crimes and maintain epidemic prevention and control (Dong, Liu, 2021). The following are typical criminal law cases in the epidemic.

Table 1-3: Typical Cases of Criminal Law during the COVID-19

Criminal case Ⅰ: Price Gouging (Fujian People's Procuratorate, 2020)	
Facts	During the COVID-19, the defendant bought masks at prices ranging from RMB 0.8 to RMB 12.8 each and sold them at prices ranging from RMB 2.5 to RMB 30 each. Among the masks sold, the total number of masks whose sales price exceeded 100% of the purchase price was 15,868, and the total sales amount was RMB 92,266.
Rule Application	The court ruled that the defendant was guilty of illegal business operation and sentenced him to a fine according to law.
Criminal case Ⅱ: Producing or Selling Fake or Substandard Preventive or Protective Products or Materials (Zhejiang People's Court and Prosecution, 2020)	
Facts	In January 2020, the defendants bought 56,000 masks without knowing the source of them. They discovered there is no production date, certificate of conformity or manufacturer on the masks, and there are obvious quality problems. But the defendants still sold them through WeChat in the name of medical masks. on February 14, the procuratorate prosecuted the defendants for the sale of medical equipment that do not meet the relevant standards.
Rule Application	On February 16, the court made a first-instance verdict: the defendants were guilty of selling medical equipment that do not meet the relevant standards, sentenced to fixed-term imprisonment and a fine.

(Source: Compiled by this author.)

However, it can be seen through the above typical cases that there are still controversies and challenges in the application of laws and procedures in judicial practice, such as the correctness or otherwise of the interpretation of the Opinion on Criminal and Illegal Activities to the catchall clauses of the Criminal Law; the existence of different sentences in the similar cases in courts due to the imperfection of the law and the vague standard of conviction; and the phenomenon of the excessive pursuit of speed in trial procedures (Qu, Li, 2021).

2.3 Administrative Cases

During the epidemic, in order to effectively guard the people, administrative organs have imposed administrative penalties for violations of the law that obstruct the prevention and control of the epidemic. For example, in Shaoxing, since the epidemic, the city has investigated and dealt with a total of 12 cases and 13 persons in administrative cases involving epidemic. Among them, the violations involved are: 8 cases of refusal to execute decisions and orders in a state of emergency, 2 cases of fabricating facts disturbing public order, 1 case of obstruction of execution of duties, and 1 case of provocation and nuisance (Public Security Bureau of Shaoxing City, Zhejiang Province, 2021).

3. Challenges to the Courts during the COVID-19

3.1 Civil Law Case

3.1.1 Inconsistent Application of Rules around the Courts

After the outbreak of the COVID-19, the courts issued guidelines or notices related to the contract disputes during COVID-19, but the trial thinking of courts is not exactly the same, mainly in five different situations: (1) clear that the COVID-19 is force majeure, but analogous or reference to the change of circumstances rule; (2) clear that the COVID-19 is force majeure, and in principle, the change of circumstances does not apply; (3) according to the specific circumstances to identify and select the rule of force majeure and change of circumstances; (4) apply force majeure; (5) apply change of circumstances (Deng, Kang, Huang, Tang, Chen, Guo, 2021). In the judicial practice, it can be seen from the civil cases listed above that some courts apply the rule of force majeure when the performance of a contract is impeded by the COVID-19, such as Civil Case Ⅰ, some courts apply the rule of change of circumstances after characterizing the epidemic as force majeure, such as Civil Case Ⅱ; and some courts apply the rule of change of circumstances directly, such as Civil Case Ⅲ.

In 2020, the Civil Code had not yet been implemented, and under the legal framework at that time, Article 26 of the Interpretation Ⅱ of the Contract Law states the elements of change in circumstances as a major change which is unforeseeable, is not a business risk and is not caused by a force majeure occurs after the formation of a contract. So, force majeure and change of circumstances are mutually exclusive, and in principle, only one of force majeure and change of circumstances can be determined for a certain objective situation.

However, as mentioned above, in the legal characterization of the COVID-19 and its prevention measures and the application of rules in related contract disputes, there is a dispute between force majeure and change of circumstances, and different rules have been applied in similar cases. On the one hand, it shows that there is ambiguity in the distinction and connection between force majeure and change of circumstances in practice; on the other hand, the Civil Code has abolished the provision of change of circumstances excluding force majeure, so the new trend of legislation has played a certain influence on practice. Therefore, we need to clarify the difference between the two, and also grasp the new legislative trend to re-examine the relationship between the two.

3.1.2 The Relationship Between Force Majeure and Change of Circumstances

In 2020, according to the Interpretation Ⅱ of the Contract Law, the change of circumstances excluded force majeure. However, due to the reality of force majeure events causing changes in circumstances, this rule was modified by the first paragraph of Article 533 of the draft of Civil Code published in December 2019, and the change of circumstances no longer requires “non-force majeure”, but only “non-commercial” (Wang, 2020). The draft of the Civil Code has clarified the relationship between force majeure and change of circumstances, making force majeure one of the causes of change of circumstances, and changing the relationship between the two from mutually exclusive to

causal (Yao, Que, 2020).

Force majeure refers to the principle that force majeure cannot be foreseen subjectively, avoided objectively and overcome (Han, 2006). In the doctrine, force majeure can be divided into three categories: natural causes, social causes and natural causes. Some scholars believe that because the government acts appear too frequently, including it in the scope of force majeure will erode the spirit of the contract. And governmental acts derived from force majeure are not force majeure itself, but the relief of force majeure (Liu, Zhang, 2006). In the author's opinion, the COVID-19 can be considered as force majeure in legal terms. The definition of force majeure is based on a combination of objective and subjective elements. First of all, the COVID-19 meets the objective element of force majeure, which is "unavoidable and insurmountable". The epidemic was caused by the new coronavirus, and based on the medical technology at that time, its spread was difficult to stop and the consequences were irreversible. Second, the COVID-19 meets the subjective element of "unforeseeable", which is a standard of reasonable foreseeability for the general public in good faith. For the epidemic prevention and control measures, whose nature is governmental acts, firstly, they are often mandatory and difficult to overcome by the general trading subjects; secondly, under the epidemic, the situation is ever-changing and governmental acts need to adapt to the changing situation quickly, so they are often unforeseeable; moreover, the prevention and control measures such as quarantine and control are the inevitable result of the development of the epidemic and are inseparably related to the epidemic as a whole, so the prevention and control measures should be also force majeure (Zhong, Mao, 2021).

However, it should be noted that a strict distinction must be made between force majeure itself and the impediment to contract performance caused by force majeure (Ding, 2020). Although the epidemic and its prevention and control measures can be characterized as force majeure, in the impediment to contract performance caused by force majeure, the application of the force majeure rule is not absolute. Because there may be a causal relationship between the force majeure and the change of circumstances, there is room for the application of change of circumstances. Therefore, when we characterize the COVID-19 as force majeure in general, it does not affect the force majeure triggering the application of change of circumstances (Ding, 2020).

3.1.3 The Convergence of Force Majeure and Change of Circumstances in the Cases by the SPC

The Opinion of Civil Cases from the SPC absorbed the latest view of the draft of Civil Code. Some terms in the Opinion are in line with the rule of change of circumstances in the draft, such as "If a party only felt it was difficult to perform a contract due to the pandemic or pandemic prevention and control measures, the parties concerned may re-negotiate the contract" and "If continuing the performance of the contract makes it obviously unfair to one party, and the party requests to change the performance period, performance method or price of the contract, the people's court shall, based on actual conditions of the case, decide whether to support such a request" (SPC, 2022).

The approach of the SPC can be seen as "integrated response mechanism", in which the epidemic and prevention and control measures are directly elevated to legal facts or

adjusted objects, and no longer evaluate whether they constitute force majeure or change of circumstances, and apply the rules of force majeure or change of circumstances to legal effects according to specific circumstances (Zhang, 2020). As force majeure, the impact of the epidemic and the prevention and control measures on the contract performance mainly includes two kinds: one is the contract cannot be performed; the second is the contract can be performed, but the continuation of performance is obviously unfair (Zheng, 2021).

Firstly, force majeure rules shall apply to the situation of failure to perform the contract. According to Article 590 of the Civil Code, the parties are exempted from liability on the premise that they cannot perform the contract due to force majeure. The non-performance of contract can be divided into complete non-performance, partial non-performance and momentary non-performance (Xu, Chen, 2020). When the contract cannot be performed entirety, the purpose of the contract cannot be realized, and according to Article 563 of the Civil Code, the parties may rescind the contract if the purpose of the contract cannot be realized due to force majeure, and such contracts are mostly personal and time-barred (Wang, Li, 2021). For example, in Civil Case Ⅰ above, although a travel contract was signed, it was objectively unable to travel abroad due to the epidemic. So, the parties could enjoy the right to rescind the contract on the basis of force majeure, which constitutes a typical case of non-performance due to force majeure. When the contract cannot be performed partially, force majeure should be allowed to create a legal right of rescission if it leads to the failure to achieve the purpose of the contract. However, if the purpose of the contract is not affected, for example, in the case of a long term lease contract, where the lessor is temporarily unable to provide the leased property due to the epidemic, but to the entire contract, it does not affect the fulfillment of the purpose of the contract, and then the statutory right of rescission may not be triggered, and the liability of the lessor, arising from the breach of contract partially during the COVID-19, may be relieved due to force majeure according to Article 590, paragraph 1 of the Civil Code (Zhong, Mao, 2021). When the performance needs to be delayed, the right of statutory discharge shall arise if the purpose of the contract cannot be achieved, but if it is not affected, only the exemption from liability for breach of contract shall be considered.

Second, the contract can continue to perform, but the basis of the contract or the environment has changed, destroying the equivalence relationship (Cui, 2021). The continuation of performance is obviously unfair, so, the rule of change of circumstances should be applied. For example, in an operational house lease contract, although it is possible to open for business, under the influence of the epidemic, the flow of customers is drastically reduced and the tenant's income is reduced, making it difficult to afford the high rent. The epidemic and the prevention measures caused a major change in the basis or circumstances of the contract so that the consideration relationship at the time of the contract was thrown into an imbalance. Although it is possible to continue the performance, it is clearly unfair. And then the principle of change of circumstances needs to be applied. According to Article 533 of the Civil Code, the legal effect of the change of circumstances rule is that the parties enter into a renegotiation phase, where they can propose a change of contract and change the contract on the basis of their agreement (Yuan, 2020). If the parties do not want to maintain the contractual relationship, they may decide to terminate the contract. If the negotiations are unsuccessful, the parties can apply to the court to change or

cancel the contract (Wang, 2021). It is important to note that the link of changing the contract gives the judge great discretionary power, but the judge is not an experienced commercial subject, and the changes will directly affect the rights and obligations of both parties, thus affecting the autonomy of the subject of the contract. Therefore, the courts had better conduct a judicial review of the change plan provided by the parties from reasonableness and feasibility, and adjust the contract on this basis. If it is impossible for the change plan to be unreasonable and unfeasible, the contract shall be terminated by judgment.

3.2 Criminal Case

3.2.1 The Controversy about the Crime Classification of Some Illegal Activities

The Opinion on Criminal and Illegal Activities, which were issued quickly after the epidemic, provided a solid guarantee for prevention and control of the epidemic, but there are also certain controversies, such as the path to the criminalization of price-gouging. (Huang, 2020) The Opinion on Criminal and Illegal Activities stipulates that during the epidemic prevention and control, those who violate the state's provisions regarding market operation and price management, hoard medical supplies for speculation, bid up the prices of protective products, medicines, seek exorbitant profits, and thus seriously disrupt the market order, if the amount of illegal gains is relatively large or there are other serious circumstances, shall be convicted of and punished for the crime of illegal business operation in accordance with item 4 of Article 225 of the Criminal Law.

First of all, there is a controversy over the interpretation of the catchall clauses of criminal law. According to the rule of ejusdem generis, in criminal law when the article lists the elements of crime, followed by the concepts such as "etc." or "other", it must make the explanation the same as the elements listed in the aspect of the nature (Zhang, 2004). The ejusdem generis has a certain function of restriction. According to the clause of Article 225 of the Criminal Law, it can be summarized, the interests protected by the provisions of the crime of illegal business operation are limited to the nation licensing system and market access system. However, according to the rule of purpose interpretation, the legal interests protected are the special economic interests of the nation, economic security and the health of citizens (Chen, 2019). According to the purposive interpretation, all acts related to illegal business can be included in the elements of the crime of illegal business, which will easily lead to pocket crime and result in lack of clarity (Huang, 2020). Therefore, the interests protected by the crime of illegal business should be limited to the nation licensing system and market access system (Chen, 2021).

Second, price gouging is a violation of price control and does not infringe on the nation administrative licensing and market access system, but rather infringes on the epidemic prevention and control system, endangering the health and safety of citizens (Gao, Lu, 2020). So, it is more in line with the legal interests protected by the crime of impairing the prevention and treatment of infections (Yu, Yuan, 2021). According to the ejusdem generis, the juxtaposition of price-gouging with other franchise-related acts would appear abrupt. The reason why price gouging is not criminalized in general but needs to be criminalized during the epidemic is that its direct impact is to disrupt the market order but

the deeper impact is to harm the epidemic prevention and control order. The essential feature of price gouging during the epidemic is not to disrupt the market order but to harm the epidemic prevention and control (Wu, 2020).

3.2.2 Vague and Inconsistent Incrimination Standards

The phenomenon of different sentences for similar cases exists in the trial, which is mainly due to the existence of vague incrimination standards for some crimes and the non-uniformity of standards in different places (Diao, Diao, 2020).

First, there is ambiguity in the incrimination standards. For example, many definitions and standards need to be further clarified in the case of counterfeiting and selling counterfeits. Whether surgical medical disposable masks should be considered as medical devices? The latest version of the "Medical Device Classification Catalogue" does not classify medical disposable masks as Class Ⅱ medical devices, but the update of the catalog has a certain lag, so there is a difference of understanding in practice. Second, the identification of the elements of "serious enough to endanger human health" lacks a clear judicial interpretation of the definition of standards (Xue, 2020). For masks, the consequences of the infringement are difficult to show in the short term, and it needs to rely on professional identification and expert opinion to define (Li, 2021).

Second, the incrimination standards are not uniform. For example, in the case of price gouging, the Opinion on Criminal and Illegal Activities states the specific criteria for identifying price gouging are set by provinces. Provinces set a sales price of a certain day as the benchmark price first, and then the price increase cannot exceed a certain percentage or the rate of difference between purchase and sale shall not exceed a certain percentage of the benchmark price. However, on the one hand, the criteria of the date of the benchmark price are not the same. Some are before the start of the emergency response date, while some are after it. On the other hand, the upper limits of profitability are also different, the maximum difference between the provinces is about 20%. So, in practice, the same price-gouging acts in different provinces may result in different penalties (Diao, Diao, 2020).

3.3 Administrative Law Cases

In the administrative litigation cases, the system of response of the head of the administrative organ has been implemented effectively. The court investigation, evidence and confrontation, court debate and final statement are carried out in an orderly manner, and the collegial court organizes both parties and the third party to express opinions on whether the facts of the administrative act are clearly identified and whether the application of law is correct, so as to fully protect the litigation rights of all parties. Moreover, some courts organize staff of administrative departments to participate in the hearing, which enhances judicial transparency. The administrative departments can also reflect on the shortcomings and problems of work from the cases. After the trial, the court will also explain to the plaintiff the serious impact of the epidemic on the society and individuals as well as the importance of epidemic prevention measures through telephone, explain the reasons and main basis of the administrative action, and explain the risks and responsibilities assumed by the government in the epidemic prevention work (Yiwu Court, 2020).

3.4 Recommendations to Overcome the Challenges

3.4.1 Clarifying the Relationship Between Force Majeure and Change of Circumstances

Firstly, there is a causal relationship between force majeure and change of circumstances. Characterizing the epidemic as a force majeure event, both force majeure and change of circumstances may be applied under different circumstances. If force majeure leads to failure to perform the contract, including complete non-performance, partial non-performance and momentary non-performance, the force majeure rule should be applied to adjust the contractual relationship; if it does not lead to non-performance but causes a major change in the basis or circumstances of the contract, and it is obviously unfair to continue to perform, the change of circumstances rule should be selected for relief. Second, under the epidemic, the court should try to promote the positive and effective performance of the contract, and if it can continue to perform, the courts should encourage the continued performance of contractual obligations in accordance with the agreement. If the major epidemic affects only a part of the contract that cannot be performed or is delayed, the parties shall, on the basis of notifying the other party, actively negotiate and take alternative measures to ensure that the contract is performed as far as possible. For certain contracts that have no possibility of performance at all due to a major epidemic, they shall be dissolved. What's more, in the legal characterization of the epidemic, as the epidemic will also have an impact on the international trade contract, when applying force majeure in the international trade contract, it is also necessary to consider the relevant domestic and international legal provisions, international practices and international conventions in general (Wang, Li, 2021).

3.4.2 Improving the Judicial Interpretation and Clarify the Standards in Criminal Cases

The lag of legislation makes the lack of clear standards in the process of combating epidemic-related crimes in terms of the nature of the behavior, the properties of the goods involved, and the seriousness of the circumstances, which results in the phenomenon of different punishment in the similar cases. The court should issue relevant judicial interpretations as soon as possible to clarify the direction of the trial of criminal cases and to unify trial ideas (Wang, 2021). In the absence of a clear judicial interpretation, the legislative intent can be explored according to the relevant laws and regulations to understand the application (Diao, Diao, 2020). In the trial the courts should fully combine the identification data, expert opinions and the opinion of administrative authorities to determine objective judgment, neither easily expand the interpretation to increase the scope of the crime, nor indulge in crime (Diao, Diao, 2020).

3.4.3 Adhere to the Policy of Leniency Combined with Severity in Criminal Cases

The purpose of severely punishing crimes related to the epidemic is to safeguard the most fundamental interests of the public, and punishment is only a means (Wang, Yao, 2020). When dealing with criminal cases, the scope and degree of severity should be determined by taking into account the society hazardous nature, special harm, severity and subjective evil of illegal and criminal activities during the epidemic period (Sun, 2020). For

the acts hindering epidemic prevention and control during the COVID-19, it should be handled strictly and severely. When it is not involved in the epidemic and does not endanger the order of prevention and control of the epidemic, the courts should not blindly handle the cases too severely (Zhang, 2020). And in the case involving epidemic prevention and control, different cases should be treated differently. For minor circumstances which do not constitute a crime, the courts should deal with the cases leniently according to the law (Guo, 2020). And while being strict according to the law, the courts should pay full attention to and apply mitigating circumstances, such as surrender, confession, merit in order to achieve the effect of the policy of leniency combined with severity (Lin, 2020).

3.4.4 Adhere to the System of the Head of the Administrative Department to Response to the Lawsuit

For cases involving food and drug safety, ecological environment and resource protection, public health safety and other major public interests, high social concern or may lead to mass events, the court shall notify the head of the administrative organ to response to the lawsuit and related legal consequences and other matters through notice of rights and obligations served by the court to the administrative organ. The court can regularly make statistics, analysis and evaluation of the implement of the system within its jurisdiction, and inform the government at the same level (SPC, 2020).

4. Conclusions

4.1 Actively Responding to the COVID-19 and Making a Significant Contribution

China has a successful experience in the judicial fight against the epidemic. At the fourth China-Singapore Roundtable on Laws and Justice in 2021, the President of the SPC also summarized the experience of Chinese courts in responding to COVID-19 and safeguarding economic and social development. First, punish all types of epidemics-related crimes in accordance with the law effectively and severely to safeguard people's life and health. Issue judicial documents and influential cases. Strengthen judicial protection for medical workers, and resolutely safeguard public health security and social stability. Second, give full play to the role of the judiciary in promoting development, stabilizing expectations and ensuring people's livelihood, and creating a sound legal environment for economic and social development. Improve judicial policies and measures to ensure the resumption of work and production, clarify judgment rules, and handle relevant disputes in accordance with the law. Third, use intelligent courts to efficiently resolve conflicts and disputes online (SPC, 2021).

4.2 Formulating the Guidance and Improving the Judicial Interpretation

In order to provide timely guidance to courts around the country, the SPC issued judicial documents and typical cases, such as Civil Cases Opinion (Ⅰ), (Ⅱ), (Ⅲ), Notice by the SPC of Strengthening and Regulating the Online Litigation Work during the Period of Prevention and Control of the COVID-19 Outbreak, Guiding Opinions on Several Issues Concerning Properly Handling Enforcement Cases Involving the COVID-19 Outbreak According to the Law, the Opinions on Punishing Criminal and Illegal Activities, Matters

concerning Effectively Conducting the Enforcement Work during the Period of Prevention and Control of the Outbreak of Novel Coronavirus Pneumonia, etc. Provincial courts have also issued relevant trial guidance to make trials legally sound (Xu, 2021).

4.3 Handling Cases According to the Law and Maintaining Social Order

According to the annual work reports of the SPC, during the COVID-19 in 2020, the SPC intensified its strength in maintaining order and social stability by issuing legal documents, including epidemic-related civil and commercial cases, foreign-related commercial and maritime cases, enforcement cases, etc. In civil cases, in terms of difficulties in implementing the agreement due to the epidemic, the courts have correctly applied force majeure rules in accordance with the law and properly tried 43,000 cases of contract breach, corporate debt and housing lease. In criminal cases, the courts tried epidemic-related criminal cases effectively, and issued 34 influential cases involving the pandemic. The courts gave tougher punishments to those cheating medical workers who aided hard-hit Hubei province, using fake charity institutions to get donations, jacking up prices, or creating or spreading pandemic-related rumors. The courts created a powerful deterrent to maintain the normal economic and social order under the epidemic prevention and control (SPC, 2021).

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2. COVID-19 and Judicial Review in India

Madan B. Lokur & Shruti Narayan

1. Introduction

In the Indian constitutional scheme, judicial review has been described as a "prime feature". (Gupta 2020:131-132). It may be described as the enforcement of a set of standards, through a process of litigation, to question the lawfulness of decisions taken by public authorities. The authors of *De Smith's Judicial Review* observe that in a "mature democracy, the courts and Parliament have distinct and complementary constitutional roles in securing good government according to the constitution" (Woolf 2013: pp. 4-9). Judicial review in India has gone a step further and now includes issuance of positive directions for nourishing the rule of law and for the enforcement of rights.

2. An Overview of Rule of Law Measures during the COVID-19 Pandemic

The COVID-19 pandemic struck India in two waves – the first between September and November 2020 and the second between March and May 2021. During both waves and even prior thereto, pandemic containment measures were in the form of executive or administrative orders issued under one or more of three statutes – the Disaster Management Act, 2005 (the DMA) under which the broadest directions for National and State lockdowns were imposed; the Epidemic Diseases Act, 1897 (the EDA); and the Code of Criminal Procedure, 1973 (the Cr.P.C.).[1] A violation of any containment measure or order invites a penalty for non-compliance as prescribed by the statute under which such measure is passed.

2.1 DMA

Authorities constituted by the DMA and their responsibility: The DMA confers extremely wide powers for dealing with a "disaster", which is broadly defined to include a catastrophe, mishap, calamity or grave occurrence, natural or man-made, or by accident or negligence.[2] The DMA constitutes the National Disaster Management Authority[3] chaired by the Prime Minister of India and has nine other members. Broadly speaking, it lays down the policy, plans and guidelines for disaster management. The implementing arm of the

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1 As is evident, these legislations were already in existence, but expansions/modifications to tackle COVID-19 were made to the Epidemic Diseases Act by the Central Government and State Governments.

2 Section 2(d) of the DMA defines a disaster meaning "a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area;"

3 Section 4 and 6 of the DMA.

Authority is the National Executive Committee (NEC)[4]. The NEC consists of senior officers from the executive and its task is to ensure that the policies and plans laid down by the Authority and orders issued by the Government of India are implemented. The DMA constitutes corresponding bodies and authorities at the State[5] and District[6] level. In other words, a three-tier structure is postulated by the DMA for policy, planning and implementation purposes with all three tiers empowered to issue directions within their respective jurisdiction for prevention or containment of any disaster.

Specific directions for lockdowns and other preventive measures (such as social distancing, wearing a mask in a public place and so on) are issued by these authorities. Non-compliance of a rule, order or direction issued under the DMA is an offence under the DMA itself, and also under Section 188 of the Indian Penal Code, 1860 (IPC). These rules, orders and directions are in place for a specific period of time to meet exigencies arising from a particular disaster. They are extended, suspended or revived from time to time, as in the case of the COVID-19 pandemic and depending upon the number of COVID-19 cases in a district or State.

Offences under the DMA: Chapter X of the DMA prescribes a range of offences in Sections 51 to 60. The violation of any order passed under the DMA is an offence under Section 51(b) which prescribes a maximum punishment of imprisonment of up to one year with fine in case of refusal to comply with any order and a maximum of two years imprisonment with fine if such refusal causes the loss of life or "imminent danger thereof".[7]

Offence under the IPC: Section 188 of the IPC is an independent and general provision penalizing the non-compliance of any government direction to the public. Section 188 provides that the disobedience of any order issued by a public servant, if such disobedience causes *inter alia* any danger to human life, health or safety, shall be punished with either imprisonment for up to six months, a fine of INR 1,000, or both. There is no requirement of motive or intention to cause such danger or harm[8] thereby making it an absolute liability

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4 Section 8 and 10 of the DMA.

5 Section 16 and 20.

6 Section 25.

7 "51. Punishment for obstruction, etc.—Whoever, without reasonable cause—(b) refuses to comply with any direction given by or on behalf of the Central Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act, shall on conviction be punishable with imprisonment for a term which may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years."

8 "188. Disobedience to order duly promulgated by public servant.—Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. *Explanation*.—It is not necessary that the offender should

provision. This provision was invoked by the NEC in the very first Order declaring a lockdown issued on 24th March, 2020[9] and continues to be invoked.

2.2 EDA

Measures and penalties under the EDA: The object of the EDA is "for better prevention of the spread of dangerous epidemic diseases". It enables the Central and State Governments to take necessary measures for prevention, including by prescribing "regulations" to tackle specific problems. Temporary regulations were issued under Section 2 of the EDA[10] by nearly every State Government and the Governments of Delhi and Puducherry, to deal with the pandemic. The regulations broadly lay down rules to be followed by medical establishments and individuals within the State with respect to testing, treatment and isolation, in keeping with the State Governments' powers under the Constitution.

Offences under the EDA: Prior to the pandemic, disobedience of any regulation or order under the EDA was only an offence under Section 188 of the IPC, which, as mentioned previously, is a general offence applicable to any violation of a public order.[11] However, on 22nd April, 2020 new offences were introduced in the EDA by the Central Government through an amending Ordinance.[12] These offences focus on violence against "healthcare service personnel", a broad term including doctors, nurses and any person empowered under the EDA to take measures to prevent the spread of disease.[13] Any "act of violence" against any healthcare service personnel includes harassment, interfering with their living or working conditions, harm to their life/property/documents, or obstruction of

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intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm."

9 Order No.40-3/2020-DM-I(A) dated 24th March, 2020 issued by Home Secretary (in his capacity as Chairperson, National Executive Committee), Government of India, Ministry of Home Affairs.

10 Section 2 of the EDA, 1897 states: Power to take special measures and prescribe regulations as to dangerous epidemic disease.—

(1) When at any time the State Government is satisfied that the State or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the State Government, if it thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

(2) In particular and without prejudice to the generality of the foregoing provisions, the State Government may take measures and prescribe regulations for — * * * * *(b) the inspection of persons travelling by railway or otherwise, and the segregation, in hospital, temporary accommodation or otherwise, of persons suspected by the inspecting officer of being infected with any such disease.

11 Section 3(1) of the EDA.

12 The Epidemic Diseases (Amendment) Ordinance, 2020 notified in the Gazette of India (Extraordinary) on 22nd April, 2020; this was enacted as the Epidemic Diseases (Amendment) Act, 2020 which was notified in the Gazette of India on 28th September, 2020.

13 Section 1A(b) of the EDA as it now stands.

duty.[14] Such an act of violence constitutes a serious offence without provision for automatic bail.[15] If convicted, an offender faces imprisonment for a minimum of three months and a maximum of five years in addition to a fine of a minimum of INR 50,000 and a maximum of INR 200,000.[16] In case an act of violence results in grievous hurt[17] caused to any healthcare service personnel, the sentence increases to a minimum of six months and maximum of seven years imprisonment, and a fine of a minimum of INR 100,000 and a maximum of INR 500,000.[18] In addition to these punishments, a person convicted under the Act will be liable to pay compensation to the healthcare service personnel hurt by their actions[19] and also pay an amount equal to "twice the fair market value" of any property damaged or to which loss has been caused[20].

In addition to the steep penalties and mandatory imprisonment, the rules governing the prosecution of these offences has been made extremely strict with fixed timelines for the investigation and trial of such offences. In addition, the amendments invert the rule of "presumption of innocence" in cases of causing grievous hurt and prescribe that the Court shall presume that an accused person is guilty of the offence, and where intent is necessary, that such intent existed, unless the contrary is proved by the accused in defence[21]. This reverse onus provision places a burden upon an accused person to prove her innocence or lack of intent without first requiring the prosecution to establish the commission of an offence.

The offences and penalties under the EDA were introduced through an Ordinance, which is a form of executive law-making for use in emergencies. The Ordinance was approved by Parliament in September 2020 and is a permanent part of the statutory law.[22]

The DMA and the EDA are intended to and do complement each other. Policies and planning at all levels (national, state and district levels) is the responsibility of one set of authorities. Implementation of orders and directions based on these policies is the responsibility of another set of authorities at all levels. The law also provides flexibility to

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14 Section 1A(a) of the EDA as it now stands.

15 Section 3A(i) of the EDA as it now stands.

16 Section 3(2) of the EDA as it now stands.

17 "Grievous hurt" is defined with reference to the definition in the Indian Penal Code, which is as follows: "320. Grievous hurt.—The following kinds of hurt only are designated as "grievous":—
First.—Emasculation.
Secondly.—Permanent privation of the sight of either eye.
Thirdly.—Permanent privation of the hearing of either ear.
Fourthly.—Privation of any member or joint.
Fifthly.—Destruction or permanent impairing of the powers of any member or joint.
Sixthly.—Permanent disfiguration of the head or face.
Seventhly.—Fracture or dislocation of a bone or tooth.
Eighthly.—Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

18 Section 3(3) of the EDA as it now stands.

19 Section 3E(1) of the EDA as it now stands.

20 Section 3E(2) of the EDA as it now stands.

21 Section 3C and Section 3D of the EDA as it now stands.

22 The contents of the Ordinance were introduced as an amendment to the EDA through the Epidemic Diseases (Amendment) Act, 2020 which was notified in the Gazette of India on 28th September, 2020.

the State governments to take corrective and remedial action at the local level, giving scope for micro management of a disaster, including the Covid pandemic.

State-specific measures and penalties under the EDA: Several State Governments also followed the Ordinance route to amend the EDA (in its application to their State) in addition to the Central Government's Ordinance mentioned above. Three illustrations of Ordinances passed by the States may be seen as examples of different offences created in the States.

The Ordinance passed by the State of Uttar Pradesh[23] ("the UP Ordinance")[24] is an example of the adoption of more strict punitive measures, introduced with regard to people "afflicted" by any contagious/ infectious disease affecting the State (that is, COVID-19). If an afflicted person concealed oneself or evaded "detection"; travelled by air/rail/public transport or violated any order of quarantine or treatment, s/he could be punished with at least 1 year's imprisonment and a fine. The offences are non-bailable, meaning that an arrested person would not be entitled to bail as a matter of right and bail could be granted by a judicial officer at their discretion. By contrast, the Ordinances promulgated by the State of Karnataka[25] and by the State of Rajasthan[26] only introduced offences regarding obstruction of a public servant or contravention of the pandemic management rules. Violations do not have any minimum imprisonment, do not focus on the infected person as a perpetrator, and are bailable.

2.3 Cr.P.C.

Measures and offences under Section 144 of the Code of Criminal Procedure, 1973[27]:

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[23] The Uttar Pradesh Public Health and Epidemic Diseases Control Ordinance, 2020 on 11th May, 2020.

[24] This later became an Act when it was approved by the State Legislature and then notified on 31st August, 2020.

[25] The Karnataka Epidemic Diseases Ordinance, 2020 promulgated on 22nd April, 2020. This became an Act when it was approved by the State Legislature and notified on 19th October, 2020.

[26] The Rajasthan Epidemic Diseases Ordinance, 2020 promulgated on 1st May, 2020. The provisions of the Ordinance were passed by the State Legislature and enacted as the Rajasthan Epidemic Diseases Act, 2020 on 16th September, 2020.

[27] The relevant extract of the Section is as follows: S.144.—Power to issue order in urgent cases of nuisance of apprehended danger.

(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, of an affray. …

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof: Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

While the DMA and the EDA were sufficient in themselves to manage the fall out of the Covid pandemic, supplementary powers were available to District Magistrates (the executive/administrative authority heading each District) through Section 144 of the Cr.P.C. These powers overlap with the power exercisable by a District Magistrate as the head of the District Disaster Management Authority under the DMA. A District Magistrate is independently empowered under Section 144 of the Cr.P.C. to issue orders to any person(s) or to the public at large, to abstain from acting in any manner which may cause *inter alia* "danger to human life, health or safety". These prohibitory orders are intended for use in urgent cases where immediate danger is apprehended and are usually imposed only for a temporary period[28]. For example, an order may be passed restricting gatherings to fewer than five people in case of reports that a sit-in protest is likely to be violent, and the order may cease to operate after 24 hours. This provision effectively restricts the movement of persons within the territorial limits of a district. Disobedience of an order under Section 144 Cr.P.C. (the order issued by local authorities to curtail public movement and gathering) is an offence under Section 188 of the IPC, which, as mentioned previously, is punishable either by imprisonment (of a maximum of six months when the act has caused danger to health or safety) or fine, but no mandatory minimum imprisonment.

2.4 Statistical Information on the Violations Registered

The first wave of the pandemic beginning with a preventive nation-wide lockdown in March 2020 exposed the absence of preparedness of the official machinery. A sudden nation-wide lockdown with barely four hours' notice resulted in an unexpected migration of labour and other workers from the cities to the villages. It is estimated that about 10 million migrants headed home for a variety of reasons, such as fear of the virus, loss of employment resulting in a potential financial and economic crisis, difficulties in staying back in crowded slums with social distancing norms and so on.

The enormous hardships faced by the migrants, many of whom walked or cycled to their village, was compounded by the unnecessarily heavy hand of the State in imposing penal provisions for violations of the law, adding to their distress and misery. Details of violations of the law registered in 2020 are available in the report of the National Crime Records Bureau (NCRB) on "Crime In India 2020". This is an annual report which publishes official statistics regarding registration and disposal of criminal offences in a given year. These numbers are only for criminal cases registered formally by the police through a "First Information Report" (FIR) filed under the provisions of the Cr.P.C.

Offences under Section 188 of the IPC: The NCRB Report records a large increase in the number of cases registered under Section 188 of the IPC during the year 2020, most of them being attributed to violations of pandemic restrictions imposed under the DMA and the EDA. This is evident from the comparative statistical data: in 2019, only 29,469 cases were registered under Section 188. This number jumped to 612,179 cases in 2020 – an

[28] The Supreme Court of India in *Ramlila Maidan Incident, In Re* (2012) 5 SCC 1 has observed that "… The legislative intention to preserve public peace and tranquility without lapse of time, acting urgently, if warranted, giving thereby paramount importance to the social needs by even overriding temporarily, private rights, keeping in view the public interest, is patently inbuilt in the provisions under Section 144 Code of Criminal Procedure."

increase of about 1977%. (National Crime Records Bureau 2021: xi)

The Report also provides data of cases registered under the DMA and the EDA, though not separately. These are grouped along with other violations under "special" or "local" laws in the "SLL" category. Under the SLL category, the NCRB Report records that the comparative number of cases registered in 2019 was 89,553 and this jumped in 2020 to 414,589 cases. The Report attributes the increase in cases under Section 188 of the IPC and under the SLL category to violations of COVID-19 norms (National Crime Records Bureau 2021: xi).

Not every incident of violation of norms results in the registration of a criminal case under Section 188 of the IPC or other laws. A minor violation, like not wearing a mask, which requires only payment of a fine, may be simply registered by the police official on the spot and the fine can be paid electronically immediately. A majority of violations are disposed of in this way and no official record of such violations is available in the NCRB Report or in the public domain. Consequently, it is safe to assume that the number of violations is much higher than available statistics show. It is only through news reports or disclosures made by the State in court proceedings that one gets an idea of the imposition of less serious penalties.

An indication of the graph for 2020 can be imagined from the available figures for the national capital, New Delhi for two months in 2021. Police officials in New Delhi, reported in the span of two months from 19th April, 2021 to 20th June, 2021, that they collected INR 270 million in fines and issued 908,243 "challans" (registrations of violations and a charge for penalties) for violations of COVID-19 protocols. 121,230 fines were for not wearing face masks in public and 20,493 were for violation of social distancing norms. However, criminal cases were registered only in 11,144 incidents with 10,209 people arrested. (Hindustan Times 2021b).

2.5 Special Sanctions Imposed in Connection with COVID-19

The legal restrictions and penalties pertaining to the pandemic fall in two categories: (i) existing penalties for violations of orders prohibiting movement or gatherings, either under Section 144 of the Cr.P.C. or under the guidelines of the DMA and existing penalties as applicable to new rules other than those prohibiting movement or gathering (that is, Section 51 of the DMA and Section 188 of the IPC for restrictions under the temporary rules); and (ii) new substantive offences and penalties legislated through an amendment to the EDA by Parliament and by the States.

Non-compliance of orders prohibiting movement, issued under the DMA as well as under Section 144, and consequent penalties are not entirely unreasonable. Since person-to-person contact is the primary manner in which COVID-19 infects, it is essential to implement some rules to avoid large gatherings. In some cases, violations attracted stiff penalties. For example, in June 2020, immediately after the strict lockdown guidelines were lifted, a birthday party with 38 guests was held at a restaurant in Delhi, violating the rule by which establishments were allowed to open with only 50% occupancy. Four persons were arrested for the violation, and were released on bail after a case was registered against them. (The Indian Express 2020). This could be considered a reasonable and appropriate application of the law.

However, as discussed below, penalties have also been unreasonably applied in some cases. For example, criminal cases were filed against persons such as migrant workers or daily-wage labour who were forced to gather or go out in public because they did not have a permanent shelter or savings required to survive an extended lockdown. The full range of restrictions introduced under the DMA, and the application of previously existing penalties to tackle violation of these restrictions, have also been discussed in the context of whether their imposition was premature, over-broad, or implemented in a hurried manner without taking into consideration the direct effects it would have on the economy and the livelihood of manual and daily wage workers, and also without making adequate provisions to support such people who were left without access to jobs.

Again, for example, the sudden lockdown imposed in March, 2020 caused panic among a large group of migrant labour and workers. The lockdown, which went into effect with only four hours' warning, prohibited all non-essential movement, and directed closure of all industrial and construction activities, was categorised as among the strictest in the world (Hale 2021). As a result of the lockdown, many migrant workers who earn wages on a daily basis in the unorganised sector found themselves unemployed and without savings, permanent shelter, or government support. They thronged train stations and bus stations seeking a way back to their home State. Cases were registered against them for "rioting" or gathering in a crowd at these places (The Hindu Business Line 2020); (Hindustan Times 2020). Thousands of these workers began to journey back to their home State on foot along national highways, and cases were registered against such workers for violating the lockdown orders which prohibited individual movement for non-essential purposes. This understanding of "essential" purposes and the initiation of criminal proceedings was heavily criticised and the Supreme Court of India later suggested the revocation of these charges in its Order dated 9th June, 2020 in Suo Moto Writ Petition(C) No. 6/2020 discussed later in this chapter (NDTV 2020).[29]

Reasonableness of restrictions: Questions have been raised about the reasonableness of certain rules. For example, the Delhi Government imposed a rule that masks must be worn even by drivers of cars when they are driving alone. This was challenged in the Delhi High Court by individuals fined for violating this rule. The High Court upheld the rule, holding that a car comprised a "public place" (The Indian Express 2021a). Legal commentators have pointed out that the judicial interpretation of a car as a public place varies with respect to the context in which the interpretation is made and therefore is highly subjective. For example, under the Narcotic Drugs and Psychotropic Substances Act, a private vehicle would not be a "public place" for the purposes of the police's powers of entry, search, and seizure. However, consuming alcohol in a car which is parked in a public

[29] The Court said: "There may be First Information Reports or complaints against migrant labourers alleging violation of Lockdown measures in moving on roads. The migrant labourers who were earning their bread by working in different establishments due to cessation of work were forced to move to their hometown. The action of movement of these migrant labourers after enforcement of the Lockdown measures was by force of circumstances. We are of the view that the State may consider withdrawing Prosecution/Complaints lodged against such migrant labourers for the offences as referred to in Section 51 of the Disaster Management Act, 2005 and other related offences lodged against the migrant labourers during the period of Lockdown under Disaster Management Act, 2005."

place will constitute an offence of drinking in a public place (LiveLaw 2021a).

Questions have also been raised about the selective manner in which restrictions were imposed. For example, in April 2021, a religious gathering called the "Kumbh Mela" was scheduled to be held in the State of Uttarakhand. Pilgrims travel from across the country to bathe in the Ganges at this weeks-long event, which made it a possible super-spreader event. Despite the potential risk, the State Government allowed the event to continue and the Central Government merely reiterated that a "Standard Operating Procedure" had been issued with guidelines for social distancing and other safety measures at the event (Livemint 2021a). Authorities later reported that at least 9.1 million pilgrims travelled to holy spots along the Ganges in Uttarakhand between January to April, 2021 with 6 million of them attending in April – a fact that the Uttarakhand High Court took note of while observing that "organising the Mahakumbh made the state a laughing stock" (Hindustan Times 2021a). The festival predictably led to a rise in COVID-19 cases since adequate testing measures were not put in place and the police officials admitted that it is "very difficult" to enforce social distancing at the pilgrimage spots (The Indian Express 2021b). In mid-April, a second wave of COVID-19 cases began to spread across the country and the Kumbh Mela was a leading cause for the spread (BBC News 2021).

Furthermore, five States held elections to their legislative assemblies with hectic campaigning in March and April, which too has been linked to a rise in COVID-19 cases (The Indian Express 2021c). While holding timely elections is important, questions were raised about the decision of the Election Commission to allow large rallies and to hold elections in multiple phases (up to nine in the State of West Bengal) rather than on a shorter schedule (India Today 2021a).

With respect to the second category of entirely new substantive offences and penalties legislatively introduced by the Central Government and the State Governments, while these were made more stringent, they were, generally, rarely imposed and do not fall in the category of universally applicable "sanctions" for preventing the spread of Covid. However, on some occasions they were misused. For example, in March 2020, the State of UP arrested a doctor taking part in a large protest against a citizenship law and charged him under the EDA as well as Section 188 of the IPC (The Wire 2020a) on the pretext that the protests were a cause of the spread of COVID-19.

In rare cases, individuals challenged the authority of the sanctioning officer. A challenge was made to the direction that empowers police officers of sub-inspector rank or above to impose fines on anyone violating COVID-19 regulations. This challenge was admitted for consideration by the Delhi High Court on 28th July, 2020[30] but remains undecided. It was reported that the ground of challenge is that the imposition of a fine is a punishment which can only be awarded by a judicial officer and not a police officer (The Hindu 2020) empowered by an executive or administrative order under the DMA.

[30] Order dated 28th July, 2020 issued by the High Court of Delhi in WP(C) No. 3995/2020.

3. Role of the Constitutional Courts in Combating the Pandemic: Recourse to Broader Powers

3.1 Cases on Migrant Workers in the First Wave

3.1.1 Recourse to Constitutional Powers in the First Wave

Several petitions have been filed in public interest ("Public Interest Litigation" or "PIL") in constitutional courts calling upon them to exercise their wide powers to protect fundamental rights of citizens under the Constitution. On some occasions, the Courts themselves initiated proceedings (*suo motu*) to consider matters of public importance, particularly during the second wave of the pandemic.

Involvement of the Supreme Court: The Supreme Court's broad powers, including under Article 32 and Article 142[31] of the Constitution, have been invoked through writ petitions and other proceedings relating to a variety of issues since the beginning of the pandemic and the imposition of a national lockdown in March, 2020. A review of some of the significant cases brought to the Supreme Court is necessary.

On the issue of migrant workers during the first lockdown (April - May, 2020): When the first national lockdown was imposed with effect from midnight on 24th March, 2020 millions of migrant workers were stranded without access to their livelihood and without the ability to travel home since all trains and buses were prohibited from operating. There was no clear announcement for the welfare of these workers, although the Central Government issued advisories to the States to make arrangements for food, shelter, and sanitation facilities for them.[32] The lack of clarity and delays in providing basic support caused considerable panic among the workers who sought to travel back to their home State, on foot, often for thousands of kilometres.

The first PIL before the Supreme Court related to the immediate problems faced by migrant workers. This petition sought directions to the State authorities to "urgently identify aggrieved migrant workers, and their families, in their areas and immediately shift them to the nearest government facility (shelter homes or other accommodation) where their daily essentials will be catered to, under medical supervision, in a dignified manner till the lockdown continues." (LiveLaw 2020a). A second PIL raised the same concerns. Both petitions were taken up on 31st March, 2020 and on that date the Supreme Court accepted the statements made by the Central Government regarding relief being provided to migrant workers. Notably, the Court appeared to accept the statement by the Solicitor General that there were "no person[s] walking on the roads" trying to reach their hometowns. This statement was widely reported and was verifiably untrue given the live news coverage of thousands of migrant workers walking home on highways (Article 14 2020). Rather than

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31 "142. Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe;"

32 Order No. 40-3/2020-DM-I(A) dated 29th March, 2020 issued by the Government of India, Ministry of Home Affairs.

take notice of the huge migration, the Court merely issued general directions that relief measures should be properly administered, and observed that: "… we are satisfied with the steps taken by the Union of India for preventing the spread of Corona Virus [COVID 19] at this stage."[33] The Court also recorded in its order that media discussions of the lockdown and "fake news" had contributed to the panic and migration of labourers. The petition was kept pending until 27th April, 2020 when it was dismissed without any further directions.[34]

Another appeal was made by a Member of Parliament, who wrote a letter to the Chief Justice of India in April 2020 in which she highlighted the condition of stranded migrant workers. The letter stated that she had personally received requests for help and executive intervention was required to assist the lakhs of migrant workers. The Supreme Court took *suo motu* cognizance of the letter on 3rd April, 2020[35] but dismissed it on 13th April, 2020 without issuing any directions or orders in the matter[36].

On 15th May, 2020 an extremely unfortunate event occurred. As many as 16 migrant labourers were run over by a train as they slept on railway tracks in the course of their journey from the State of Maharashtra to their home State of Madhya Pradesh (The Wire 2020b). An application was filed before the Supreme Court highlighting this tragedy and generally seeking intervention and directions to local authorities to help migrant labourers walking home. The Supreme Court declined to intervene, stating that it was not possible to monitor the situation and that State Governments were responsible (LiveLaw 2020b). The reluctance of the Court to intervene despite the loss of life due to the inadequate implementation by the Central Government of relief measures in terms of the order dated 31st March, 2020 was rather unfortunate.

A PIL filed seeking payment of wages to workers under a welfare statute, the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) was considered by the Court on 8th April, 2020 but no directions were issued. The Court recorded the statement of the Central Government that an amount of INR 68 billion had been paid to the workers towards arrears of wages as of 5th April, 2020.[37] The petition has not been considered thereafter.

Social welfare workers and activists also filed a petition seeking payment of wages to the migrant workers (LiveLaw 2020c). When the Court considered the petition on 13th April, 2020, it was reported that the Chief Justice expressed a disinclination to inquire into the matter (The Telegraph 2020). On 21st April, 2020 the Court recorded that "various measures" were being put in place to help migrant workers and disposed of the petition through a short order without any specific finding that wages were being paid to all workers across States or that any such scheme was being planned or implemented.[38]

Involvement of the High Courts: In contrast, High Courts in the States took proactive steps to intervene in the ongoing human rights crisis and hold the government authorities

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[33] Supreme Court Order dated 31st March, 2020 in WP(C) No. 468/2020.
[34] Supreme Court Order dated 27th April, 2020 in WP(C) No. 468/2020.
[35] Supreme Court Order dated 3rd April, 2020 in WP(C) No. 470/2020.
[36] Supreme Court Order dated 13th April, 2020 in WP(C) No. 470/2020.
[37] Supreme Court Order dated 8th April, 2020 in WP(C) Diary No. 10846/2020.
[38] Supreme Court Order dated 21st April, 2020 in WP(C) Diary No. 10801/2020.

accountable for the migrants' welfare. The High Courts of Odisha[39], Rajasthan[40], Kerala[41], Bombay[42], Gujarat[43] and Karnataka[44] issued directions for the welfare of migrant workers in April and May 2020. These interventions, along with civil society efforts, led to the introduction of special trains and buses for migrant workers to travel home and some processes for them to register and avail of welfare measures. However, these steps were somewhat scattered and uneven which did not completely resolve the issues faced by migrant workers. In addition, reports that the (unemployed and indigent) workers were being charged fares for the train services provoked further questions regarding the adequacy of the measures (The Times of India 2020).

A 'resurgent Supreme Court: It was not until 26th May, 2020, almost 56 days after the Court's assistance was first sought that the Supreme Court took a serious view of the humanitarian crisis caused by the sudden lockdown. One of the reasons proffered for the Court's change of approach was the mounting criticism of its inaction, particularly from its former judges and from former High Court judges (Article 14 2020). On 26th May, 2020 the Supreme Court initiated *suo motu* proceedings once more and issued an order taking note of news reports of migrant labourers stranded across the country, their attempts to journey home on foot, and the absence of any food, water, or shelter provided by State authorities. The Court directed the Central Government as well as State Governments to submit responses to the concerns raised within two days.[45] The Court then took up the matter on 28th May, 2020 and reviewed the submissions made by the States and various civil society organisations and individuals who sought to intervene in public interest.[46] The Court issued some specific directions, including:

i) Migrant workers should not be charged train or bus fare for travel to their hometown through the special trains and buses arranged by the governments for them.
ii) Free food should be provided to stranded workers waiting for buses/ trains and adequate publicity of the availability of the food should be given.
iii) States and railway authorities should share the responsibility to provide food and water to travelling workers.
iv) The process of registering individuals should be speeded up and they should be given assistance at help desks as well as complete information as to the modes of transport available.
v) Persons walking home should be immediately taken care of and provided with transport and other facilities.
vi) Workers arriving in their destination State should receive health screenings and other facilities without charge.

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39 Odisha High Court Order dated 29th March, 2020 in WP(C) (PIL) No. 9095/2020.
40 Rajasthan High Court Order dated 31st March, 2020 in WP(C)(DB) No. 5153/2020.
41 Kerala High Court Order dated 31st March, 2020 in WP(C) No. 23724/2016.
42 Bombay High Court (at Nagpur) Order dated 30th March, 2020 in WP No. 3427/2020.
43 Gujarat High Court Order dated 11th May, 2020 in WP(PIL) No. 42/2020.
44 Order dated 8th May, 2020 in WP No. 6435/2020.
45 Supreme Court Order dated 26th May, 2020 in Suo Motu WP(C) No. 6/2020.
46 Supreme Court Order dated 28th May, 2020 in Suo Motu WP(C) No. 6/2020.

On 9th June, 2020 the Court took note of updates provided by the States, the Central Government, and civil society organisations and individuals and issued further directions. These included directions for the identification of stranded workers and provision of transport for them to be completed within 15 days; for the establishment of counselling centres to help migrant workers access welfare schemes; for district authorities to collect details of the workers who return home and help them in case they need to return to their place of employment; and crucially, that the States should consider withdrawal of prosecutions or complaints initiated against migrant workers under Section 51 of the DMA, which was invoked by certain States against workers alleged to have violated the lockdown orders issued under the DMA by walking home across State borders.[47] Another order was passed by the Court on 31st July, 2020 by which States were directed to file affidavits indicating their continued compliance with the directions issued in the previous orders.[48]

This form of monitoring by the Supreme Court - through taking cognizance of issues raised and requesting responses from public authorities with periodic updates - is extremely effective and is deployed in appropriate situations to ensure the protection of fundamental human rights. After 26th May, 2020 the Supreme Court's orders and approach required the Central as well as State Governments to inform the public of the measures being taken and for those measures to be tested for adequacy. This was precisely the proactive approach requested from the Court in earlier petitions and has been employed by the Supreme Court in several other PILs. It is described by legal scholars as "*continuing mandamus*" – a form of adjudication that enables the constitutional courts to ensure and supervise the implementation of its directions. This is a process by which a constitutional court keeps the PIL ongoing, giving orders and issuing directions from time to time and monitoring their compliance through regular hearings. "The Government and administrative bodies are asked to submit affidavits with regard to compliance status with justifications for delays and inaction. The court in many ways … becomes the nodal point for change, facilitating and coordinating action to ensure rights-realization" (Poddar & Nahar, 2017).

Given that this approach is well-established, the Supreme Court's reluctance to intervene in April and May, 2020 was surprising and was adversely commented upon by legal commentators. A column in *Bar and Bench*, a legal news and analysis website, noted that: "The Supreme Court has never shirked from resolving the common man's problems, be it pollution issues or human rights issues. However, migrants have thus far faced only disappointment, as the Apex Court dismissed plea after plea, maintaining a policy of non-interference. … It is concerning to read such orders, where matters have been casually disposed of, placing over-reliance on the assurance of the learned Solicitor General. In one of the petitions, the Court has even recorded that there is no migrant on the roads merely based on a statement by the government. The most basic right to life of the poor migrants is being crushed on a daily [basis], while petitions were disposed of in a routine manner. It bears clarification that the Executive must be given some additional elbow room while it is dealing with a global pandemic of the present nature. However, when the failure of the State is so apparent, the Court could have played a major role in verifying its claims, monitoring

[47] Supreme Court Order dated 9th June, 2020 in Suo Motu WP(C) No. 6/2020.
[48] Supreme Court Order dated 31st July, 2020 in Suo Motu WP(C) No. 6/2020.

the process, and holding the government accountable for its failures." (Maqbool 2020). The absence of any positive action by the Supreme Court was in stark contrast to the proactive approach of the High Courts.

The *suo motu* petition initiated by the Supreme Court culminated in a judgment dated 29th June, 2021 in which the Court issued various directions for permanent measures to ensure food security and other forms of essential support for migrant workers across the country. The judgment was welcomed by some civil society activists (Mander 2021). However, it was also pointed out that the directions issued are not time-bound, which has an impact on the compliance by State authorities; and certain submissions including for emergency cash transfers to pay for essential facilities including rent, education of children, gas, oil, and milk have not been accepted (National Alliance of People's Movements 2021).

3.2 Combating the Pandemic in the Second Wave (March - May, 2021)

Responses in the second wave: The second wave of the COVID-19 pandemic was a public health catastrophe in India. While the country was recovering from the after-shocks of the mass migration followed by the first wave, the virus mutated itself into the Delta variant and besieged the country in the second wave from March 2021 onward. A few hundred thousand people were quickly infected with the virus and tens of thousands died. The catastrophe completely exposed and overwhelmed the medical infrastructure. Among the more serious and critical problems faced by the country was an acute shortage of beds in hospitals and serious allegations of a shortage of medicines and ambulances. Doctors, nurses and hospital staff all across the country were completely beleaguered with the virulence and intensity of the Delta variant. One of the most tragic aspects of the second wave was the severe shortage of medical oxygen particularly for those whose lungs were infected. Hundreds, if not thousands died due to the unavailability of medical oxygen. The sheer magnitude of this tragedy compelled High Courts of many States to intervene and pull up the government and its officers to ensure the supply of essentials (including oxygen) and to monitor the implementation of preventive measures which had been considerably relaxed in March 2021.

On 19th April, 2021 the Delhi High Court revived proceedings in a petition filed in 2020 seeking directions for the management of the COVID-19 pandemic.[49] The High Court took this unusual step to intervene because, as it noted,

> "The pandemic is presently raging with much greater intensity than prevalent at the time when this petition was initiated in the year 2020. The number of COVID-19 positive patients, as reported on a daily basis, has exceeded 25,000 in the NCT of Delhi. As of 18.04.2021, the country has reported an all-time high of 2.7 lakh cases, [270,000 cases] with the current doubling rate being around ten days ... According to medical estimates, around 15 to 20% of these patients could require hospital admissions, with a quarter of them requiring specialized ICU care. This translates to a requirement of roughly 50,000 beds daily in the country, this has already pushed the limited health care system beyond its limits. It is evident that the health care

[49] Delhi High Court Order dated 19th April, 2021 in WP(C) No. 3031/2020.

infrastructure is on the verge of an imminent and complete collapse."

The most pressing issue considered by the High Court in almost 30 hearings between 19th April, 2021 and 4th June, 2021 with the Court sitting late at night on some days was the supply of medical oxygen. The importance of the Delhi High Court's intervention cannot be understated. The "first wave" between September and November, 2020 saw a peak of about 9000 daily cases in Delhi (The Indian Express 2021d). In comparison, the second wave was reported as "devastating", with a peak of 28,000 new cases and hundreds of deaths per day (Livemint 2021b). The media described the Delhi High Court as "the last hope for many hospitals struggling to get oxygen for COVID-19 patients as supplies run dangerously short while government officials bicker over who is responsible" (Reuters 2021).

The High Court took recourse to its broad powers to intervene, which led to appeal proceedings by the Central Government before the Supreme Court. In the course of the hearings on 30th April, 2021 while oxygen was in extremely short supply, the High Court directed the Central Government to take steps to ensure adequate supply of oxygen to the capital city of New Delhi on or before midnight of 3rd May, 2021 and an assurance was given by the government's counsel that the supply would be made. However, when the situation was reviewed on 1st May, 2021 the Court found that the necessary quantity was not being supplied. The Court summoned the head of the Department for Promotion of Industry and Internal Trade of the Central Government.[50] Due to further non-compliance with the direction to ensure adequate supply, the Court issued a show cause notice to the Central Government on 4th May, 2021 for contempt of court proceedings[51] This prompted an appeal by the Central Government to the Supreme Court which is discussed below.

3.2.1 The Supreme Court's Response in the Second Wave

3.2.1.1 Essential Supply

The Supreme Court on 22nd April, 2021 initiated *suo motu* proceedings (*In Re: Distribution of Essential Supplies and Services During Pandemic*)[52], provoked by the "grim" situation in various parts of India, with a "sudden surge in the number of covid patients and mortality" and the fact that "a certain amount of panic has been generated and people have invoked the jurisdiction of several High Courts…". The Supreme Court's intention appears to have been to ensure "even handed" distribution of essential services and supplies and for the Central Government to prepare and present "a national plan" for dealing with certain broad issues – the supply of oxygen, the supply of essential drugs, the

50 Delhi High Court Order dated 1st May, 2021 in WP(C) No. 3031/2020.

51 Delhi High Court Order dated 4th May, 2021 in WP(C) No. 3031/2020. The Court held: "18. During the course of the hearing, it has been brought to our notice that the GNCTD is still not receiving 700MT of liquid medical oxygen per day; even though, the Supreme Court while passing its detailed order dated 30.04.2021, had directed compliance by the Union of India, by the midnight of 03.05.2021. … We, therefore, direct the Central Government to show cause as to why contempt action should not be initiated for not only non-compliance of our short order dated 01.05.2021, but also of the order passed by the Supreme Court dated 30.04.2021. To answer the said notice, we direct the presence of Mr. Piyush Goyal and Ms. Sumita Dawra before us tomorrow."

52 Suo Moto Writ Petition No. 3/2021.

method and manner of vaccination, and the declaration of lockdowns.[53]

The fact that several High Courts were hearing petitions regarding these issues in their own States caused significant confusion as to the scope of their powers of judicial review of administrative actions affecting their States until the Supreme Court issued certain clarifications in a subsequent order passed on 27th April, 2021.[54] The Court stated that its purpose in instituting the *suo motu* proceedings was not to "supplant or to substitute the judicial process" being conducted by High Courts, which it acknowledged have a "robust understanding of ground realities" and are "well suited" to assess those ground realities. The purpose of the intervention, it was stated, was to perform its constitutional duty to protect fundamental rights and not "stand silent as a mute spectator" during a "national crisis", as a complement to, and without restraining, the exercise of powers by the High Courts. The Court sought detailed information on the preparedness of the Central and State governments on the issues of supply of oxygen, medicines, and the vaccination programme. The Court also appointed as *amicus curiae* two senior advocates[55] and referred to the possibility of forming a "panel of medical experts … to disseminate authentic information" for combatting the pandemic.

While the Court was not proactive during the migrant worker crisis followed by the first lockdown, the second wave – with high infection rates and a palpably deficient healthcare system within the national capital of Delhi, where the Supreme Court is seated – appeared to have a more direct impact on the Court and provoked a more interventionist reaction. The proceedings culminated in a detailed order pronounced on 30th April, 2021[56] with a shorter operative order containing the main directions[57] including a direction for the rectification of the deficit in the supply of oxygen to Delhi.

3.2.1.2 Supply of Oxygen

The proceedings in this *suo motu* petition were revived and continued on 5th May, 2021 when the Central Government approached the Supreme Court in a challenge against the Delhi High Court's notice of contempt of court proceedings (*Union of India v. Rakesh Malhotra & Anr.)*[58]. On 5th May, 2021 the Court took note of the issues regarding the supply of oxygen, including (1) the methodology being used by the Central Government to compute the requirement of oxygen to the States and Union Territories; (2) the requirement of managing the available oxygen to optimize its availability in Delhi; and (3) the actual availability of oxygen. Considering these various issues and the need for a scientific assessment on these bases, the Supreme Court stayed the operation of the notice issued by the High Court of Delhi in terms of contempt of that court, while clarifying that the High Court would be entitled to continue proceedings for monitoring the situation.[59]

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53 Supreme Court Order dated 22nd April, 2021 in Suo Motu WP(C) No. 3/2021.
54 Supreme Court Order dated 27th April, 2021 in Suo Motu WP(C) No. 3/2021.
55 A Senior Advocate is a designation of distinction conferred upon advocates by the Supreme Court or a High Court as recognition of their ability, standing at the Bar, special knowledge, or experience in law in terms of Section 16 of the Advocates Act, 1961.
56 Supreme Court Judgment dated 30th April, 2021 in Suo Motu WP(C) No. 3/2021.
57 Supreme Court Order dated 30th April, 2021 in Suo Motu WP(C) No. 3/2021.
58 SLP(C) Diary No. 11622/2021.
59 Supreme Court Order dated 5th May, 2021 in SLP(C) Diary No. 11622/2021.

On 6th May, 2021 the Supreme Court passed another detailed order in the proceedings in *Union of India v. Rakesh Malhotra*, by which it directed the setting up of a National Task Force (NTF) to conduct a thorough examination of the medical infrastructure, and in particular, availability and distribution of medical oxygen.[60]

3.2.1.3 Vaccines

On 31st May, 2021 the Court passed yet another detailed order concerning the Government's vaccination policy.[61] By this order, the Court examined the issues arising from the Government's vaccination policy, including procurement, distribution, prioritisation of certain categories of recipients; the effect of vaccination by private hospitals (which charged a fee for vaccination); the rationality of the differential pricing of vaccines; issues arising from the creation of a digital portal as the only way in which an appointment could be made, particularly the disadvantage faced by illiterate or underprivileged sections of society without easy access to the internet, smartphones or laptops, and lacking familiarity with technology. It was also observed by the Court that the portal was not accessible to persons with visual disabilities. The Court then highlighted some pending concerns with the policy and directed the Central Government to undertake a review of its vaccination policy in light of the concerns raised and to provide additional information and clarity on some of the points.

Proactive responses of High Courts: The Karnataka High Court also exercised its powers in a PIL on 5th May, 2021 to direct the Central Government to increase the quantity of oxygen allocated to the State of Karnataka noting that there had been a number of incidents of COVID-19 patients dying due to a lack of medical oxygen and that the supply of oxygen was a "minimum requirement" for the State to comply with its duty to protect the right to life under the Constitution.[62] The Court also observed that there was no buffer stock of oxygen. This order was challenged before the Supreme Court by the Central Government but the challenge was rejected, with the Supreme Court upholding the High Court's decision. The Supreme Court orally observed during the hearing that the High Court had undertaken a "well-calibrated, well-considered judicial exercise" and had correctly examined the demand, and that the Supreme Court would not "leave the citizens of Karnataka in the lurch" (LiveLaw 2021b).[63]

The Allahabad High Court also took *suo motu* cognizance of the second wave in April 2021. After issuing an order in which the Court suggested several steps for the State Government to take in the interest of preventing the spread of infection, the Court on 20th April, 2021 observed that "No concrete plan has yet been chalked out in the light of our observations made in our last order …" and took an extraordinary step to itself order a lockdown in 5 cities – Prayagraj, Lucknow, Varanasi, Kanpur, and Gorakhpur.[64] This order of lockdown was challenged in the Supreme Court by the UP Government and the Supreme Court passed an order staying its operation, thereby rendering it ineffective. However, the

[60] Supreme Court Order dated 6th May, 2021 in SLP(C) Diary No. 11622/2021.
[61] Supreme Court Judgment dated 31st May, 2021 in Suo Motu WP(C) No. 3/2021.
[62] Karnataka High Court dated 5th May, 2021 in W.P. No. 6435/2020.
[63] Supreme Court Order dated 7th May, 2021 in SLP(C) Diary No. 11694/2021.
[64] Allahabad High Court Order dated 19th April, 2021 in PIL No. 574/2020.

Allahabad High Court's humanitarian sense of responsibility towards the well-being of the general population in the face of an unprecedented and deadly pandemic compelled the UP Government to implement a weekend lockdown from 24th April, 2021 (India Today 2021b) and a full lockdown from 30th April, 2021 (Business Today 2021).

The Gujarat High Court initiated *suo motu* proceedings to take cognizance of the surge of Covid cases in the state on 11th April, 2021. The Court noted that "The newspapers, news channels are flooded with the harrowing tales, unfortunate and unimaginable difficulties, unmanageable conditions of the infrastructure, the shortfall and the deficit of not only testing, availability of beds, ICU, but also the supply of Oxygen and the basic medicines like Remdesivir, etc."[65] The Court also noted that "Concealment of accurate data would generate more serious problems including fear, loss of trust, panic amongst public at large" and "Figures given by State are not matching with the actual number of positive cases" on 15th April, 2021 (LiveLaw 2021c).

The Madras High Court (for the State of Tamil Nadu) held the Election Commission of India responsible for not stopping political parties from violating Covid protocols during their campaign rallies for elections to the State Assembly polls during April, 2021. The Court said that murder charges should probably be imposed on the panel for being "the only institution responsible for the situation that we are in today".

The Calcutta High Court (for the State of West Bengal) also took note of the effect of election campaigning in rising cases and issued an Order on 13th April, 2021 by which district authorities were informed that they would be held responsible (along with the election officers) for implementation of prevention guidelines (LiveLaw 2021d). On 19th April, 2021 the Court reiterated that election officials should use the resources available to them, including police resources, to prevent violations of the guidelines (LiveLaw 2021e).

The Bombay High Court held urgent sittings – including at night – to ensure uninterrupted supply of oxygen to the city hospitals. The Court questioned the Ministry of Health and Family Welfare for reducing the supply of oxygen to Maharashtra from a particular plant despite the State bearing the load of 40% of the COVID-19 patients in India, and directed immediate restoration of supply (LiveLaw 2021f).

The Madhya Pradesh High Court issued directions to authorities to: (i) ensure continuous and regular supply of oxygen and necessary medication (Remdesivir) to hospitals caring for COVID-19 patients; (ii) augment all such hospitals that generally cater to medical needs of middle class/poor/below poverty line families, by providing the necessary equipment; and (iii) fix rates to be charged by private Hospitals/Pathological Labs/Diagnostic Centres for treatment/tests (LiveLaw 2021g). The Court noted that the right to health was constitutionally guaranteed, saying "Article 38, Article 39(e), Article 41 and Article 47 in Part-IV of the Constitution of India as well as the fundamental right guaranteed vide Article 21 of the Constitution of India deal with potent and substantive contents of the right to life which in its broad sweep also includes right to good health".

3.3 Post the Second Wave (June 2021)

The issue of death certificates was flagged for persons who died due to complications

[65] Gujarat High Court Order dated 11th April, 2021 in WP(PIL) No. 53/2021.

from COVID-19 not reflecting the cause of the death as Covid (The Hindu 2021). This became extremely important due to the announcement of *ex gratia* compensation by State governments to the families of those who died due to covid related complications and for 'covid orphans'. The Supreme Court issued directions for presenting a clear protocol on "Covid deaths" on 30th June, 2021 in *Reepak Kansal v. Union of India* and *Gaurav Kumar Bansal v. Union of India*.[66] The Court directed that "simplified procedure/guidelines" must be issued by the Central Government for issuance of death certificate or any other document which states the exact cause of death, so that the cause is "Death due to COVID-19". The Court stated: "… such guidelines may provide if a person has died after he was found covid positive and he has died within two to three months, either in the hospital or outside the hospital or at home, the death certificate/official document must be issued to the family members of the deceased who died due to COVID-19 stating the cause of death as "Died due to COVID-19". …. In the guidelines, it may also be provided that if the family member(s) of the deceased who died due to COVID-19 has/have any grievance that in the death certificate/official document the correct/exact cause of death is not mentioned, he/she must be provided with some remedy to approach the appropriate authority to get the death certificate/official document corrected." The Court also stated that in respect of a death due to a complication or other disease connected to COVID-19, the death certificate can specifically mention such complication or disease. The necessary guidelines for issuance of an official document on COVID-19 deaths were issued only on 3rd September, 2021 by the Ministry of Health and Family Welfare and the Indian Council for Medical Research (NDTV 2021).

The issue of incorrect attribution of the cause of death was brought to the notice of the Delhi High Court by a woman whose 34-year-old husband died during the second Covid wave.[67] It was her case that her husband was not suffering from any co-morbidities and that the discharge summary did not explain the cause of his death. The High Court on 21st September approved the functioning of a High-Powered Committee of medical experts formed by the Delhi Government to carry out a fact-finding exercise on a case-to-case basis for ascertaining the probable cause of death after studying the records of the case produced by the hospital concerned. This is significant for two reasons, namely, for sustaining an insurance claim and for receiving *ex gratia* compensation offered by the State.

In another petition filed before the Supreme Court[68], the petitioner sought an inquiry commission and an investigation by a premier criminal investigating agency into the issue of shortage of medical oxygen during the second wave. The Supreme Court referred to the proceedings in the course of its suo moto proceedings and in *Rakesh Malhotra*[69] (referred to earlier in this chapter) and the NTF which had been set up through its order, and asked whether it should do a "legal post mortem" of past events, or take steps to bring about change in the future, with the NTF.

The steps taken by the Supreme Court in *Rakesh Malhotra* were undoubtedly

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66 Judgment dated 30th June, 2021 in WP(C) 554 of 2021.
67 *Riti Singh Verma v. State of NCT of Delhi & Ors.* WP(C) No. 7081/2021.
68 *Naresh Kumar v. Union of India & Ors.* W.P.(Crl.) No. 404/2021.
69 SLP(C) Diary No. 11622/2021.

important and will have an effect on the preparedness for any other or similar medical emergency. However, as the Delhi High Court and Government of Delhi demonstrated with the fact-finding High Powered Committee, it is possible and necessary to investigate the circumstances which led to the devastation in the second wave. It would supplement any future planning and also provide some sense of closure and recognition to the families of victims.

3.4 Analysis of the Courts' Role

There has been some commentary on the nature of the interventions by the Supreme Court as well as the High Courts in the management of the pandemic response, particularly during the second wave.

The Supreme Court, being cognizant of the unusual nature of the proceedings and the normal understanding of the separation of powers and functions between the executive and the judiciary, addressed these issues in the Order dated 31st May, 2021, stating:

> "In grappling with the second wave of the pandemic, this Court does not intend to second-guess the wisdom of the executive when it chooses between two competing and efficacious policy measures. However, it continues to exercise jurisdiction to determine if the chosen policy measure conforms to the standards of reasonableness, militates against manifest arbitrariness and protects the right to life of all persons. This Court is presently assuming a dialogic jurisdiction where various stakeholders are provided a forum to raise constitutional grievances with respect to the management of the pandemic."

The directions issued and inquiries undertaken by the constitutional courts have sparked discussion on whether the courts have overstepped boundaries separating powers between the organs of the State. The Central Government itself appealed against the directions of at least two State High Courts (Delhi and Karnataka). Before the Supreme Court also, the Central Government suggested that "overzealous" judicial intervention may lead to "unforeseen and unintended" consequences (The Times of India 2021). Some have termed the Delhi High Court's daily monitoring of the capital's health infrastructure "micromanaging" and accused the judiciary of overreaching and taking decisions without scientific expertise (Dixit 2021). Such criticism places propriety above the objective of securing essential supplies and services. The lack of preparedness on the part of both the Central Government as well as the State Governments was evident as cases started to rise in March 2021 and hospitals began to fill up. Indian social media networks were full of pleas from individuals for oxygen cylinders, COVID-19 medication, and assistance in finding a hospital bed. The Delhi High Court's involvement was precipitated by hospitals which found themselves short of oxygen and in some cases found that promised supplies were being diverted to other states or otherwise could not reach them. Press conferences and other announcements from the governments did not provide enough opportunity for the general public to understand the situation, leading to panic, and absolutely no public hearing (such as a virtual town hall) were held, nor grievance redressal mechanisms were set up for individuals to raise their concerns with the implementation of any policy.

In this situation, the High Courts and the Supreme Court intervened in public interest

as the only independent institutions having the power to hold the government accountable and seek answers.

4. Conclusion

During both waves of the COVID-19 pandemic, priority was given by the courts in India to deal with lockdown violations and other measures. One of the possible reasons for this was the simplistic belief engendered by the government that the virus was largely confined to the cities. Consequently, mass migration of labour and workers from cities to rural areas would expose the villagers to the virus and perhaps infect them. The response of the courts seems to have been influenced by this belief and therefore treated as an administrative problem rather than a rights issue or a serious public health issue. Enforcement of the rule of law and administrative orders became the focus of attention and the larger picture was missed.

The second wave hit the country very hard and the courts appreciated that the problem was no longer an administrative issue, but a human rights and humanitarian crisis. This realization made the constitutional courts far more responsive to the rights of the people to live a life of dignity, which includes timely and effective medical assistance. The misery of those infected with the virus and the large number of deaths shook up the courts. It was realized that the problem was not a rule of law problem but the inability of the administration to fulfil its governance responsibilities. PILs then became the order of the day and some courts even initiated *suo motu* proceedings. These timely and proactive interventions through PILs brought human rights and public health issues into focus.

The lesson, we believe, is that constitutional courts have a much larger societal role and are not mere adjudicatory bodies. Judicial review of administrative action is a necessary handshake to ensure stability in governance, particularly during a crisis.

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3. Judicial Response to COVID-19 in India: Analysing the Role of the Courts in Addressing a Human Crisis

Ritwick Dutta

1. Introduction

The development of public interest litigation has been an extremely significant development in the history of the Indian jurisprudence. The decisions of the Supreme Court in the 1970s loosened the strict locus standi requirements to permit filing of petitions on behalf of marginalized and deprived sections of the society by public spirited individuals, institutions and/or bodies. The higher courts exercised wide powers given to them under Articles 32 and 226 of the Constitution (*The Constitution of India, 1950*). The sort of remedies sought from the Courts in the public interest litigation goes beyond award of remedies to the affected individuals and groups. In suitable cases, the Courts have also given guidelines and directions. The Courts have monitored implementation of legislation and even formulated guidelines in the absence of legislation. The origin and evolution of public interest litigation in India emanated from realization of constitutional obligation by the Judiciary towards the vast sections of the society—the poor and the marginalized sections of the society. This jurisdiction has been created and carved out by the judicial creativity and craftsmanship.

1.1 Public Interest Litigation and Judicial Activism

The Courts expanded the meaning of right to life and liberty guaranteed under Article 21 of the Constitution (*The Constitution of India, 1950*). The rule of locus standi was diluted and the traditional meaning of "*aggrieved person*" was broadened to provide access to justice to a very large section of the society which was otherwise not getting any benefit from the judicial system.

In a case, the Supreme Court held that: "Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions *access to justice* through 'class actions', 'public interest litigation' and 'representative proceedings.' (Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India 1981). Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions."

The Indian courts may have taken some inspiration from the group or class interest litigation of the United States of America and other countries but the shape of the public interest litigation as we see now is predominantly indigenously developed jurisprudence. The public interest litigation as developed in various facets and various branches is unparalleled. The Indian courts by their judicial craftsmanship, creativity and urge to provide access to justice to the deprived, discriminated and otherwise vulnerable sections of

society have touched almost every aspect of human life while dealing with cases filed under the label of public interest litigation. The credibility of the superior courts of India has been tremendously enhanced because of some vital and important directions given by the courts. The courts' contribution in helping the poorer sections of the society by giving new definition to life and liberty and to protect ecology, environment and forests are extremely significant (State of Uttaranchal v. Balwant Singh Chaufal 2010). The COVID-19 situation is no different. The Supreme Court along with some high courts passed significant orders on how to deal with the crisis facing humanity.

In another case, the Supreme Court observed 'that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief (People's Union for Democratic Rights v Union of India 1982). Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed. That would be destructive of the rule of law which forms one of the essential elements of public interest in any democratic form of Government. The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights.

The purpose behind this paper is to observe and highlight the role of Indian Judiciary in addressing human crisis amidst such a pandemic situation through judicial activism. The Judiciary has made every possible attempt to intervene and preserve the fundamental rights of the marginalized sections of the society. This paper discusses the various judicial pronouncements on COVID-19 and how the fundamental rights are preserved.

2. The Supreme Court and the Pandemic

The COVID-19 presented a challenge to both the medical infrastructure as well as government institutions. Given the lack of response from the government, public spirited people approached the court for seeking urgent directions to deal with the humanitarian crisis. This paper analyses some of the key intervention by the Supreme Court on COVID-19 and the nature of directions issued by it.

2.1 Compensation to COVID-19 Victims

In a recent case, the Supreme Court considered the need to provide ex gratia monetary compensation of to the families of the deceased who have succumbed to the pandemic of COVID-19, in view of Section 12 of the Disaster Management Act. (*The Disaster Management Act, 2005*) The petitioners have taken the stand that as mandated by Section 12 of the Act, the National Authority shall have to recommend guidelines for the minimum

Table 3-1: The Selected Court Cases and Its Issues in this Chapter

Courts	Case Details	Issues Discussed
The Supreme Court of India	Reepak Kansal v Union of India and Others, 2021	Compensation to COVID-19 victims.
	Sachin Jain v Union of India, 2020	Nation-wide cost related regulation for treatment of COVID-19 patients at private/corporate hospitals.
	In Re: Distribution of Essential Supplies And Services During Pandemic, 2021	Distribution of medicine and essential services like drugs, oxygen and vaccination.
	Union of India v Raksh Malhotra, 2021	Supply of oxygen in Delhi
	Youth Bar Association of India Vs. Union of India, 2021	Door-to-door COVID-19 vaccination programme for all citizens, particularly those who are elderly, differently abled, less privileged, belong to the weaker sections of the society
	Union of India v Rakesh Malhotra, 2021	Distribution of COVID-19 vaccination.
	Jerryl Banait vs. Union of India, 2020	Precautionary guidelines for frontline workers.
	In Re: Contagion of COVID-19 Virus in Prisons, 2020	Condition of under trial prisoners amidst COVID-19.
	In Re: Contagion of COVID-19 Virus in Children Protection Homes	Prevention of spread of COVID-19 in Child Care Institutions.
Kerala High Court	Sabu P. Joseph vs. State of Kerala, 2021	Affordable treatments to all citizens without discrimination.
Bombay High Court	Jan Swasthya Abhiyan and Ors. vs. State of Maharashtra, 2020	Prevention of the spread of COVID-19 in the State of Maharashtra.

(Source: Compiled by this author.)

standards of relief to be provided to persons affected by disaster, which shall include ex gratia assistance on account of loss of life. However, Government of India took the stand that the "shall" used in Section 12 may be read as "may" and it should be read as directory/discretionary and shall not be construed as "mandatory". In this regard, the Court viewed that the object and purpose of enactment of Disaster Management Act, 2005 and the relevant provisions of DMA 2005 are required to be referred to and considered and stated (Reepak Kansal v Union of India and Others, 2021):

> "10.1 In Section 12 of DMA 2005, the word "shall" is used twice. The intent of the legislature by using the word "shall" twice is very clear and the same can be in tune with the Statement of Objects and Reasons for enactment of DMA 2005 and the functions and powers of the National Authority. One of the Objects and Purposes is "mitigation".
>
> …
>
> 10.4 Therefore, to construe the word "shall" as "may" and as directory/discretionary,

> the very object and purpose of the Act will be defeated. The word "shall" used twice in Section 12 significantly imposes a duty cast upon the National Authority to issue guidelines for the minimum standards of relief which shall include ex gratia assistance on account of loss of life as also assistance on account of damage to houses and for restoration of means of livelihood.
>
> [...]
>
> As observed hereinabove, nothing is on record that any decision/guidelines has/have been issued by the National Authority for ex gratia assistance on account of loss of life due to COVID-19 pandemic while recommending guidelines for minimum standards of relief to be provided to the persons affected by the disaster/COVID-19 pandemic. Once, it is observed as above and it is held that the word "shall" have to be read as "shall" and it is the mandatory statutory duty cast upon the National Authority to recommend guidelines for the minimum standards of relief which shall include ex gratia assistance on account of loss of life."

The Court came to the conclusion that the "the National Authority has failed to perform its statutory duty cast under Section 12 and therefore a writ of mandamus is to be issued to the National Authority to recommend appropriate guidelines for ex gratia assistance on account of loss of life due to COVID-19 pandemic while recommending guidelines for the minimum standards of relief to be provided to persons affected by disaster/COVID-19 pandemic as mandatory under Section 12 of DMA 2005." The Supreme Court disposed of the writ petition and directed the NDMA to recommend guidelines as mandated under section 12(iii) of DMA Act, 2005 and to issue simplified guidelines for issuance of death certificates.

2.2 The Pandemic and the Nation's Medical and Socio-Economic Capital

The Supreme Court in another case considered the issue with respect to nation-wide cost related regulation for treatment of COVID-19 patients at private/corporate hospitals. The alleged that the private/corporate hospitals are commercially exploiting the patients suffering from COVID-19 by charging exorbitant charges as a result the vulnerable sections are deprived of proper treatment (Sachin Jain v Union of India, 2020). The Apex Court while agreeing to the fact that the cost of medical treatment for COVID-19 should not act as a deterrent to the patients suffering from the said pandemic resulting in denial of access to medical care, held that "No one should be deprived of access to the medical care, because of the high cost towards the charges for treatment of COVID-19. However, the Court was not in favor of putting a cost restriction on fees charged. According to the Court, 'it is not possible to determine/lay down the uniform cost structure, for treatment of patients suffering from COVID-19 throughout the country, inasmuch as the cost structure varies from State to State and Union Territory to Union Territory, depending upon the conditions and the availability of medical facilities. There is unanimity among all that the cost of treatment for COVID-19 is not and cannot be the same in all the States/Union Territories. We, therefore, consider it iniquitous to impose a ceiling on the charges for treatment of COVID-19'.

Notwithstanding this finding, the Court felt that there is a need to not 'let go' of this important issue and directed the Petitioners to approach the concerned authority and the decision of the authority should be placed before the Court. The operative part reads:

> … we permit the petitioner party-in-person, learned counsel or their representatives to make a representation in this behalf to the Secretary, Ministry of Health and Family Welfare, Government of India, who shall meet all the parties concerned of the present petition on 16.07.2020 at New Delhi and an appropriate decision may be taken within a period of one week thereafter. The decision of the said meeting shall be placed before this Court for further consideration of the matter before issuing directions/guidelines under the provisions of the Disaster Management Act, to the various State Governments/Union territories."

The same petitioner also sought the issue of appropriate writ directing the Government to regulate the cost of treatment of patients infected with COVID-19, at Private/Corporate hospitals across the country and directing the Union of India to bear the cost of treatment of COVID-19 patients at private hospitals, for the poor and vulnerable and who have neither the means nor the insurance cover, by expanding the coverage under Public Health Schemes such as Ayushman Bharat. In this regard, the Court directed the Health Ministers and Secretaries to meet within a week; prepare a master plan; have the second meeting to review the master plan; submit a further report to the Court (Sachin Jain v Union of India, 2020). It is important to highlight that the Supreme Court invoked its extraordinary power to direct the executive comprising of both civil servants and ministers to meet and decide on the issue.

In April 2021, India was hit with the second wave of COVID-19 the second wave was far more devastating than the first wave. The Supreme Court took up the issue of distribution of medicine and essential services where the Court considered at length distribution of drugs, oxygen and vaccination which are being carried out by Government including the Central Government according to protocols established by the health authorities. The Court opined that the distribution of these essential services and supplies must be done in an even handed manner as per the advice of the health authorities. In this regard, directed the Central Government to come up with a National Plan for dealing with services and supplies during the pandemic (In Re: Distribution of Essential Supplies and Services During Pandemic, 2021) Specially, the Court was cognizant of the fact that there has been in a way a breakdown of the governance which necessitated intervention by the Court. The Court passed direction on almost all aspects related to the COVID-19 crisis. The list of subjects on which directions were passed included Supply of oxygen, Supply of essential drugs; Method and manner of vaccination and Declaration of lockdown. The Supreme Court sought detailed response from the Government of India and passed the following specific directions:

> "1. The UOI shall ensure, in terms of the assurance of the Solicitor General, that the deficit in the supply of oxygen to the GNCTD is rectified within 2 days from the date of the hearing, that is, on or before the midnight of 3 May 2021;
>
> 2. The Central Government shall, in collaboration with the States, prepare a

buffer stock of oxygen for emergency purposes and decentralize the location of the emergency stocks. The emergency stocks shall be created within the next four days and is to be replenished on a day-to-day basis, in addition to the existing allocation of oxygen supply to the States; …."

2.3 The Case of Delhi's Depleting Oxygen

The issue of oxygen supply was considered in another case by the Supreme Court where it dealt with the specific three issues – (i) The methodology adopted by the Union Government for computing the requirement of oxygen of the States and Union Territories; (ii) The need to manage available resources of oxygen to optimize their availability for the National Capital Territory of Delhi, which is dependent on an efficient supply chain; proper distribution of oxygen from the supply points to hospitals; and by building buffer stocks of oxygen and (iii) Actual availability of oxygen (Union of India v Raksh Malhotra, 2021). Upon hearing the matter, the Court viewed that a consensus has emerged that there is a need to ensure that the allotments of medical oxygen to the States and UTs is made on a scientific, rational and equitable basis. Thus, the Court suggested that an expert body having renowned national experts with diverse experience in health institutions can be considered for being set up as a National Task Force, which will provide a public heath response to the pandemic on the basis of a scientific approach. It is necessary that an effective and transparent mechanism is set up within the Government for the purpose of allocating medical oxygen to all States for being used during the COVID-19 pandemic. The Union Government has agreed to set up a National Task Force to streamline the process. According to the Court, the rationale for constituting a Task Force at a national level is to facilitate a public health response to the pandemic based on scientific and specialized domain knowledge. We expect that the leading experts in the country shall associate with the work of the Task Force both as members and resource persons. This will facilitate a meeting of minds and the formulation of scientific strategies to deal with an unprecedented human crisis. The establishment of this Task Force will enable the decision makers to have inputs which go beyond finding ad-hoc solutions to the present problems. The likely future course of the pandemic must be taken into contemplation at the present time. This will ensure that projected future requirements can be scientifically mapped in the present and may be modulated in the light of experiences gained. Estimating projected needs is crucial to ensure that the country remains prepared to meet future eventualities, which will cause a demand for oxygen, medicines, infrastructure, manpower and logistics. The Court further stated that the establishment of the Task Force will provide the Government with inputs and strategies for meeting the challenges of the pandemic on a transparent and professional basis, in the present and in future.

The Supreme Court also specified the terms of reference of the National Task Force which included (i) Assess and make recommendations for the entire country based on the need for, availability and distribution of medical oxygen; (ii) Formulate and devise the methodology for the allocation of medical oxygen to the States and UTs on a scientific, rational and equitable basis; (iii) Make recommendations on augmenting the available supplies of oxygen based on present and projected demands likely during the pandemic; (iv) Make recommendations for the periodical review and revision of allocations based on the

stage and impact of the pandemic;

Importantly, the Court highlighted the need to conduct audits for determining: (a) whether the supplies allocated by the Union Government reach the concerned State/UT; (b) the efficacy of the distribution networks in distributing supplies meant for hospitals, health care institutions and others; (c) whether the available stocks are being distributed on the basis of an effective, transparent and professional mechanism; and (d) accountability in regard to the utilization of the supplies of oxygen allocated to each State/UT.

In addition, the Court directed that the task force Plan and to adopt remedial measures for ensuring preparedness to meet present and future emergencies which may arise during the pandemic; also to facilitate the use of technology to ensure that the available manpower is optimized for implementing innovative solutions particularly in order to provide an outreach of expert medical care to rural areas; Suggest measures to augment the availability of trained doctors, nurses and para-medical staff including by the creation of suitable incentives; Promote evidence based research to enhance effective responses to the pandemic; Facilitate the sharing of best practices across the nation to promote knowledge about the management of the pandemic and treatment of cases.

2.4 COVID-19 and Vaccination

A petition was filed under Article 32 of the Constitution to seek directions to the Union of India to enforce a door-to-door COVID-19 vaccination programme for all citizens, particularly those who are elderly, differently abled, less privileged, belong to the weaker sections of the society and those who are not capable of registering on-line for approaching vaccination centers (Youth Bar Association of India Vs. Union of India, 2021). The Court however, rejected the petition on the reasoning that:

> "The vaccination programme is already under way and this Court is monitoring the situation in the suo motu proceedings which have been initiated during the course of the second wave of the COVID-19 pandemic. At this stage, it would be difficult to issue a general direction of the nature which has been sought, particularly having regard to the diversity of conditions prevalent in different parts of the country. Any order that the Court passes should not impinge upon the administrative powers of the State Governments to take suitable measures, including door to door vaccination, in appropriate cases.
>
> Hence, at the present stage, it would be appropriate to permit the petitioners to address their concerns to the Ministry of Health and Family Welfare and to make concrete suggestions in that regard. This may be considered at the appropriate level. We clarify that the present order will not have any bearing on the suo motu proceedings where the Court is monitoring the response to the COVID-19 pandemic."

The Court however, in another matter opined that the issue of vaccination is absolutely crucial, since health experts globally agree that vaccination of the nation's entire eligible population is the singular most important task in effectively combating the COVID-19 pandemic in the long run. Hence, the present matter, the Court has limited to hear the submissions on the government of India's vaccination policy and its roadmap for the future (Union of India v Rakesh Malhotra, 2021). That based on the submissions of the Union of

India, three issues have been highlighted by the Court – (i) vaccine distribution between different age groups; (ii) vaccine procurement process and (iii) the augmentation of the vaccine availability in India. The Court went into the issue of prioritization of the groups for obtaining the COVID-19 vaccines. It even went a step further to make preparation for the possible 'third wave'. The Court directed the government to furnish details with respect to:

- The preparedness with respect to specific needs of children in the event of a third wave of the pandemic in terms of medical infrastructure, vaccination trials and regulatory approval, and compatible drugs;
- Whether under the policy of the government, it is permissible for State or individual local bodies to access vaccine supplies of foreign manufacturers;

Further, the Court stated that based on the submissions it is clear that there exists a digital divide in India, particularly between the rural and urban areas. The extent of the advances made in improving digital literacy and digital access falls short of penetrating the majority of the population in the country. It is further opined that serious issues of the availability of bandwidth and connectivity pose further challenges to digital penetration. A vaccination policy exclusively relying on a digital portal for vaccinating a significant population of this country between the ages of 18-44 years would be unable to meet its target of universal immunization owing to such a digital divide. It is the marginalized sections of the society who would bear the brunt of this accessibility barrier. This could have serious implications on the fundamental right to equality and the right to health of persons within the above age group. Thus, in the light of the submissions made by the government India, the Court observed that it may not be feasible to require the majority of our population to rely on friends/NGOs for digital registrations when even the digitally literate are finding it hard to procure vaccination slots. The Supreme Court directed the government to submit the complete data on the Central Government's purchase history of all the COVID-19 vaccines till date (Covaxin, Covishield and Sputnik V). The data should clarify: (a) the dates of all procurement orders placed by the Central Government for all 3 vaccines; (b) the quantity of vaccines ordered as on each date; and (c) the projected date of supply.

3. The Court, COVID-19 and Those Worst Affected

The plight of the front-line workers was brought to light when a medical professional filed a Public Interest Litigation seeking judicial intervention for the enforcement of precautionary guidelines issued by the World Health Organization and the Ministry of Health and Family Welfare, which reiterated the importance of using Personal Protective Equipment while interacting with those infected with the virus. The petitioner who is a medical professional approached the court, seeking directions to ensure availability of appropriate Personal Protective Equipment, including sterile medical/Nitrile gloves, starch apparels, medical masks, goggles, face shield, respirators (i.e. N-95 Respirator Mask or Triple Layer Medical Mask or equivalent), shoe covers, head covers and coveralls/gowns to all Health Workers including Doctors, Nurses, Ward Boys, other medical and paramedical professionals actively attending to, and treating patients suffering from COVID-19 in India,

in Metro cities, Tier-2 and Tier-3 cities (Jerryl Banait vs. Union of India, 2020). The court also expressed its disappointment in the recent pelting and attacking of health care workers in Indore who had gone to screen individuals for the virus. Condemning the act of violence, the court opined that:

> "The pandemic which is engulfing the entire country is a national calamity. In wake of calamity of such nature all citizens of the country have to act in a responsible manner to extend helping hand to the Government and medical staff to perform their duties to contain and combat the COVID-19. The incidents as noted above are bound to instill a sense of insecurity in doctors and medical staff from whom it is expected by the society that they looking to the call of their duties will protect citizenry from disease of COVID-19. It is the duty of the State and the Police Administration to provide necessary security at all places where patients who have been diagnosed coronavirus positive or who have been quarantined are housed. The Police security be also provided to doctors and medical staff when they visit places for screening the people to find out the symptoms of disease."

Moreover, the court, satisfied with the merits in the petitioner's argument issued specific directions to the government of India, with a hope of creating a safety and support mechanism for all front-line workers. The court held that the Ministry of Health and Family Welfare was bound to ensure the availability of all protective equipment as had been prayed for in the petition. Further, the court also directed the provision of police protection and security to necessary hospitals and doctors in Covid wards, and extended the same even in cases when doctors and other staff would venture out to screen for the virus. Acknowledging the shortage in resources, the court ruled that the Government would also look into alternatives including enabling and augmenting domestic production of protective clothing and gear to medical professional. This includes the exploring of alternative modes of production of such clothing (masks, suits, caps, gloves etc.) and permitting movement of raw materials. The court also felt that exporting protective equipment could be temporarily halted, till the internal demand of the nation was met, and gave the government discretionary powers to do the same.

3.1 COVID-19 and Prisons

The Supreme Court in another matter opined that there is an imminent need to take steps on an urgent basis to prevent the contagion of COVID-19 virus and directed on March, 2020, when the first wave started to show cause as to why directions should not be issued for dealing with the present health crisis arising out of Corona virus in the country, and further to suggest immediate measures which should be adopted for the medical assistance to the prisoners in all jails and the juveniles lodged in the Remand Homes and for protection of their health and welfare." (In Re: Contagion of COVID-19 Virus in Prisons, 2020) In a subsequent order the Court passed specific order directing that the physical presence of all the under-trial prisoners before the Courts must be stopped forthwith and recourse to video conferencing must be taken for all purposes. Also, the transfer of prisoners from one prison to another for routine reasons must not be resorted except for decongestion to ensure social distancing and medical assistance to an ill prisoner. Also,

there should not be any delay in shifting sick person to a Nodal Medical Institution in case of any possibility of infection is seen.

The Supreme Court further directed that prison specific readiness and response plans must be developed in consultation with medical experts. "Interim guidance on Scaling-up COVID-19 Outbreak in Readiness and Response Operations in camps and camp like settings" jointly developed by the International Federation of Red Cross and Red Crescent (IFRC), International Organization for Migration (IOM), United Nations High Commissioner for Refugees (UNHCR) and World Health Organization (WHO), published by Inter-Agency Standing Committee of United Nations on 17 March, 2020 may be taken into consideration for similar circumstances. A monitoring team must be set up at the state level to ensure that the directives issued with regard to prison and remand homes are being complied with scrupulously. With respect to the issue of overcrowding, the Court highlighted Article 21 of the Indian Constitution which ensures Right to Life to every person to emphasize the need to control the spread of the Corona Virus within the prisons. It directed for the setting up at the state level a High Powered Committee[1] comprising of to determine which class of prisoners can be released on parole or an interim bail for such period as may be thought appropriate. The Court even went a step further to suggest that the "the State/Union Territory could consider the release of prisoners who have been convicted or are under-trial for offences for which prescribed punishment is up to 7 years or less, with or without fine and the prisoner has been convicted for a lesser number of years than the maximum. The Court however stated that it is made clear that we leave it open for the High-Powered Committee to determine the category of prisoners who should be released as aforesaid, depending upon the nature of offence, the number of years to which he or she has been sentenced or the severity of the offence with which he/she is charged with and is facing trial or any other relevant factor, which the Committee may consider appropriate."

However, the concerns with respect to the plight of the prisoners did not end with the directions. In a subsequent hearing, it was pointed out by the Amicus Curie that the prisoners who have been released according to the guidelines framed by the High-Powered Committee in various States are stranded because they have no means to reach their homes or their places of residence. This led the Court to issue directions to the states to ensure that the government shall ensure that all the prisoners having been released are not left stranded and they are provided transportation to reach their homes or given the option to stay in temporary shelter homes for the period of lockdown.

3.2 COVID-19 and Children

The Supreme Court also intervened and opined over how to prevent the spread of the virus to Child Care Institutions (CCIs). These include children in need of care and protection (CNCP), and children in contact with the law (CiCWL) in Observation Homes, children in foster and kinship care, all of whom are protected within the ambit of the Juvenile Justice (Care and Protection of Children) Act, 2015. (In Re: Contagion of COVID-19 Virus in Children Protection Homes).

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1 The High Power Committee is to comprise of (i) the Chairman of the State Legal Services Committee, (ii) the Principal Secretary (Home/Prison) by whatever designation is known as, (ii) Director General of Prison(s).

In view of the ever-changing nature of the pandemic, the court requested the State Government and nodal departments to keep the superintendents abreast with all relevant advisories, and circulars along with guidance issued where required. The Juvenile Justice Committees (JJCs) of every High Court was directed to ensure that the directions are complied with in letter and spirit. Further, the District authorities were expected to give necessary permission to transfer children to their family homes or Juvenile Justice Board (JJB) or any other authority.

The court directed the Child Welfare Committee to proactively undertake steps and provisions to curb the spread in CCIs, and also deliberate over whether or not a child should be kept in a CCI given the contagious nature of the virus. The CCIs were further directed to organize online counselling sessions to dispense information on preventive measures that can be undertaken, and also have online counselling sessions with families to try to reserve institutionalization as the last resort. They were asked to maintain constant telephonic and virtual contact with children sent back to their families, and further coordinate with the District Child Protection Committees and Foster care and Adoption Committees. The court, recognizing the ills that plague the life of such children, specifically violence, and gender based and sexual abuse, directed the CCIs to be increasingly vigilant to ensure the prevention of any such incident.

The Court encouraged the Juvenile Justice board and children's court to hold sessions and proceedings virtually, in light of the social distancing norms of the pandemic, and also consider measures to prevent children from children residing in Observation Homes, Special Homes and Places of Safety from risk of harm arising out of COVID-19. The Hon'ble Court opined

> "In this regard, JJBs and Children's Courts are directed to proactively consider whether a child or children should be kept in the CCI considering the best interest, health and safety concerns. These may include:
> (i) Children alleged to be in conflict with law, residing in Observation Homes, JJB shall consider taking steps to release all children on bail, unless there are clear and valid reasons for the application of the proviso to Section 12, JJ Act, 2015.
> (ii) Video conferencing or online sittings can be held to prevent contact for speedy disposal of cases.
> (iii) Ensure that counselling services are provided for all children in Observation homes."

Reiterating that COVID-19 had now been declared a pandemic by the WHO, the court that the situation warrants urgent attention and action to pre-empt emergency and disaster situation from arising with regard to children in State care. All state governments were directed to circulate relevant information on how to curb the spread to all CCIs, and to work with Persons in Charge of CCIs and District Child Protection Units to plan staffing rotations or schedules to reduce in-person interaction by CCI staff, where feasible. They were also encouraged to begin developing a system for how to organize trained volunteers who could step in to care for children, when the need arises. The role of the government extended to making provisions to ensure that counselling was available, and that there were monitoring systems in place to prevent violence, abuse, and neglect, including gender-based violence,

which may be exacerbated in contexts of stress produced by lockdown. They were asked to ensure adequate budgetary allocation for the costs that are likely to arise for the effective management of the pandemic, and that all bottlenecks and procedural delays are effectively curbed. Further, they were to ensure adequate availability of good quality face masks, soap, disinfectants such as bleach, or alcohol-based disinfectants, etc. and availability of adequate food, drinking water, and other necessities such as clean clothes, menstrual hygiene products, etc.

As the primary caretaker for these vulnerable children, the Court issued detailed guidelines to the CCI. The excerpt of the same has been reproduced herein:

> "The Person in Charge of the CCI and all other staff working in the CCI shall proactively and diligently take all necessary steps to keep the children safe from the risk of harm arising out of COVID-19, in furtherance of the fundamental principle of safety enshrined in the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015).
>
> Further, the court issued preventive, responsive and guidance measures to be undertaken by CCIs to ensure well-being of children."

Judicial activism, combined with the independence of the three organs of the state, has allowed the courts to intervene in the day-to-day happenings of the society when crucial. The Hon'ble Apex Court hence took suo-moto cognizance of the plight of the children in Child Care Institutions, emphasizing how this vulnerable section would be far more susceptible to be infected and affected by the virus.

4. High Court and the COVID-19

As each wave of the pandemic took the country within its grip, the Hon'ble High Courts set precedents unlike others in an attempt to provide respite to those infected or affected by the virus.

The Hon'ble High Court of Kerala took cognizance of the Public Interest petition, that in view of the catastrophic effect of the pandemic on citizens across the state, and the nation, all hospitals in Kerala-in the public or private sector-must strive to provide affordable, if not free, treatment to all citizens without discrimination. The concerns raised in the petition included the despondency faced by a citizen when he is denied health care assistance for want of sufficient hospital beds and infrastructure. (Sabu P. Joseph vs. State of Kerala, 2021). Further, it was reiterated that the number of active cases in Kerala was insidiously climbing every day and that admission and care in a Government Hospital/Facility as becoming increasingly difficult. The petitioner was emphatic that in such a situation, a COVID-19 patient, who is in need of emergent care would have no choice between a government facility and a private one and hence would be compelled to seek admission in the latter, thus exposing him/her to unimaginable financial burden. He then argued that in the global pandemic scenario it would be grossly unethical to let private health facilities charge as they please which would lead to unconscionable profiteering.

The Court, upon perusal of Government Orders notified in that regard, appreciated the order stating that it provides specific mechanisms for grievance redressal and unequivocally

fixes the ambit of the tariff that can be charged by the hospitals/nursing homes in the private sector. The court recorded that;

> 'We find the afore rates to be very reasonable, because it includes almost all the components of basic hospitalization, including nursing and doctors' charges, bed charges and essential medical expenses.
>
> … That said, we must also record our great appreciation for the order because, for the first time, it makes the Kerala Clinical Establishments (Registration and Regulation) Act, 2018 ('the Act' for short), applicable as far as COVID-19 treatment is concerned, making it indubitable that private hospitals require to abide by its provisions, particularly, Section 39 read with Rule 19 of the Kerala Clinical Establishments (Registration and Regulation) Rules, 2018 (hereinafter referred to as the 'Rules'). The conjoint effect of the Act and the Rules is that the hospitals will have to now publish the rates of their services, as required under Section 39 of the Act and Rule 19 of the Rules and any violation of the same will visit them with penal consequences mentioned therein.'

The Hon'ble Court, taking cognizance of the increasingly worsening scenario of the pandemic, issued the following directions to the state government:

> "1.All private hospitals in Kerala were directed to reserve half of their beds for the treatment of COVID-19 patients, and offer treatment at the rates notified by the government.
>
> 2.The government was directed to establish the State Level Grievance Authority, and employ Grievance Redressal mechanisms.
>
> 3.Every private hospital in the State of Kerala would display the rates of the services to be given to the public and in particular to a COVID-19 patient, would will also publish the price list of the drugs required for treatment."

The Hon'ble Chief Justice of the Bombay High Court took heed of the gravity of the situation and acknowledged that despite the extensive steps undertaken by governments, both at the center and the state, the spread of the virus had not been curtailed, and in fact, India stood at the fourth position in the list of the ten worst affected nations. The court opined in specific over the grasp that the pandemic had maintained over the state of Maharashtra, and issued specific directions to deal with all 24 grievances that were raised by the petitioner (Jan Swasthya Abhiyan and Ors. vs. State of Maharashtra, 2020). In a view to provide respite from the pandemic, the court directed the continuation and initiation of the following endeavors:

I. "Drive for robust detection of positive cases, intensive contact tracing, aggressive testing, and extensive spread of information and awareness relating to norms to keep one safe for a better future;
II. Develop wholesome strategy for dealing with all classes of patients, and balancing health care for COVID-19 patients and patients suffering from other diseases alike;
III. display on the website, all information relating to real time availability of facilities at Government/MCGM run hospitals/clinics as well as private hospitals for

COVID-19 patients and patients suffering from other diseases for minimizing harassment and inconvenience to the extent possible;

IV. based on statistical data as well as inputs, take an informed decision either on continuation of lockdown or revocation of relaxations to the extent necessary or regulation of human activities to keep the nation working and at the same time preventing further risk;"

5. Conclusion

The manner in which the Supreme Court dealt the issue of COVID-19 is a classic instance of how the Indian Court has dealt with issues of public interest. However, the major point of distinction is that the Court was reacting to an emergency situation requiring urgent and immediate action. The Court has held in many judicial decisions that the power to issue does not merely confer power on this Court to issue direction, order or writ for the enforcement of fundamental rights. Instead, it also lays a constitutional obligation on this Court to protect the fundamental rights of the people. The Court asserted that, in realization of this constitutional obligation, "it has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights". (M.C Mehta v Union of India, 1987). The Court realized that because of extreme poverty, a large number of sections of society cannot approach the court. The fundamental rights have no meaning for them and in order to preserve and protect the fundamental rights of the marginalized sections of the society by judicial innovation; the Courts by judicial innovation and creativity started giving necessary directions and passing orders in the public interest. Viewed from this angle, the manner in which the Court has been overseeing the steps taken by the Government in dealing with the COVID-19 crisis is a classic instance of not only continuing mandamus but also the Constitutional court becoming one which rather than adjudicating on disputes between parties or resolving issues of constitutional importance is more focused on governance. This does not augur well in term of separation of power. An active court overseeing government action to deal with a crisis also signifies the failure of governance by both elected members and selected bureaucrats. A government which responds and functions only on directions of the judiciary and not through parliamentary oversight and control goes against the basic principle of democracy. The Court's intervention during the pandemic was much wanted due to the lack of good governance. The Courts had to interfere and direct specific measures for the best interest of the marginalized sections of the society and to preserve their fundamental rights. However, the basic functioning of parliaments and judiciaries was hobbled by the nature of crisis which leads to the lack of preparedness to manage it efficiently. Since, the Central and State Governments struggled during the hit of pandemic on 2020 and 2021, the Supreme Court of India stepped in to safeguard the fundamental rights of the Indian Citizens. The High Courts also micromanaged the pandemic situation in their respective States. This in itself is not a happy situation. The role of courts is to adjudicate on dispute and not to govern. The Pandemic in a way 'forced' the Court to venture into an area which is not strictly its domain.

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4. Indonesia Judiciary during the Pandemic: Staying Afloat in Troubled Water

Linda Yanti Sulistiawati

1. Introduction

As the largest archipelago in the world, Indonesia is made up of 17,000 islands – five major islands and other smaller groups of islands. The population of Indonesia stands at 270.20 million (Badan Pusat Statistik, 2021), making it the fourth-most populous country in the world. Due to its vast geographical expanse and large population, one of the main challenges in Indonesia is its lack of infrastructure, which has, in turn, led to uneven economic development and social justice across the country, including access to healthcare. For instance, geographical factors, such as the availability and distribution of healthcare services, may particularly lead to disparities between districts (Mulyanto, Kunst, Kringos, 2019). Thus, in response to the President of Indonesia's statement on March 2, 2020, that COVID-19 cases had been found in the country, and the World Health Organization's subsequent declaration of a COVID-19 pandemic, the Government of Indonesia ("GoI") had to immediately respond with the most suitable way to curb the spread of the virus and minimize the challenges.

The GoI responded by enacting Law No. 4 of 1984 on Contagious Diseases ("Law on Contagious Diseases") and Law No. 6 of 2018 on Health Quarantine ("Law on Health Quarantine") as the basis to implement related regulations and bylaws to tackle the COVID-19 pandemic (Badan Nasional Penanggulangan Bencana and Universitas Indonesia, 2020). With these laws, the GoI set several rules and policies, for example, placing limits on human traffic, shutting down schools, places of worship, introducing social distancing in public facilities and working from home. One of the rules stipulated under the above laws at the initial period after COVID-19 hit Indonesia and became the basis for enacting the policies was Government Regulation No. 21 of 2020 on Large-Scale Social Distancing to Accelerate the Mitigation of Coronavirus Disease 2019 (COVID-19) which has been stipulated on March 31, 2020, by the GoI (GR No. 21/2020) (GoI, 2020a). The GoI also promulgated rules that appeared to prioritize economic considerations over public health factors. These were not always welcomed by the people, as evidenced by the complaints that have been made to the GoI in relation to these matters.

The pandemic also brought challenges to the judicial system, particularly in the implementation of procedural laws. The public movement limitations, working from home policies, and concerns over catching the virus have become obstacles to the normal flow of judicial processes For example, the criminal proceedings in Indonesia require the presence of parties in the courtroom, trials which are generally open to the public is potential to cause a crowd if many people are watching in the courtroom. This is contrary to the government's efforts to suppress the spread of COVID-19 (Santosa, 2020). Therefore, on March 23, 2020, most trials across the nation were suspended due to the COVID-19 pandemic. However, lower courts were still allowed to conduct selected trials offline,

albeit with restricted attendance at hearings and temperature scans for all attendees before entry (Gumelar, 2020).

This paper discusses the COVID-19 in Indonesia, particularly matters related to the steps taken by GoI, the Indonesian judicial system, and its jurisprudence, from the beginning of the pandemic until December 15th, 2021. The aims of this paper are four-fold. First, to discuss the efforts that have been made by the GoI to combat the effects of the COVID-19 pandemic, in particular, the effects on the Indonesian judicial system and its jurisprudence. Second, to provide possible suggestions to assist the Indonesian judiciary during this pandemic. Third, to explain the obstacles and challenges the judicial institutions have to overcome so that constitutional rights are upheld. Fourth, to highlight some major cases relating to COVID-19 that have come before the court, and our comments on the said cases.

2. Indonesia's Response to the COVID-19 Pandemic

In light of Indonesia's unique geography and demography, unlike any other countries, the GoI has implemented different measures to contain the spread of COVID-19 in a dynamic manner, so that adjustments can be made in response to new COVID-19 developments. This chapter will discuss the key measures that have been implemented.

2.1 Earlier Stage of COVID-19 Pandemic in 2020

2.1.1 Health-Related Measures

When COVID-19 cases were first detected in Indonesia, the GoI chose to enact and implement the Law on Contagious Diseases, Law on Health Quarantine., Law on Regional Government as underlying laws, before enacting relevant regulations and bylaws that do not require prior approval from the legislature.

The rules issued to control the spread of infection is legally binding and non-compliance may be met with administrative or criminal sanctions, whereas guidance for the public is merely advisory. Directives, which are legally binding instructions to public authorities, are most commonly in the form of a presidential address which is followed up by regulations that are implemented by government agencies or regional leaders. Guidance is frequently employed to support legal rules and to affect behavior through recommendations instead of hard law.

Through GR No. 21/2020 (GoI, 2020a) the GoI established Large-Scale Social Restrictions (PSBB). This provides guidance to regional leaders to restrict social activities and the movement of people and/or goods within their respective regions, upon approval from the central government, specifically, via the Minister of Health.

Following GR No. 21/2020, government institutions and regional leaders introduced regulations to implement PSBB policies in their respective institutions or regions. For example, through a Circular, the Minister of Administrative and Bureaucracy Reform restricted travel and the taking of leave for civil servants on national holidays during the COVID-19 pandemic (Minister of Administrative and Bureaucracy Reform, 2020). The Circular provides disciplinary sanctions for the violators in the form of a verbal warning, written warning up to release from office, and termination. The Minister does not publish the enforcement of the Circular.

Furthermore, the government of Greater DKI Jakarta has required every person located within the area to adhere to COVID-19 health protocols which include, inter alia, mask-wearing, restriction on outdoor activities, i.e., study from home, limitation on workplaces, as stated in Government of DKI Jakarta Regulation No. 101 of 2020 on the First Amendment of Regulation No. 79 of 2020 on Disciplinary and Law Enforcement on Health Protocols as an Effort to Prevent and Control COVID-19 ("GR of DKI Jakarta No. 101/2020") (Government of Greater Jakarta, 2020). Pursuant to GR of DKI Jakarta No. 101/2020, those who contravene the rules will be subject to administrative sanctions in the form of corrective work, such as cleaning public facilities for periods of one to four hours while wearing a special vest, or a fine of IDR 250,000 that may be increased to a maximum of IDR 1 million for repeat offenders. These measures also apply to business entities in DKI Jakarta. Every business entity must implement health protocols, for example, by requiring every employee to wear a mask at all times, and limiting the number of employees in the workplace at any time to 25% of the workplace capacity. Any business entity that violates these rules is liable to administrative fines of up to IDR 50 million, and for repeat violations, up to IDR 150 million.

However, not all provinces have set their own sanctions for non-compliance with COVID-19 protocols. For provinces that have not, the enforcement of COVID-19 policies relies primarily on the Law on Health Quarantine and police powers based on the Criminal Code (Indonesian Criminal Code, 1915).

The Law on Health Quarantine sets out imprisonment terms and fines for various violations of quarantine or isolation rules that apply to transportation providers, individuals, and corporations, per Articles 90 to 94. These sanctions can go up to 10 years' imprisonment or a fine of IDR 15 billion. Crimes under this Law are investigated by the police and specialized Civil Service Investigators with jurisdiction in health-related crimes as per Article 84.

Meanwhile, the Indonesian police rely on an interpretation of existing Criminal Code regulations. The primary regulation linking police authority, COVID-19, and the Criminal Code is the National Police Chief Decree of 2020 (National Policy Decree, 2020), which broadly provided, inter alia, that:

a) Public events, including social, cultural, religious, music, sports, entertainment events, protests, and other activities are prohibited if they involve mass congregations. In cases of necessity, such events should follow relevant guidelines;
b) The public follow information and formal recommendations from the government;
c) Stockpiling necessities in excess should be avoided;
d) The public should not be influenced by or create fake news.

According to the data published by the Indonesian COVID-19 Task Force (Indonesia COVID-19 Task Force, no date), the bulk of non-compliance of COVID-19 rules and policies arises from the flouting of health protocols, in particular, the rules on wearing masks and limitations on public gatherings. In some cases, the implementation of sanctions sparked criticisms due to different interpretations taken by the law enforcement officers. For example, in DKI Jakarta, those caught not wearing masks were ordered to lie down in a coffin, whereas offenders in East Java were ordered to dig graves, pray for COVID-19

victims at cemeteries, and do push-ups. Epidemiologists criticized such sanctions as being ineffective, not educational, and unstandardized across the country (Burrows, Souisa, and Renaldi, 2020). Criticism has also been directed at the officials in Pekanbaru, Riau province, where no specific punishment for violations is provided for in their local COVID-19 regulations. The officials there have been criticized by a coalition of civil society groups for bringing criminal charges against those found in violation of the city's PSBB. According to critics, PSBB violations should only be considered as administrative violations, therefore police officers do not have the authority to pursue criminal charges (Post, 2020).

2.1.2 Measures in Financial Matters

Aside from the health-related measures, on March 31, 2020, the GoI issued the Interim Emergency Regulation in Replacement of Law No. 1 Year 2020 on Financial State Policy and Financial System Stability to Manage COVID-19 (Perppu No. 1/2020) (GoI, 2020b) to mitigate the economic impact of the COVID-19 pandemic. By providing the GoI with powers to widen the budget deficit to 3% of Gross Domestic Product, reallocate mandatory spending, shift budgeted funds between institutions, authorize procurement, and use available finances within the State budget, the GoI would be in a better position to alleviate the heavy financial burdens brought about by the COVID-19 pandemic. However, Perppu No. 1/2020 has sparked controversy due to Article 27 (2) and (3) which provide that the Ministry of Finance, Bank of Indonesia, the Financial Services Authority, and other officials involved in the implementation process, will not be prosecuted if they perform their duties in good faith and in accordance with statutory requirements. Further, all verdicts of the actions taken based on Perppu No. 1/2020 cannot be the object of a lawsuit at the administrative law court (GoI, 2020b). Nevertheless, this Perppu was officially passed by the House of Representatives as law and on May 18, 2020, the Perppu was enacted as Law No. 2 of 2020 (Indonesia Ministry of Finance, 2020). Subsequently, several complaints were submitted to the Constitutional Court, contending that Perppu No. 1/2020 is unconstitutional which will be discussed further in this paper.

2.2 The Response in 2021

With the rapidly developing COVID-19 pandemic, on January 6, 2021, the GoI, through the Minister of Home Affairs Instruction No. 1 of 2021 on Implementation of Restriction on Public Activities to Control the Spread of COVID-19 (Ministry of Home Affairs, 2021a), chose to apply a different approach to fighting the pandemic by establishing the Restriction on Community Activities (*Pemberlakuan Pembatasan Kegiatan Masyarakat* or PPKM). With this PPKM, the central government has the role of deciding which cities or provinces should limit their public movement, regardless of whether there was prior request from the regional governments. The GoI provided detailed measures that should be taken by the regional governments, covering a wide range of issues such as allocation and distribution of vaccines, strengthening testing, tracing, and treatment (which includes the launch of PeduliLindungi mobile health surveillance application), distribution of social assistance and social security, and budget allocation for the management of COVID-19. The GoI's responsibility in PSBB also applies in PPKM, which is to provide medical assistance, food, and other essential needs for those on quarantine.

In June 2021, the Delta variant was detected in Indonesia, thereby causing thousands

of infected cases and casualties (Wahyuni and Andriyanto, 2021). The President requested the COVID-19 related institutions, including the COVID-19 Task Force and Ministry of Home Affairs, to implement stricter measures to suppress the spread of infection. On July 2, 2021, the Minister of Home Affairs enacted Ministerial Instruction No. 15 of 2021 on Emergency Restriction on Public Activities, which focused primarily on Java and Bali – every region in Java and Bali was to apply the PPKM from July 3 to July 20, 2021 (Ministry of Home Affairs, 2021b).

On July 20, 2021, the Minister of Home Affairs enacted Ministerial Instruction No. 22 of 2021 on the Implementation of Level 4 COVID-19 Restriction of Public Activities in Java and Bali (Instruction No. 22/2021) (Ministry of Home Affairs, 2021c). Under this Instruction, people who live in areas classified under Level 4 must observe a strict stay-home policy which entails (a) enforcing online schooling, (b) implementing 100% work-from-home measures for non-essential businesses, (c) implementing activities with a maximum of 50% capacity for essential businesses (for example, financial and banking services that involve some degree of physical interaction with customers), and 25% capacity for other administrative staff, (d) allowing a full 100% capacity for critical businesses (for example, hospitals, disaster management and basic utility services), and (e) ceasing the operation of malls and shopping centres.

In light of the constantly evolving situation, the COVID-19 Task Force made several adjustments to the measures, namely (a) expanding the PPKM to regions outside Java and Bali (Ministry of Home Affairs, 2021d), and (b) providing that, in applying the PPKM, the level of contingency in every region is determined based on the severity of the outbreak, which is in turn based on an assessment by the Ministry of Health (Ministry of Home Affairs, 2021e). The PPKM has been extended several times with the most recent extension period from October 19 to November 8, 2021.

Instruction No. 22/2021 and its following regulations stipulate that regional government leaders must adhere to the Instruction, and that non-compliance would result in administrative sanctions ranging from a written notice to temporary termination. Every business owner, restaurant, shopping centre, public transport operator who violates the rules in the Instruction will be the subject of administrative sanction, the most serious of which involves business closure. For individuals, the sanctions that may apply are stipulated in Articles 212 to 218 of the Criminal Code, Contagious Diseases Law, Health Quarantine Law, local regulations, bylaws, and any related rules and legislation.

Some notable issues that have arisen in 2021 relating to the handling of COVID-19 pandemic include the shortage of oxygen supply for COVID-19 patients (BBC, 2021)[1] and breach of data protection laws on the Pedulilindungi mobile application (Widianto, 2021).

3. The Indonesian Judiciary System and the COVID-19 Pandemic

The Indonesian legal system is based on the Civil Law system (European Continental System) which is influenced by local Adat Law (Customary Law) and Islamic Law. The Civil Law system has been formed in Indonesia since Dutch colonialism and affects the

[1] BBC (2021) Indonesia faces oxygen crisis amid worsening Covid surge. *BBC News*. Available from: https://www.bbc.com/news/world-asia-57717144 [Accessed 5 October 2021].

current legal products which are marked by "written laws". In the culture of the Civil Law System, the law is identical to the laws, the source of the law and its values are based on the laws (Aditya, 2019). Furthermore, Courts are not bound by decisions of courts at the same level or higher (Lindsey, no date).

Concerning the COVID-19 pandemic, the GoI has decided certain laws that became underlying to implement rules and policies in overcoming the pandemic. The sanctions provided by the laws related to the violation of COVID-19 pandemic measures consist of administrative and criminal charges. The Indonesian judicial institutions play a big part in enforcing the regulations.

The judicial institutions in Indonesia consist of the Supreme Court, Constitutional Court, and Judicial Commission. The Supreme Court has the highest judicial power over the existing four court jurisdictions, namely General Court, Religious Court, State Administrative Court, Military Court. The Constitutional Court has the authority to try cases at the first and final level, and has the final say in reviewing allegedly unconstitutional laws. The Judicial Commission has authority to propose candidates for appointment as justices of the Supreme Court, and to maintain and ensure the honor, dignity, and appropriate behavior of judges.

3.1 How the Indonesian Judicial System Manages Impacts of COVID-19 Pandemic

3.1.1 Supreme Court and Related Institutions

The judicial institutions had to manage challenges and obstacles when the COVID-19 pandemic reached Indonesia. One of the earliest measures taken in the Indonesian judicial system was the issuance of Circular Letter No. 1 of 2020 by the Supreme Court on March 23, 2020 (SC Circular Letter No. 1/2020). This Circular suspends court trials across the nation, however, the lower courts and criminal courts were allowed to continue to conduct selected trials offline with restricted attendance at hearings and temperature scans for all attendees before they were permitted entry. The underlying principle behind this measure is that the safety of the people should be the supreme law (*salus populi suprema lex esto)* (Indonesian Supreme Court, 2020). SC Circular Letter No. 1/2020 has been amended several times to adjust with the developing situation of the COVID-19 pandemic.

The criminal courts also faces problems due to the COVID-19 health protocols set by the GoI, with the main obstacle being social distancing. Through the letter of the Directorate General of General Courts No. 379/DJU/PS.00/3/2020 (Letter No. 379/2020), the Supreme Court allowed criminal court proceedings to be conducted electronically (via teleconferencing) and requested the courts to work together with the Attorney-General's Office and Correctional Institutions. Further, the Supreme Court also issued Circular Letter No. 4 of 2020 on the Administration and Trial of Criminal Cases in Court (SC Circular Letter No. 4/2020) which stipulates that the administration and e-trials for criminal cases can be conducted electronically in special circumstances where it is impossible to proceed with the regular procedures, for example, due to physical distance, natural disaster, pandemic, or other emergencies as determined by the GoI or the judges.

With the hopes to facilitate easier access to the litigation process, the Supreme Court enables e-Court applications to cover e-Litigation for both civil and criminal cases, by

providing information electronically on court dates and trial schedules, the case dossier, the trial proceedings, and even the delivery of the verdict or ruling. In addition, the Supreme Court also provides technical assistance on e-Court to judges and registrars in an effort to counter the lack of IT knowledge within the institution (Indonesian Supreme Court, 2020, p. 206).

One of the many issues facing Indonesian courts today is the lack of an integrated database; therefore those interested in following cases for a particular classification should first collect data from courts across the country. As an archipelagic country with thousands of islands and millions of people, Indonesia must continue to develop its information system, including the database of legal cases in every court Indonesian Supreme Court, 2020, p. 67).

According to the Supreme Court database, it is stated that in 2020 e-trials have been used by 379 out of 389 District Courts across Indonesia Indonesian Supreme Court, 2020, p. 149). By conducting proceedings through teleconferences, distance is no longer an obstacle. According to the Supreme Court database, further, there is no specific classification for cases related to the COVID-19 pandemic, however, the numbers of cases registered through e-Court application in 2020 are as follows: (i) 82,409 General Court cases; (ii) 102,729 Religious Court cases, and (iii) 2,143 State Administrative Court cases Indonesian Supreme Court, 2020, p. 160).

3.1.2 Constitutional Court

On March 5, 2009, through the issuance of Constitutional Court Regulation No. 18 of 2009 on Guidelines for Electronic Filing and Video Conferencing (CC Reg. No. 18/2009), the Constitutional Court implemented a judicial system based on digital technology to conduct its reviews (Indonesia Consitutional Court, 2009). Therefore, when the COVID-19 pandemic hit Indonesia, the Constitutional Court was more than prepared and ready to implement virtual proceedings (Indonesia Constitutional Court, 2021).

The current Constitutional Court policy in convening reviews through video conferencing is that the justices must still be in attendance physically at the Constitutional Court, while the applicants can be located anywhere with an internet connection and still have to adhere to the usual court rules and procedures, for instance, advocates and applicants must comply with the rules of courtroom attire (Indonesia Constitutional Court, 2020).

4. Cases, Legal Actions and Judicial Reviews

The rationale behind administrative law is that criticism and legal claims are part of the checks and balances in the administration of a democratic state (Noor, 2021). As the third-largest democracy in the world, this concept also applies in Indonesia. The steps taken by the GoI in combatting COVID-19 have become the object of judicial review requests and challenges. Many Indonesians have questioned the policies and regulations through criticism and even lawsuits against the GoI.

Aside from violations that were settled on the site by the law enforcement officers (Noroyono, Mansur and Saputri, 2021), there are cases that went through legal proceedings in the court room. We have selected some interesting cases related to the GoI's handling of

the COVID-19 pandemic, as provided below.

4.1 Constitutional Court

The GoI is relying on several laws to enforce measures to combat the COVID-19 pandemic. Although most Indonesians do not object to the regulation, some laws have been repeatedly requested for a judicial review in the Constitutional Court. The request for review is related to the enactment of Perppu No. 1/2020, which has officially passed as Law No. 2 of 2020, Contagious Diseases Law, and Health Quarantine Law.

The main issue in the judicial review is the provisions in Perppu No. 1/2020, which was enacted as Law No. 2 of 2020, regarding the protection from any legal charges for government officials and institutions who implement the COVID-19 pandemic regulations on fiscal and monetary sectors as long as they perform their duties in good faith and in accordance with statutory requirements, and legal interpretation of several terms and provisions on Contagious Diseases Law and Health Quarantine Law.

Table 4-1: Major Cases Related to the COVID-19 Pandemic Measures in Constitutional Court

No.	Case Number	Petition	Details	Decision
I	Judicial Review on Perppu No. 1/2020 against the Constitution			
1.	23/PUU-XVIII/2020 (Constitutional Court Decision, 2020a)	Judicial Review of Article 2(1) a 1, 2, and 3, Article 27, and Article 28 Perppu No. 1/2020 against the 1945 Constitution	The Petitioners argued that the regulation is discriminative and has a potential to facilitate to criminal acts of corruption and its inconsistency with the Constitution by granting immunity to government officials in the finance related institutions.	On June 23, 2020, the Constitutional Court rejected both applications and ruled that the object of the review was no longer valid by virtue of the enactment of Perppu No. 1/2020 as Law No. 2 of 2020
2.	24/PUU-XVIII/2020 (Constitutional Court Decision, 2020b)	Judicial Review of Article 27 Perppu No. 1/2020 against the 1945 Constitution	The Petitioners argued that the regulation has a potential to facilitate to criminal acts of corruption and its inconsistency with the Constitution by granting immunity to government officials in the finance related institutions.	
II	Judicial Review on Law No. 2/2020 against the Constitution			
1.	37/PUU-XIX/2021 Constitutional Court Decision, 2020c)	Judicial Review of Law No. 2 of 2020 against the 1945 Constitution	The Petitioner requested: a. the examination of (i) the formal aspects of the formation of the Law and (ii) the material aspects of certain provisions by providing a constitutional interpretation of the relevant laws; and	On October 28, 2021, the Constitutional Court rejected the request for a review of the formal aspect, but granted partially the petition for the material aspects. Three constitutional justices submitted a dissenting opinion, stating that the

No.	Case Number	Petition	Details	Decision
			b.declare that provisions that are contrary to the Constitution and endanger the national economy and/or financial system stability have no binding legal effect.	entire application for judicial review, that is, both formal and material aspects, should be rejected since the Law has been legally promulgated in accordance with emergency procedures and the material aspects of certain provisions must be viewed against the backdrop of the COVID-19 pandemic.
2.	42/PUU-XVIII/2020 Constitutional Court Decision, 2020d)	Judicial Review of of Law No. 2 of 2020 against the 1945 Constitution	The Petitioners requested the examination of Law No. 2 of 2020 and declare that the Law is contrary to the Constitution and have no binding legal effect; therefore, it should be revoked.	On October 28, 2021, the Constitutional Court rejected the request. The Constitutional Court stated that the Petitioners did not comply with court rules, especially in a pandemic situation, by objecting to attending any virtual proceeding; therefore they are considered not to be present in the courtroom.
3.	43/PUU-XVIII/2020 Constitutional Court Decision, 2020e)	Judicial Review of Article 2(1) a 1, 2, and 3, and Article 27(1), (2), and (3) of Appendix to Law No. 2 of 2020 against the 1945 Constitution	The Petitioner requested: a.the examination of (i) the formal aspects of the formation of the Law, and (ii) the material aspects of Article 2(1) a 1, 2, and 3, and Article 27(1), (2), and (3) Appendix to Law No. 2 of 2020; and b.declare that provisions that are contrary to the Constitution and endanger the national economy and/or financial system stability; therefore it should not have binding legal effect.	On October 28, 2021, the Constitutional Court rejected the request for a review of the formal aspect, and rejected the request to examine the respective articles with the ground that it had no legal basis.
4.	45/PUU-XVIII/2020 Constitutional Court Decision, 2020f)	Judicial Review of Article 2, Article 12(2), Article 27, and Article 28(3) and (10) of Appendix to Law No. 2 of 2020 against	The Petitioner argued that Article 2, Article 12(2), Article 27, and Article 28(3) and (10) of Appendix to Law No. 2 of 2020 has exceeding the scope of the COVID-19 pandemic management and creating a legal uncertainty. The Petitioner requested examination on respective	On October 28, 2021, the Constitutional Court rejected the request with the ground that it had no legal basis and the object of the review was no longer valid.

No.	Case Number	Petition	Details	Decision
		the 1945 Constitution	provisions of Appendix to Law No. 2 of 2020 or declare that provisions concerned are only applies for budget fiscal year of 2020.	
5.	47/PUU-XVIII/2020 Constitutional Court Decision, 2020g)	Judicial Review of Article 28(8) Appendix to Law No. 2/2020 against the 1945 Constitution	The Petitioners argued that the provision that revoked Article 72(2) Law No. 6 of 2014 on Villages regarding the Village Funds (*Dana Desa*) created legal uncertainty in the administration of village governance, so it must be considered unconstitutional.	On October 28, 2021, the Constitutional Court rejected the application with the ground that the Petitioners have misinterpreted Article 28(8). The Article stipulates that the mandatory spending of Village Funds allocations is temporarily suspended and becomes effective again after the pandemic is officially declared over which must be done no later than the end of the 2nd year after the enactment of the Law No. 2/2020.
6.	49/PUU-XVIII/2020 Constitutional Court Decision, 2020h)	Judicial Review of Article 27(1), (2), and (3) of Appendix to Law No. 2 of 2020 against the 1945 Constitution	The Petitioner requested: a.the examination of the material aspects of Article 27(1), (2), and (3) of Appendix to Law No. 2 of 2020; and b.declare that the provision is contrary to the Constitution; therefore, it should not have binding legal effect. The Petitioner argued that the article in question has the potential to override his constitutional right to demand legal accountability from the relevant agencies for the use of the state budget.	On October 28, 2021, the Constitutional Court rejected the request with the ground that it had no legal basis and the object of the review was no longer valid.
7.	75/PUU-XVIII/2020 Constitutional Court Decision, 2020i)	Judicial Review of Article 2(1) a 1, 2, and 3, Article 6(12), Article 27, and Article 28 of Appendix to Law No. 2 of	The Petitioners requested: a.the examination of (i) the formal aspects of the formation of the Law, and (ii) the material aspects of Article 2(1) a 1, 2, and 3, Article 6(12), Article 27, and Article 28 Appendix to Law No. 2 of 2020; and	On October 28, 2021, the Constitutional Court rejected the request for a review of the formal aspect, and rejected the request to examine the material aspects of Article 27(1) and (3) since the object for the review was no longer valid and there

No.	Case Number	Petition	Details	Decision
		2020 against the 1945 Constitution.	b.declare that provisions that are contrary to the Constitution and endanger the national economy and/or financial system stability; therefore it should not have binding legal effect. The Petitioners argued that the articles in question granted an absolute power to the President and provided immunity to the related institutions.	was no legal basis for examination on other respective articles.
III	Judicial Review on Health Quarantine Law against the Constitution			
1.	34/PUU-XVIII/2020 Constitutional Court Decision, 2020j)	Judicial Review of Article 55(1) of the Health Quarantine Law against the 1945 Constitution	The Petitioners argued that the term “people” in Article 55(1) must refer to the poor and thus the GoI is obliged to take full responsibility for their needs during the Regional Quarantine in the respective regions. Further, the Petitioners argue that the absence of a specific reference on “people” has caused the Central Government to establish PSBB instead of Regional Quarantine which is detrimental to them.	On July 13, 2020, the Constitutional Court rejected the application on the grounds that the Petitioners had no legal standing. The Constitutional Court stated that the Petitioners cannot clearly explain the loss that they experienced in relation to the implementation of Article 55(1).
2.	14/PUU-XIX/2021 Constitutional Court Decision, 2021)	Judicial Review of Article 10(1) of the Health Quarantine Law against the 1945 Constitution.	The Petitioner sought a constitutional interpretation of the law in question which is considered contradictory to the Constitution because it places the Government authority over the sovereignty of the people, and the revocation of implementing regulations issued by the Governor of DKI Jakarta on the implementation of PPKM in DKI Jakarta.	On June 10th, 2021, the Constitutional Court rejected the request, ruling that it had no legal basis. Further, the Constitutional Court is constitutionally entitled to examine laws, not its implementing regulations, against the Constitution.
IV	Judicial Review on Contagious Diseases Law and Health Quarantine Law against the Constitution			
1.	36/PUU-XVIII/2020	Judicial Review of	The Petitioners, consisting of medical doctors and the	On November 12, 2020, the Constitutional Court rejected

No.	Case Number	Petition	Details	Decision
	Constitutional Court Decision, 2020k)	Article 9(1) of Contagious Diseases Law and Article 6 of Health Quarantine Law against the 1945 Constitution	Indonesian Health Law Society, requested a provisional order requiring the GoI to provide for the basic needs of medical personnel and healthcare workers, especially during the pandemic.	the application. However, three constitutional justices submitted a dissenting opinion, contending that due to the risks borne by the medical personnel and healthcare workers in carrying out their duties, the request was justified by law, and should have been granted.

(Source: Compiled by this author.)

Based on the above, the law with the most requests for judicial review is Law No. 2 of 2020 on Stipulation of Government Regulation No. 1 of 2020 on State Financial Policy and Financial System Stability for the Management of the COVID-19 Pandemic in Facing Threats to the National Economy and/or Financial System Stability, in particular Article 2, Article 12 (2), Article 27, and Article 28. A similar argument that has been addressed by the applicants who requested an examination of the formal aspects is that the forming of Law No. 2 of 2020 is unconstitutional because it did not involve the Regional Representative Council (*Dewan Perwakilan Daerah – DPD*) in the ratification of the law. However, pursuant to Article 22D (2) 1945 Constitution in conjunction with Article 71 d and Article 249 (1) b Law No. 17 of 2014 on People's Consultative Assembly (MPR), the House of Representatives (DPR), Regional Representative Council (DPD), and the Regional House of Representatives (DPRD) which was last amended by Law No. 13 of 2019, it stipulates that the Regional Representative Council is involved in discussing the Bills relating to regional autonomy; relations between central and local governments; formation, expansion, and merging of regions; management of the economy and natural resources; central and regional financial balance; and provide advice to the House of Representatives on the draft laws relating to state budget revenues and expenditures as well as bills on taxes, education, and religion. Law No. 2 of 2020 does not specifically stipulate the matters concern; therefore, the involvement of the Regional Representative Council is not needed. Concerning the examination on material aspects, especially on the protections given to the financial sector authorities as referred to in Article 27 of Law No. 2 of 2020, it is in our views that such protection is provided only for actions and decisions taken in good faith and accordance with the law. Article 27 Law No. 2 of 2020 provides a definition that limits the financial and monetary officials in carrying out their duties. However, it is undeniable that the control of the use of the state budget must be closely monitored to ensure that the authorities perform their duties in a proper, correct, and careful manner.

The above court proceedings were conducted via video conference by the Constitutional Court.

4.2 Supreme Court

There is no specific classification for violation of regulations related to COVID-19. The Supreme Court database registered cases based on types of law violations, which

include general criminal cases, special criminal cases, civil cases, religious civil cases, special civil cases, and drug abuse. In 2021, cases related to COVID-19 pandemic were recorded in 601 courts throughout the country with details as follows (i) 5,615 cases registered in the Courts of First Instance; (ii) 200 cases are in the process of appeal in the Court of Appeal; and (iii) 5 cases are under review at the Supreme Court. General crimes were recorded as the highest case with 3,563 cases, while religious civil cases were recorded as the second highest case with 1,090 cases. Religious civil cases include cases of marital law (Indonesia Supreme Court, no date-a).

The following are some of the major cases related to COVID-19 that are filed at the Supreme Court and its judicial bodies.

Table 4-2: Major Cases Related to the COVID-19 Pandemic Measures in Supreme Court, State Administrative Court, and Civil Court

No.	Date	Case Information	Details	Decision
I	Supreme Court			
1.	October 29, 2021	• Application for judicial review of President Regulation No. 14 of 2021 on the Amendments to Presidential Regulation No. 99 of 2020 on Procurement and Implementation of Vaccinations in the Context of Eradicating the COVID-19 Pandemic (PR No. 14/2021) Respondent of this application is President of Republic of Indonesia	• The Petitioner argued that Article 13A(2), Article 13A(4), and Article 13B of PR No. 14/2021, which requires every Indonesian citizen to receive the COVID-19 vaccine and that those who do not are liable to administrative and/or criminal sanction, were legally defective., • The Petitioner requested that PR No. 14/2021 be declared formally and materially defective because it contradicted promulgation procedures as provided in Law No. 12 of 2011 on the Establishment of Legislation, and the spirit of human rights in guaranteeing every citizen to obtain health protection as regulated in Law No. 36 of 2009 on Health and Law on Contagious Diseases (Saputra, 2021).	As of December 10, 2021, the application of the case is still under review (Indonesia Supreme Court, no date-b).
II	State Administrative Court			
1.	November 6, 2020	• A lawsuit filed by a group of people at the DKI Jakarta Administrative Court • Case Register No. 203/G/TF/2020/PTUN.JKT	• The petitioner stated that the decision of the DPR, the Minister of Home Affairs, and General Election Commission (*Komisi Pemilihan Umum* or KPU) to continue holding the 2020 Regional Election (*Pemilihan Kepala Daerah* or Pilkada) amid the COVID-19	On April 15, 2021, the Administrative Court rejected the lawsuit (Jakarta Administrative Court, no date-a).

No.	Date	Case Information	Details	Decision
			pandemic was against the law. • The Petitioner requested for the Administrative Court to postpone the Pilkada until the pandemic subsided.	
2.	August 9, 2021	• A lawsuit filed by a street vendor at the DKI Jakarta Administrative Court • Case Register No. 188/G/TF/2021/PTUN.	• The Petitioner argued that the implementation of the PPKM is not in line with the definition given in the Law on Health Quarantine.	The trial is still ongoing (Jakarta Administrative Court, no date-b).
III	Civil Court			
1.	April 1, 2020	• A class action lawsuit filed by a group of Small and Medium Enterprises in the Central Jakarta District Court, DKI Jakarta • Case Register No. 186/Pdt.G/2020/PN Jkt. Pst	The petitioners claimed that the GoI was negligent and slow in tackling the COVID-19 pandemic, thus causing them to lose their businesses.	The lawsuit was rejected by the Court (Central Jakarta Court, no date).
2.	June 26, 2020	• A lawsuit filed by 11 residents of Pematang Siantar, North Sumatra province • Case Register No. 67/Pdt.G/2020/PN Pms	The applicants claimed that the Mayor of Pematang Siantar, North Sumatra had created a social stigma in the community of them as COVID-19 patients, which resulted in them losing their jobs and businesses.	The lawsuit was resolved through mediation (Pribadi, 2020).
3.	July 7, 2021	• A lawsuit filed by a lawyer in Jakarta in the Depok District Court • Case Register No. 13/Pdt.G/2021/PN Dpk	The applicant claimed that Raffi Farid Ahmad, a celebrity, has acted unlawfully and not set a good example to the public by attending a party without wearing mask shortly after he received his first vaccine injection.	The lawsuit was rejected by the Court (Depok District Court, no date).

(Source: Compiled by this author.)

Upon the foregoing, two issues have surfaced among the public, which are the sanctions or punishment for those who refuse the vaccine and the 2020 Regional Election (Pilkada) which took place amid a pandemic.

The discussions emerged from the issuance of PR No. 14/2021 with the argument that the administrative and/or criminal sanctions or punishment for choosing not to receive the vaccine should be treated as an *ultimum remidium.* However, the majority stated that although every citizen has the right to exercise their human rights, they must also respect the rights of others in obtaining health assurance from their environment (Usman, 2021).

Regarding the Pilkada, subsequently, there have been many COVID-19 clusters reported in three regencies in the Banten province (Firmansyah and Hidayatullah, 2020) and East Java province after it was carried out (Azmi, 2020). Many argue that the decision to

hold the 2020 Regional Election was not based on reliable considerations. Public health matters should be prioritized over political interests so that the increase in the number of people contracting the virus can be minimized (BBC, 2020).

From March 2020 to November 2021, the Supreme Court database recorded around 1,019 court decisions related to the COVID-19 pandemic, including requests for judicial review and civil cases (Indonesia Supreme Court, no date-c). These cases do not necessarily involve the GoI, with the majority of lawsuits, 65 cases, filed in the Surabaya District Court, East Java. These claims mainly involve disputes over COVID-19 health protocols, for example, the refusal to comply with the funeral protocol for COVID-19 patients, exceeding the maximum number of people allowed at a public gathering, defamation due to social stigma surrounding COVID-19 patients, and personal data protection of COVID-19 patients.

4.2.1 Criminal Court

There are around 342 criminal cases related to COVID-19 health protocol violations recorded in the Supreme Court database from March 2020 to November 2021, with 308 cases having been decided in the District Court and 34 cases having been appealed to the High Court (Indonesia Supreme Court, no date-d). Below are details of some interesting criminal cases.

Table 4-3: Major Criminal Cases Related to the COVID-19 Pandemic Measures in Criminal Court

No.	Court Decision Date	Court Location and Decision Number	Decision	Case Details
1.	May 27, 2021	• At North Jakarta District Court • Decision No. 221/Pid.Sus/2021 /PN.Jkt.Tim	Muhammad Rizieq Shihab, a controversial Indonesian cleric, found guilty of violating the COVID-19 health protocol by causing a large public gathering.	• Mr. Shihab was charged under Article 160 of the Criminal Code and Article 93 of the Law on Health Quarantine, and was sentenced to two years' imprisonment. • The Prosecution appealed against this decision. • On August 2, 2021, through the decision of the High Court No. 171/Pid.Sus/2021/PT DKI, the verdict was upheld (Indonesia Supreme Court, no date-e). • The Prosecution filed a cassation appeal against the High Court decision. • On October 11, 2021, the Supreme Court rejected the appeal (Saputra, 2021).
2.	July 13, 2021	• At. Tasikmalaya District Court • Decision No. 18/Pid.C/2021/ PN Tsm	Asep Lutfi Suparman, a street vendor, found guilty of violating the	• Mr. Suparman was charged under Article 34(1) in conjunction with Article 21(2)(g) and (f) of the West Java Province Regulation No. 5 of 2021 on Maintenance of Peace,

No.	Court Decision Date	Court Location and Decision Number	Decision	Case Details
			COVID-19 health protocol for wandering outside the allowed hours during PPKM.	Public Order, and Community Protection, • He was sentenced to a fine of IDR 5,000,000 with the provision that if not paid it will be replaced by three days of imprisonment (Tasikmalaya District Court, no date). • Mr. Suparman chose the imprisonment sentence for his inability to pay the fine (CNN, 2021).
3.	October 22, 2021	• At Jember District Court • Decision No. 4057/Pid.C/2021/ PN Jmr	Zainul Fuad found guilty of violating the COVID-19 health protocol by causing a large public gathering.	• Mr. Fuad was charged under Article 49 of the East Java Province Regulation No. 2 of 2020 on Amendments to the East Java Provincial Regulation No. 1 of 2019 on Maintenance of Peace, Public Order, and Community Protection and • He was sentenced to a fine of IDR 10,000,000 and 15 days of corrective work (Jember District Court, no date). • Mr. Fuad was the head organizer for the wedding reception for the Mayor of Jember, who is a relative of Hendy Siswanto (Primadhyta, 2021).
4.	December 10, 2021	• At Tangerang District Court • Decision No. 21/Pid.S/2021/ PN Tng	Rachel Vennya Ronald. Salim Suhaili Nauderer, and Maulida Khairunnisa found guilty of violating the COVID-19 quarantine requirements	• They were charged under Article 93 in conjunction with Article 9(1) Health Quarantine Law and Article 55(1) Civil code and • They were sentenced to four months imprisonment with eight-month probation and a fine of IDR 50,000,000, with the provision that if not paid it will be replaced by imprisonment for one month (Tangerang District Court, no date). With this ruling, they did not need to serve the imprisonment as long as they do not commit a crime during the eight-month probationary period. • Rachel Vennya Ronald and Salim Suhaili Nauderer are internet influencers with millions followers who returned from their overseas trip and escaped from their quarantine hotel before their required stay ended (Sutrisna, 2021).

(Source: Compiled by this author.)

Based on the brief description on the above cases, the Courts have been criticized over its ruling, particularly for cases that attract public attention that seemed unequal and unfair. According to Article 28D.1 of the 1945 Constitution, it stipulates that every Indonesian citizen is equal before the law, and the Court as a judicial system is obliged to treat its citizens equally, including in the administration of justice. In addition to the principle of equality before the law, the Court is also expected to apply equal justice to the poor and the rich. The government should also assume a certain degree of responsibility for assuring the poor equal access to probation and parole (The New York Times, 1964). This can be seen by comparing the Court's decision over Asep Suparman and Rachel Vennya's cases as stated above. Asep Suparman was not granted the probation, unlike Rachel Vennya. This case has attracted public attention not only because the offenders were famous people but it is also believed that this case is only the 'tip of the iceberg' of the overall situation of handling the COVID-19 pandemic regarding how law enforcement officers, especially immigration officers, do not enforce the quarantine regulation. This is what needs to be improved by the judges throughout the country to have careful consideration before making a decision.

5. Conclusion

As a populous country with a vast geographical expanse, Indonesia faced many challenges when the COVID-19 pandemic hit. The lack of infrastructure had led to uneven economic development and social justice across the country, including access to healthcare. To address the challenges, the GoI established numerous rules and policies that were appropriate to the situation, namely, restricting the movement of people, shutting down schools and places of worship, introducing social distancing in public facilities, and implementing work-from-home policies. The GoI also issued Perppu No. 1/2020 an important yet controversial regulation. These regulations and policies were not always welcomed by the people, as demonstrated by requests for judicial review submitted to the Constitutional Court and lawsuits filed at the District Courts.

Issues related to violation of regulations on COVID-19 were resolved inside and outside of the courtroom, with most violators receiving administrative sanctions in the form of corrective work. Problems occur when there are differences in the interpretation of regulations by law enforcement officials. Therefore, the GoI must improve and provide appropriate socialization to related officials and institutions.

The Indonesian legal system is based on the Civil Law system (European Continental System) which is marked by "written laws". In conducting its proceeding, the Indonesian judicial system is bound by laws. The sanctions provided by the laws related to the violation of COVID-19 pandemic measures consist of administrative and criminal charges. The Indonesian judicial institutions play a big part in enforcing the regulations.

The judicial system in Indonesia was also affected by the COVID-19 pandemic, especially in court procedures. Problems occur because of the lack of infrastructure and facilities, reliable IT knowledge, and the reluctance of court officials and parties in adapting to modern ways. In the spirit of creating an effective and efficient litigation process, the Supreme Court implemented e-Court and e-Litigation by synergizing electronic means with the existing judicial process, to overcome geographical issues. The Constitutional Court experienced similar issues when faced with the COVID-19 pandemic. The Indonesian

judiciary needs to improve its IT system, in particular the development of a centralized database of legal cases and a classification of special cases, provide appropriate technical assistance to advance the IT knowledge of the parties involved in the court process, as well as the ease of finding information for those in need.

It is still too early to say with certainty that all challenges have been managed. Nevertheless, the efforts made by the Supreme Court and the Constitutional Court to address these issues must be appreciated.

Last but not least, regardless of the COVID-19 pandemic, all Indonesian courts have to apply principles of equality before the law and equal justice for the poor and the rich so that the mandate contained in the 1945 Constitution could be enjoyed by all Indonesian citizens.

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5. The Legal Fight against COVID-19 Pandemic in Malaysia

Dato' Mah Weng Kwai

1. Introduction

The first reported case of the Coronavirus disease ("COVID-19") in Malaysia can be traced back to 25th January 2020 but it was not only until March 2020 when Malaysia saw a steep increase in daily COVID-19 cases (Elengoe, 2020). This microscopic pathogen has devastated the global community, unlike any other that mankind has experienced in recorded history and Malaysia was not spared. Without exception it has affected all aspects of life, with very serious consequences to the health, socio-economic, political and security sectors with the evolving novel legal challenges including cross border disputes due to the non-performance of contracts. As a result of this, the word 'Pandemic' became the most searched word and was chosen as Word of the Year 2020 ("Pandemic" chosen as Word of the Year 2020 by Dictionary.com, 2020). The Courts are dealing with an increase in cases of inter alia, matrimonial disputes, insolvencies, tenancy cases, sale of goods contracts and even in constitutional matters.

This book chapter will endeavour to address the various measures taken by the Government to try to contain the unprecedented threat of the COVID-19 pandemic to human health and life, measures such as the implementation of the Standard Operating Procedures ("SOPs") on large scale lockdowns, quarantine requirements, wearing of face masks and social distancing rules. This chapter will address the relevant legislation enacted as a consequence, the penalties provided for the non-compliance of the SOPs during the pandemic and the role of the Courts in the judicial response to the various measures imposed.

2. Measures Taken by the Government to Prevent the Spread of COVID-19

2.1 Legislation and Measures

The Government was proactive in controlling the spread of the disease by exercising its powers under the Prevention and Control of Infectious Diseases Act 1988 ("PCID Act") (Prevention and Control of Infectious Diseases Act, 1988) to implement and enforce the first lockdown on 18 March 2020 and to enact subsidiary legislations which gave rise to the standard operating procedures ("SOPs") (Fan & Cheong, 2020). At the initial stages, Executive Orders took the form of ad hoc measures such as with the Companies (Exemption) (No. 2) Order 2020 (Companies (Exemption) (No. 2) Order, 2020).

An example of the measures provided in the Order was that the presumption of insolvency of a company unable to pay its debts under Section 466(1)(a) of the Companies Act 2016 (Section 466(1)(a) Companies Act, 2016), was extended from 21 days to 6 months thus allowing some respite to ailing and cash-strapped companies. Various forms of

lockdowns were introduced since March 2020 such as the Movement Control Order ("MCO"), Conditional MCO ("CMCO"), Enhanced MCO ("EMCO") and Recovery MCO ("RMCO") (Fan & Cheong, 2020). EMCO and MCO contained the more stringent restrictions. The different MCOs were implemented in each State of the Federation of Malaysia differently to allow the States with less COVID-19 cases to open up more of their economic and social sectors. The Government released the COVID-19 Management Guidelines in Malaysia No. 5/2020 ("COVID Guidelines") (COVID-19 Malaysia, 2020) to provide guidance to the public and healthcare workers on, amongst other things, how to manage COVID-19 cases, conducting swab tests, and the list of screening centers and hospitals that handle and test COVID-19 patients respectively.

At the same time, the Ministry of Health was quick in taking action through the enforcement of health screening at all points of entry into the country. Thermal scanners were placed in airports to enhance the detection of fever amongst tourists and locals who were returning from abroad. When this was first implemented, those who were returning from Wuhan, China were screened, identified and isolated in special quarantine areas for COVID-19. However as the disease continued to spread, the Government imposed a mandatory 14-day quarantine order on all those who were returning from abroad (Tang, 2020).

As a way to ease the Government's efforts in slowly re-opening the economy in response to the number of infected cases in a certain State, the Government announced the implementation of the National Recovery Plan (The Star, 2021), that is, a four-phase exit strategy from the MCOs. To determine whether a State could move to the next phase, there were three indicators to be observed: COVID-19 transmissions in the community based on the number of daily infections, the capacity of the public healthcare system based on the bed utilisation rate in the Intensive Care Units (ICUs) in the Hospitals and the number of the persons that had been vaccinated.

- It started with Phase 1 which consisted of the full Movement Control Order whereby movement was almost fully restricted. Phase 2 was entered into once the number of infected cases fell below 4,000 per day, the utilisation of the ICU beds returned to moderate levels and at least 10% of the population has been fully vaccinated.
- Upon entering Phase 2, certain restrictions were slowly eased up. This included economic activities reopening in phases with up to 80% of workers allowed onsite for certain sectors. However, no social activities and interstate travel were allowed (The Edge Markets, 2021).
- For Phase 3, all economic activities except for those with high risks of transmission would be allowed to operate at 80% capacity. Parliamentary sessions were allowed to resume during this phase. Businesses which were still not allowed to operate included pubs, spas and beauty salons where physical distancing would be not possible. To enter Phase 3, the number of daily cases would have to fall below 2,000, the healthcare system would be operating at a comfortable level and at least 40% of the population would have received their double dose of vaccination. (The Edge Markets, 2021)
- The final phase of the recovery plan would be Phase 4 where the economy would be fully operational and interstate/international travel would be allowed. This would be

achieved when the average daily cases of infection was below 500, the healthcare would be at a normal level and at least 60% of the population had been fully vaccinated. (The Edge Markets, 2021)

The Government developed a mobile application called "MySejahtera" to facilitate contact tracing of the people (Bernama, 2020). Among the functions of the application is assisting the Government in managing and mitigating the COVID-19 outbreak by tracing an individual's movements, helping users in getting treatment if they are infected, locating the nearest hospital/clinic for COVID-19 screening and treatment and assisting in the process of vaccination appointments. Any individual entering a premise is required to scan the barcode as a way to signify that they have entered the premise and to 'check out' once they have left. Failure to do so may result in the individual being fined! (New Straits Times, 2021).

In addition to the above, to ensure the continuity and feasibility of the above mentioned measures, the Government has taken steps to strengthen its implementation by amending the Courts of Judicature Act 1964, the Subordinate Courts Act 1948 and the Subordinate Courts Rules Act 1955. These three statutes were amended to introduce the definition of "remote communication technology" which enables the Courts to conduct proceedings through a television link or live video or any other electronic means of communication.

2.2 Penalties for Non-Compliance of SOPs during the Pandemic

Various SOPs were enforced such as the imposition of lockdowns, traveling restrictions, the mandatory wearing of masks in public, the scanning of a "tracking App" called MySejahtera upon the entering of communal/public premises and many more. Any breach of the SOPs will lead to an individual and/or company being summoned, which summons could be compounded. The Prevention and Control of Infectious Diseases PCID (NO. 7) Regulations 2020 ("PCID Regulations") (Prevention and Control of Infectious Diseases PCID (NO. 7) Regulations, 2020) provided that any person who contravened any provision of the Regulations, on conviction, would be liable to a fine not exceeding one thousand ringgit (RM1,000) or to imprisonment for a term not exceeding six months or to both (Fan & Cheong, 2020). According to Section 3(3) and Section 3(4) of the PCID Act an authorized officer who fails to maintain the confidentiality of all matters which come to his knowledge in performance of his official duties under the PCID Act shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine or both (Section 3(3) and Section 3(4) Prevention and Control of Infectious Diseases PCID Act, 1988). The Regulations proved to be effective in containing the spread of COVID-19 for many months with mostly single digit or double digit numbers in daily cases.

2.3 Reliefs Provided by the Government to Aid Those Affected by the Pandemic.

2.3.1 Financial Measures

One of the biggest financial measures taken by the Government to help the public was in the form of an automatic moratorium on the repayment of loans due (Annuar, 2020). This was a deferment package granted by banking institutions for all loans taken by individuals

and Small and Medium Enterprises (SMEs) starting from 1st April 2020 and was initially implemented for six months. It was later extended until the end of the year 2020. This initiative was introduced by Bank Negara Malaysia to ensure that the financial intermediation function of the financial sector would remain intact, access to financing would continue to be available and banking institutions would remain focused on supporting the economy during these exceptional circumstances.

After the announcement of another lockdown in 2021, the Government re-introduced the blanket six-month moratorium as part of a RM150 billion relief package (Yusof, 2021). This relief was offered to all income groups that were suffering financially due to the pandemic. The borrowers were required to apply for the deferral even though the approvals would be unconditional and automatic. However, this moratorium only applied to loans or financing that had been approved before 1st July 2021. Credit card debts were not covered by the moratorium but instead individuals were offered to convert their debt into a term loan.

Another 'initiative' given by the Government was allowing individuals to withdraw certain amounts of money from the Employees' Provident Fund (EPF) to aid in the cash flow during the difficult economic times posed by the COVID-19 pandemic. Those who were eligible could withdraw up to RM60,000 from their first account via the i-Sinar facility.

2.3.2 COVID Act 2020

As a means to help those that are affected, the Government also implemented the Temporary Measures for Reducing the Impact of the Coronavirus Disease 2019 (COVID-19) Act 2020 ("COVID Act") in an effort to provide temporary financial relief to individuals and companies (Coronavirus Disease 2019 (COVID-19) Act, 2020). For example, Section 7 Part II of the COVID Act assists parties who were unable to perform their contractual obligations as a result of the measures prescribed under the PCID Act by ensuring that the other party will not be able to exercise its right under the contract against the defaulting party. Some categories of contracts exempted under Section 7 are construction/building contracts, performance bonds, professional services contracts, leases or tenancies of non-residential immovable property, events contracts, contracts by a tourism enterprise and religious-pilgrim related contracts. It does not, however, include contracts of employment, particularly contracts of personal services.

2.3.2.1 Section 7 of the COVID Act 2020

While many would interpret Section 7 of the COVID Act widely, there are still those who would adopt a narrow interpretation of the provision. For example, an individual who operated a hair salon would not have been able to operate due to the lockdown restrictions. As a result, the individual lost months of income and was unable to pay the rent for his commercial premises. In interpreting the provision in a wider sense, the individual would be protected under Section 7 of the COVID Act as the individual was unable to perform his contractual obligations, ie. paying rent according to the tenancy agreement, due to the fact that his salon could not operate because of the lockdown restrictions. However, when adopting the narrow interpretation, others may argue that the individual's inability to pay the rent was a result of his inability to manage his financial assets appropriately to provide

for the months of not having any business and not because of his sudden loss of income.

Section 7 of the COVID Act also provides that this relief is only applicable to "non-residential immovable property". This includes properties used for commercial purposes, such as restaurants, kindergartens, small office flexible offices (SoFo) units, shopping malls, small office versatile office (SoVo) and so on. Residential properties would include houses, flats, service apartments and even small office home office (SOHO) units. So in a sense, that same individual who was unable to operate his hair salon due to lockdown restrictions and who had little or no income for months would be unable to rely on Section 7 of the COVID Act if he was unable to pay for his residential rent (ZICO Law, 2022).

2.3.2.2 Force Majeure

For the contracts that do not fall within the scope of Section 7, parties have relied on force majeure clauses to avoid liability for non-performance of their contracts due to the emergency and/or the Movement Control Order. In this event the party will have to prove that a force majeure event has happened which is an occurrence that is outside of the control of a party to a contract and causes the party to be unable to perform or complete its contractual obligations. The party will have to prove that specific wordings such as "pandemic", "epidemic", "plagues" and "national emergency" were mentioned in the clause (Prashant and Yi, 2021).

2.3.2.3 Frustration

In the absence of the force majeure clause, parties can resort to relying on the common law doctrine of frustration which is provided under Section 57 of the Contracts Act 1950. It states that the frustration of a contract occurs when "a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful".

In the case of Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd (2007), the requirements to fulfil section 57 were set out as follows:

1. the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If a provision has been made, then the parties must be taken to have allocated the risk between them;
2. the event relied upon by the promisor must be one for which he is not responsible for. Self-induced frustration is ineffective; and
3. the event which is said to discharge the promise must be such that it renders it radically different from that which was undertaken by the contract. The Court must find it practically unjust to enforce the original promise.

Therefore, in the case of limitations imposed under the Emergency Ordinance and the MCO 2.0, a party who seeks to rely on the doctrine of frustration may argue that these circumstances were beyond the control of the parties to a contract and may not have been contemplated by parties when entering into the contract.

In the English courts, a claimant had tried to submit that this doctrine of frustration applies in cases relating to Letters of Credit. In the case of *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm), Salam Air had applied for an injunction in the High Court to refrain Latam Airlines from making demands under 3 standby Letters of Credit. The claimant budget passenger airline entered into three aircraft leases with the

defendant airline group. The claimant leased the aircrafts with a view to operating domestic flights within Oman initially. However as a result of the COVID-19 pandemic, Oman introduced strict travel restrictions which prohibited all flights to or from the Oman airports (with a few exceptions). The claimant stopped paying rent, redelivered the aircrafts and notified the defendant of its wishes to terminate. Furthermore, Salam Air made an application for an injunction in the High Court to restrain the defendant from making any claim under the Letters of Credit on the ground that the leases have been frustrated by the effects of the COVID-19 pandemic, in particular, restrictions on air passenger flights imposed by the authorities in Oman, where Salam Air and the aircrafts were based.

One of the two issues to be answered was whether Salam Air could demonstrate a sufficiently arguable case that the leases were frustrated by the effects of the COVID-19 pandemic. The Court referred to the case of *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] 1 CLC 876 which sets out the factors to be considered:

> "Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances"

In the present case, the Court had to consider whether there was a "frustration of purpose". The Court was of the view that there was no shared purpose between the parties but instead had concerned the claimant alone. Furthermore, the leases were also drafted to show the intention of the parties that the claimant's obligation to pay rent continued in almost any conceivable circumstances. On these grounds, the claimant had failed to satisfy the threshold for the second issue. Although this is an English case, this decision may be persuasive in argument in the Malaysian courts.

2.3.2.4 Mediation

The COVID-19 Act also provides for mediation under section 9, which is voluntary in principle and must be consented to by both parties. Among the Government's incentive for encouraging mediation, it announced during the tabling of the COVID-19 Bill in both Houses of Parliament that the Government will allocate not less than RM29 million to provide mediation services through a COVID-19 Mediation Centre (PMC-19) for the public and companies that are affected by COVID-19 for disputes of up to RM300,000 in value. This is to assist members of the public in resolving their contractual disputes arising from the implementation of the Movement Control Order.

2.3.2.5 Limitation Period

Another salient clause in the COVID-19 Act are sections 11 and 12 that provide for modifications to the Limitation Act 1953, as Section 6 of the Limitation Act 1953 provides for a six-year limitation period for certain cases. As a result of section 12, any limitation period stipulated in Section 6 of the Limitation Act 1953 which expired during the period from 18th March 2020 to 31st August 2020 shall be automatically extended to 31st December 2020. This allowed for aggrieved parties to be treated fairly and not be restrained

from enforcing their rights against defaulting parties.

2.3.2.6 Hire-Purchase

The COVID-19 Act also provided modifications to the Hire-Purchase Act 1967 under sections 22 to 24. Owners of goods under the hire-purchase agreements were refrained from exercising their right of repossession of the goods for any default of payment during the period from 1 April 2020 to 30 September 2020. This was in line with the loan moratorium provided by banking institutions whereby loan repayments were deferred during the said period.

2.3.2.7 Insolvency of Companies

Furthermore, the Companies (Exemption) Order (No. 2) 2020 and the Direction of the Minister of Domestic Trade and Consumer Affairs under Paragraph 466(1)(a) ("Directive") were gazetted to help ease the burden of the business community as a result of the pandemic. Under the Directive, the statutory threshold for the presumption of insolvency was increased from RM10,000 to RM50,000. The time period for a company to comply with the notice of demand for presumption of insolvency under Section 466(1)(a) of the Companies Act 2016 was extended from 21 days to six months.

2.4 Evaluation of the Laws

2.4.1 Are the Measures to Fight the COVID-19 Pandemic too Excessive?

Despite the SOPs, the country saw a sudden increase in cases in October 2020 (the second wave) which led to the Government declaring a State of Emergency on 11.1.2021 ostensibly to curb the spread of the disease. As a result of this, Parliament was suspended and enactments were made without having to pass through Parliament. The Emergency (Essential Powers) Ordinance 2021 ("Emergency Ordinance") and the Emergency (Essential Powers) (No. 2) Ordinance 2021 ("Emergency Ordinance No. 2") subsequently were enforced on 14.1.2021 and 11.3.2021, respectively. This led to concerns growing amongst the public, especially with the Emergency Ordinance No. 2 which criminalised fake news that may have severe ramifications on the freedom of expression. However, to date, not many have been charged under this Ordinance for spreading fake news regarding the COVID-19 infections and vaccinations. The Emergency Ordinance and Emergency Ordinance No. 2 were officially revoked on 25th October 2021 (The Star, 2021)

There were cries of outrage from the opposition political parties against the Government's decision to promulgate Section 14 of the Emergency (Essential Powers) Ordinance 2021, which had resulted in the suspension of Parliament. The Opposition Leader, Anwar Ibrahim, filed an application for a judicial review of the proclamation against the then Prime Minister Muhyiddin Yassin and the Government claiming that the Cabinet had given unlawful advice to the King during the State of Emergency. However, the Court dismissed the application on the grounds that the advice of the Cabinet and the then Prime Minister Muhyiddin to the King to promulgate the Emergency Ordinance is not amenable to judicial review.

While there were very few complaints regarding the imposition of the lockdowns, the public felt that the many summonses which were issued were unfairly compounded. This

led to many offenders either defaulting in the payment of the fines as a result of not being able to afford them and/or appealing against the issuance of the summons. When the COVID-19 pandemic first hit Malaysia, the earlier regulations provided for a much lower fine. The PCID Regulations provided for a fine not exceeding one thousand ringgit (RM1,000) or to imprisonment for a term not exceeding six months or to both. The penalty was subsequently increased to a fine not exceeding ten thousand ringgit (RM10,000). This caused an outcry by members of the public who complained that such a steep increase in fines would put an even harsher strain on those with lower financial means and who were already struggling economically as a result of the COVID-19 pandemic.

While many took measures to comply with the SOPs in order to avoid being summoned, there were still those who were not able to comply for some reason or other. One of the more regrettable cases was when homeless persons were fined for not wearing masks in public. While the enforcement of the SOPs no doubt played a major role in controlling the severity of COVID-19 in Malaysia, many were unhappy with how the authorities exercised their powers in enforcing them. It caused uncertainty and stress for many who were faced with the challenges of having to pay for the compounds when their financial stability was already severely affected by COVID-19.

3. Judicial Review during the Pandemic: Role of Courts

3.1 Whether the Rule of Law Concerns Have Been Discussed/Addressed Adequately

Cases that came before the Courts were largely cases where the compounds were disputed or unpaid. As a result of this, only a small number of cases have been reported. In Malaysia, the Courts do not have the power to decide on whether to proceed with or withdraw a charge arising from a breach of the SOPs, as the prosecutorial power falls under the discretion of the Attorney General as provided under Article 145(3) of the Federal Constitution. As a Magistrate's court is independent, there is no issue of supervision or interference by a superior court. Any party unhappy with the final judgment can proceed to appeal or apply for a revision of their sentence as in the ordinary course of proceedings. The Court may exercise its discretion in deciding the appropriate punishment for the offender.

In a 2020 case where two individuals were charged for breaching the Lockdown Rules by "going fishing", the Magistrate on conviction sentenced the offenders to 3 months imprisonment (Chin Chee Wei and Anor v PP 2020). The decision of the Magistrate caused a public outcry as many were of the view that the duo were forced to "go fishing" for food as they had no money to buy any food. The two offenders had informed the court that they could not afford to pay the fine and hence would have to go to jail in default.This caught the attention of the Judicial Commissioner of the High Court who exercised his power of revision under Section 31 of the Courts of Judicature Act 1964. After considering the nature of the breach, the pleas in mitigation and the issue of public interest, the High Court on revision found the sentence to be too harsh and excessive. The High Court revised the sentence and replaced it with a compulsory attendance order as the offenders had no alternative but to "go fishing for food".

In a separate 2021 case, an offender was charged in the Magistrates' Court for crossing

state borders without a letter of approval from the police (Tran Thi Nhanh v Public Prosecutor 2021). The offender pleaded guilty in the first instance and was sentenced to five months imprisonment. The offender applied for the sentence to be revised. On Revision, the High Court held that the harsh sentence had resulted in a substantial miscarriage of justice and replaced the sentence of imprisonment with a fine.

3.2 Reporting of Court Cases for Breaches of the Pandemic Sanctions

Despite the fact that there were many instances of offenders compounding their summonses for breaching the SOPs, there has been little or no reporting of such cases in the mainstream media or reported judgements.

Amongst the few reported cases was one where at the time the offender was arrested for being in possession of drugs, he was also found to be in the company of others without proper reason and to have exceeded the 10 kilometer distance limit imposed under the SOPs, which is in breach of the PCID Regulations and as a result, additional charges were preferred against him (Pendakwa Raya v Lee Kim Tuyen 2020)!

3.3 Do the Superior Courts in Malaysia Have any Role to Play?

In Malaysia, there is no separate and distinct constitutional court within the judicial hierarchy. Constitutional issues are dealt with in the Court of Appeal or the Federal Court. Also, there is no separate and distinct administrative court in Malaysia. Administrative cases are dealt with in the Appellate and Special Powers division of the High Court.

Any breaches of the law, including breaches of the SOPs implemented or any offenders charged under the PCID Act will be dealt with at the Magistrates' Court, being the court of first instance. In the event an offender is not satisfied with the decision of the Magistrate, he may appeal to the High Court. An appeal from the High Court will be heard in the Court of Appeal, which will be the final court of appeal. The Federal Court, which is the apex court in Malaysia, does not deal with such cases unless there are constitutional issues involved.

In realising the importance and the responsibility of the Courts during these unprecedented times, Justice Zaleha Yusof, when delivering a judgment stated that "The court cannot turn a blind eye but instead must take judicial notice of the magnitude and effect of the COVID-19 pandemic, all of which remains real and affects the security of this Nation" (Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor 2021).

3.4 Selected Court Cases

The law that governs judicial review in Malaysia is Order 53 of the Rules of Court 2012. It is an accepted view that not all decisions made by a public authority are amenable for judicial review. In a Federal Court case, it was held that in order to decide on such a matter, the Courts must first determine whether there is a public law element in dispute (Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors 2008). It would then be necessary to examine the source of the power and the nature of the decision made. The following are several prominent judicial review cases in Malaysia during the pandemic.

3.4.1 Dato Seri Anwar Bin Ibrahim v Tan Sri Dato' Hj Muhyiddin Bin Hj Md Yassin (Perdana Menteri Malaysia) & Anor (2021) MLJU 1247

In this case, the Applicant sought to challenge the lawfulness of The Emergency (Essential Powers) Ordinance 2021 by contending that the advice given by the Cabinet, led by the then Prime Minister, to promulgate Section 14 of the Emergency Ordinance which then resulted in the prorogation and/or suspension of the Parliament was ultra vires his constitutional and/or statutory duty as Prime Minister of Malaysia and/or his Cabinet and further sought to declare the Emergency Ordinance as unlawful, unconstitutional and therefore void and having no effect.

The High Court held that the Emergency Ordinance was validly enacted and the Court had no jurisdiction to entertain the judicial review application. Hence, the decision of the Prime Minister in advising the Yang di-Pertuan Agong, who is the supreme head of the Federation, was not amenable to judicial review.

3.4.2 Kaj Development Sdn Bhd v Melaka State Government & Ors [2021] 1 LNS 465

In this case the Applicant had filed an application for judicial review to challenge the Melaka State Government's decision to terminate the agreement to reclaim land from the sea within a concession area in the Straits of Malacca. One of the arguments of the Applicant was that the termination notice given by the State Government was ultra vires Sections 7 and 9 of the Covid Act 2020 as the agreement was a "construction work contract" which fell within the scope of Section 7 and that the matter should have been referred to mediation instead of being terminated, as provided under Section 9.

The Court disagreed with the Applicant and dismissed the leave application. It is important to note that the Respondent's decision to terminate the agreement was in exercise of the Respondent's "public duty or function". The Court held that Sections 7 and 9 of the COVID Act 2020 governs the private rights of parties in respect of certain commercial transactions and it does not concern public administrative law.

3.4.3 Food Hawker in Ranau

A woman in Ranau, Sabah had filed an application for judicial review against the Ranau District Council for a ruling that only those who have been fully vaccinated may conduct business at the market. This was in line with the new SOP issued by the District Council which allowed only fully-vaccinated traders and their assistants to conduct business at the market.

The applicant had refused to take the vaccine on the ground that she was still unsure of its safety as the vaccine was still under trial and was concerned of the risks she may face after being vaccinated. She filed the application for judicial review naming the District Council as the sole respondent on the grounds that the respondent was contravening Article 5 and Article 8 of the Federal Constitution which provide for liberty of the person and that all persons are equal before the law and are entitled to equal protection of the law, respectively.

The applicant had also contended that the respondent's decision also contravened Article 9 of the Federal Constitution, which provides for the freedom of movement.

The applicant is now seeking an order of Certiorari to quash the District Council's decision and an order of Prohibition against the respondent from prohibiting her from conducting her business at the market.

3.4.4 The Seven Applicants Who Filed an Application for Judicial Review on Behalf of Their Minor Children

Another notable case is the case of the seven Applicants who filed an application for judicial review on behalf of their minor children. They appealed against the High Court's decision which denied them leave for a judicial review of a decision by the Government to carry on with the vaccination programme while pending clinical trial results of the drug Ivermectin, among others. The Court held that leave was not to be granted due to the fact that the vaccination drive was a Government policy premised on medical and scientific opinion which the court had no jurisdiction over such matters. The Court also held that vaccination was voluntary and did not infringe the Applicants' fundamental rights as claimed. The Court was of the view that in the event the Applicants were concerned that non-vaccinated students would be barred from attending school, the Applicants should challenge such a decision instead.

3.4.5 Discharge of a Soldier from the Army Who Refused to Be Vaccinated

A soldier who refused to be vaccinated was discharged from service as a result. The ex-soldier filed a Judicial Review application to quash the decision of the authorities to discharge him from service prematurely. As of October 2021, leave was granted to the ex-soldier to challenge his dismissal by a Judicial Review.

Considering the fact that judicial review is mainly concerned with the legality of the decision-making processes of officers and ministers of the Government, it would not come as a surprise if there are judicial review applications made against any of the new regulations enacted by the Government in an effort to combat the spread of the COVID-19 virus.

4. Post 2020 Movement Control Orders

4.1 Effects of the COVID-19 Pandemic

As a result of the pandemic, it was reported in September 2021 that over 37,000 small and medium sized enterprises (SMEs) and 200 sports-related companies have shut down their businesses as they could no longer afford the cost to run their businesses. Furthermore, over nine foreign companies have closed down their operations in the country from March 2020 to May 2021. Many factors influence their decisions which include the global economic contraction, the decline in foreign and domestic sales and an increase in operating costs.

The pandemic has cut across all levels of the community in the form of job losses, business closures and a new economic landscape where traditional ways of working are replaced. Companies are forced to adapt swiftly to the new norm by introducing different measures to sustain themselves whilst providing for a safe working environment. This included introducing working from home, modifying the interior of the office to allow for

social distancing, implementing temperature screening and contact tracing. The importance of obtaining a skill to create an online business presence had become ever more prominent.

With those that have lost their jobs due to the economic recession, many were forced to turn to do different work that was out of their normal expertise. This included e-hailing, food delivery, freelancing and starting online businesses. Companies such as Grab, were forced to accommodate the rise in demands of new drivers and the demands from customers.

4.1.1 White Flag Campaign

With the lack of income taking a toll and people were desperately running out of food and essentials, a white flag campaign was started on social media where those who were affected would hang a white flag in front of their homes to let those who could help know which households were facing distress. People from around the country including celebrities joined and supported the campaign by making donations in money and/or in kind. After the campaign reached attention nationwide, an application was developed called the "Bendera Putih App" to enable volunteers and donors to easily track those who were signaling their cry for help (Chung, 2021).

At one stage, Court proceedings almost came to a standstill as a result of the MCO. However, the Courts adopted virtual hearing procedures which were made necessary to overcome the challenges faced by the Courts and to avoid a massive backlog of cases (Gan and Lee).

There were procedures that were implemented prior to the COVID-19 pandemic which assisted in adopting a fully virtual approach to tackle Court cases. Before the COVID-19 pandemic, Malaysia had implemented the e-Filing system in Court whereby parties would have to file their documents and cause papers electronically. The Courts also adopted virtual Case Management hearings known as e-Review. During an e-Review, parties are required to log into the e-filing system website and to conduct the Case Management e-Review via a chatbox where the presiding Judge or Registrar will proceed to make directions for the case.

Due to the unpredictability of the virus with its many variants and mutations, the COVID Act is to be operational until 23 October 2022, unless extended. An extension can be made possible by Section 1(3) of the COVID Act which confers on the Prime Minister the power to extend the operation of the COVID Act by way of an order published in the Gazette. Section 1(4) provides that any order for extension has to be laid before Parliament as soon as practicable after it is made. With that, academics and critics have voiced their concerns over the fact that the COVID Act is not wide enough in scope to encompass employees, small businesses and individuals that require protection for having breached their existing contracts.

In Malaysia, there is currently no law which allows the Government to make COVID-19 vaccination mandatory. With that being said, there is also no specific law that disallows mandatory vaccination policies to be imposed by employers. The Health Minister has said that while they cannot make vaccinations mandatory, they will "make life difficult" for unvaccinated individuals. The National Bank of Union Employees ("NUBE") publicly criticised the Health Minister for making such a statement, saying that this approach is "akin to the Government resorting to gangsterism against citizens". NUBE viewed such an

approach as discriminatory against those who are unvaccinated. While there are some who share the same views as NUBE, there are others who view vaccination as a necessity for a safe work environment.

When schools were allowed to reopen, teachers who were not vaccinated were not allowed to conduct classes face to face with the students. It was announced by the Public Service Department in September 2021 that all civil servants are required to be fully vaccinated before 1st November 2021 with the exception of those who could not take the vaccine due to health reasons. Civil servants who are not vaccinated within the given time frame will face disciplinary actions pursuant to the Public Officers (Conduct and Discipline) Regulations 1993 (Teh, 2021). The Human Resources Minister, Datuk Seri M. Saravanan, has stated that workers who refuse to be vaccinated for COVID-19, action can be taken against them under the Occupational Safety and Health Act 1994 as this Act provides for the need for a safer and healthier working environment. The requirement to be fully vaccinated in many economic sectors has become common so much so that it has even become a job requirement.

While the Government and the private sector can impose rules and regulations on their employees to be fully vaccinated, it then begs the question of what happens if their employees still refuse to be vaccinated? Is the inability to go to work a breach of their employment contract? As of mid November 2021, there has been no disciplinary action taken thus far against any civil servants who remain unvaccinated. Amongst the 1.6 million civil servants in Malaysia, only 1.8% of them are not vaccinated. The Public Service Department has allowed Government heads of their respective departments to take appropriate action against unvaccinated staff members. However, this must be done according to procedure. For example, the employer would have to issue a show-cause letter to the unvaccinated employees at which point the employees have 21 days to respond with their reason for not being vaccinated. In the event the reason is unsatisfactory, a domestic inquiry could be formed to determine the next course of action (Radhi, 2021).

As of 8 November 2021, the total number of COVID-19 cases recorded in Malaysia amounted to 2,591,486 with over 29,937 deaths. However, the good news is that the total number of individuals who are fully vaccinated (double-dose) have reached 24,980,505 out of a population of about 32 million. This has allowed the Government to reopen the economy with most of the States entering Phase 4.

4.2 What's Next for Malaysia?

With the COVID-19 situation and the regulations imposed still being susceptible to change, it is difficult to pinpoint what Malaysia can expect to see in the coming months. However, based on past experiences, the following may happen.

For one, vaccination may still be unlikely to be made mandatory. The statement from NUBE is merely the tip of the iceberg. To make vaccination mandatory would cause too large a controversy and the Courts will then be faced with more Judicial Review cases. Seeing as private and public sectors are allowed to decide on disciplinary actions being taken against unvaccinated employees, the Courts can expect to see more unlawful termination and/or constructive dismissal claims by employees against their employers. The abovementioned case of the ex-soldier who was prematurely discharged from service is

merely one of many cases to come (Nor, 2021).

Furthermore, we can expect to see new COVID-19 variants in the future. Just as recently as 24 November 2021, a new variant that has been named Omicron was reported to the World Health Organisation ("WHO") by South Africa (World Health Organization, 2021). It has since spread to countries like Denmark, Australia, the United Kingdom, Germany and Hong Kong and even to Malaysia. While it remains unclear whether the current vaccine is effective against the Omicron variant, WHO has assessed the overall global risk and reported it to be very high. While it may be unlikely for this new variant to bring about new regulations and SOPs in Malaysia, it may be more likely that the Government will reintroduce the existing regulations and SOPs already in place. However, depending on the virulence of the Omicron variant, Malaysia may once again be put under a strict lockdown in order to curb the spread of the mutated virus.

4.3 What Could Have Been Done Differently?

The Government unnecessarily allowed politics to interfere with its responsibility to put the needs of the country first during the pandemic. Due to the declaration of the state of Emergency, Parliament was suspended and could not be convened to discuss serious issues that needed immediate attention. Instead, the public had to rely on the rash and inconsistent decisions of the Ministers who may not have truly comprehended the problems faced by the public. During the Emergency Ordinance, there was no "check and balance" of the decisions of the Government. This led to inconsistent directions being made in enforcing the restrictions and measures taken to curb the spread of the COVID-19 virus.

It has been reported and even admitted by the then Prime Minister that the sudden rise in cases in October 2020 was, in fact, due to the Sabah State Election that was held despite the disapproval of the public of such a large scale event in the midst of the pandemic, prior to any news on the availability of a viable vaccine. The large gathering of people during the State Election was not the only reason for the spike in cases. Government officials were seen campaigning and coming in contact with the public without wearing their masks and without any repercussions despite the wearing of masks mandate. It was also hurriedly declared that Government officials returning from Sabah to their homes would not need to quarantine themselves, even though at that point in time, any person traveling internationally or interstate would have to quarantine themselves for a prescribed period of time. This State Election is a prime example of the Government allowing politics to interfere with its responsibilities in ensuring that the public and country would be well taken care of during the pandemic.

The Government should have made better efforts to financially support and assist low income communities, many of whom became homeless as a result of not being able to have a roof over their heads. The Government could have considered setting up direct hotlines for those who needed immediate assistance, or to have people reach out to lower income communities to have a better understanding of their struggles in order to achieve efficient and effective solutions. Instead, the needy public was forced to resort to the White Flag Movement, relying solely on the generosity of their community members and/or non-Government organisations for food aid. Besides reaching out to communities to understand their struggles, the Government could have reached out to rural communities at an early

stage to educate them of the severity of the COVID-19 virus. Those in the rural communities may not have access to daily news and therefore may not have understood how dire the situation was. This could have resulted in many disregarding the SOPs in force and unwittingly contributed to the spread of the COVID-19 virus.

The Government should have ensured that public authorities and Government officials adhered to the SOPs put in place. There were several instances where public authorities and Government officials publicly and blatantly disregarded the SOPs but were not held accountable for their breaches. It is important for the authorities to set a good example for the public by following the very rules and regulations which they had implemented.

Table 5-1: The Summary of the Selected Court Cases and Their Relationship to Fundamental Rights and Rule of Law in this Chapter

Case	Legal Basis	Affected Legal Fundamental Right/s	Court Decision	Implication on the Rule of Law
1. Chin Chee Wei and Anor v PP	Power of Revision by High Court. Section 31 of the Courts of Judicature Act 1964.	Right to life and liberty of the person.	High Court substituted the sentence of 3 months imprisonment with a compulsory Attendance and Work Order for a period of three months for four hours each day.	Principles of sentencing - sentence not to be manifestly excessive.
2. Tran Thi Nhanh v Public Prosecutor	Power to call for records of Subordinate Courts- Section 323 of the Criminal Procedure Code.	Right to life and liberty of the person.	High Court on appeal substituted the order of imprisonment of 5 months imposed by the Magistrate's Court with a sentence of 30 days effective from the date of arrest.	Principles of sentencing - sentence not to be manifestly excessive.
3. Pendakwa Raya v Lee Kim Tuyen	Power to call for records of Subordinate Courts- Section 323 of the Criminal Procedure Code.	Right to life and liberty of the person.	High Court on appeal allowed the accused to be released on bail, with a surrender of his passport to the Court.	Right to bail pending an appeal notwithstanding the appellant is a foreigner.
4. Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor	Dissolution of Parliament. Section 14 of the Emergency Ordinance 2020.	Dissolution of Parliament due to the Proclamation of Emergency.	The Proclamation of Emergency declared by the King on the advice of the Prime Minister was held not amenable to Judicial Review.	Valid exercise of a constitutional power by the Executive.

Case	Legal Basis	Affected Legal Fundamental Right/s	Court Decision	Implication on the Rule of Law
5. Kaj Development Sdn Bhd v Melaka State Government	Application for Judicial Review of the State Government's decision to terminate the agreement for reclamation of land works.	Right to contract.	Sections 7 and 9 of the COVID Act 2020 govern the private contractual rights of parties. They are not applicable to public administrative law. The application for leave for Judicial Review was not granted.	Upholding the provisions of a newly enacted legislation.
6. Food Hawker	Whether vaccination is a mandatory requirement to operate a hawker stall.	The right to work and the right to personal liberty.	The application for Judicial Review is still pending.	Rights of an unvaccinated person.
7. Minor Children	Whether vaccination of children is mandatory in the absence of legislation.	The right to privacy and right to health.	Application for leave for Judicial Review of Court was not granted.	Upholding due process for Judicial Review. Cause of action held to be premature.
8. Discharge of a serving soldier	Whether vaccination of a soldier is mandatory in the absence of legislation.	The right to privacy and right to health.	The application for Judicial Review is still pending.	Use of Judicial Review as a remedy.

(Source: Compiled by this author.)

5. Conclusion

In conclusion, it will be pertinent to state that the Courts have continued to work hard to uphold the Rule of Law during these challenging times. The response of the Courts towards the Rule of Law has not changed in the interpretation and enforcement of the law without fear or favour during the pandemic. The imposition of the emergency laws have been upheld by the Courts as being constitutional and hence there is no merit in the argument that the imposition of the emergency laws were illegal.

In Malaysia, the Courts will not hesitate to strike down any provisions of law passed by Parliament if they are held to be unconstitutional, ultra vires or void. The interpretation of the COVID-19 Act 2020 and the emergency laws cannot be gainsaid as they have been fully argued and considered by the Federal Court, which is the apex court of Malaysia. In Malaysia, the separation of powers between the executive, the legislative and the judiciary is fully recognised and upheld under the Federal Constitution. The judiciary being the third branch of the Government is independent and discharges its duties and obligations

sufficiently without fear or favour, prejudice or bias.

While undoubtedly, there were numerous steps taken by the Government which played an important role in curbing the spread of the COVID-19 virus, there may have been a few administrative decisions made that hindered the progress of the country towards achieving low infection rates at an earlier point in time.

Currently, with the Government taking proactive steps by enhancing the vaccination drive, achieving herd immunity and administering booster vaccination shots, the Government has re-opened the economy and considers COVID-19 as endemic. As the vaccination of adults in Malaysia has exceeded 90% of the population to date, it would appear that the enacted legislations and regulations and the proactive measures taken by the Government have substantially helped to control the spread of COVID-19 to the best extent possible.

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6. Rule of Law Issues during the COVID-19 Pandemic in Malaysia: The Declaration of Emergency, Its Aftermath, and Its Impact on the Constitutional Rights of Ordinary Malaysians

Roger Chan Weng Keng

1. Introduction

This article first examines Movement Control Order (announced by the Prime Minister's Office on 16th March 2020 to contain the COVID-19 outbreak in Malaysia to be enforced vide the *Prevention and Control of the Infectious Diseases Act 1988 (PCID)* and the *Police Act 1967*. It will then discuss a number of the provisions as relating to the offences and penalties imposed in the event of violation during the unprecedented lockdowns that follow including intervening events leading to the perceptible rise in the number of cases.

This led to the Proclamation of an Emergency on 11th Jan 2021 by His Majesty, the King (the *Yang di-Pertuan Agung*) (*YDPA*) on the advice of the 8th Prime Minister of Malaysia and his Cabinet. Articles 40 and 150 of the Federal Constitution will be discussed together with the relevant case law. What needs to be pointed out is the rationale for the Emergency was officially understood to be to counter the devastating impact of the COVID-19 pandemic. However, whether it actually does still remains to be debated at the time of writing and the writer will weigh in on that part of the debate as to whether there is gross violation of basic civil liberties and constitutional rights.

This will lead to an examination on Emergency (Essential Powers) Ordinance 2021 (Federal Government Gazette, 14th January 2021) to explain some of its important features such as ouster of courts' jurisdiction and the suspension of constitutional institutions such as Parliament and State Assemblies. The challenges that were taken up in Courts and the decisions given will also be examined in the context of the Federal Constitution as Malaysia's very own Constitution is called.

How far the Emergency has impacted the remedies of judicial review and lives of ordinary Malaysians vis-à-vis their human rights will also be examined.

The question of whether the Ordinances passed during the Emergency have been revoked remain a highly contentious topic, though on 1st August 2021 the Emergency came to an end. This necessitates an examination as to various legal perspectives and the factual matrix of what transpired in official media statements between the Palace and the Prime Minister's Office and to developments taking place right until submission of this article, based on which arguably conclusions could be drawn.

2. The Movement Control Order in Malaysia

Due to a spike of COVID-19 cases, the 8th Prime Minister of Malaysia announced on 16th March 2020, the Movement Control Order (MCO) covering the entire country. The

MCO is premised upon two (2) pieces of legislation namely the *Prevention and Control of the Infectious Diseases Act1988 (PCID) and the Police Act 1967*. Broadly speaking this article will describe the MCO on a number of milestones until a Proclamation of Emergency (the Emergency) was issued by his Majesty the King under Article 150 of the Federal Constitution on the 14th January 2021 by reason of the existence of a grave emergency threating the security, economic life and public order of the Federation of Malaysia arising from the epidemic of an infectious disease, namely the Coronavirus Disease 2019 (COVID-19). Thereafter the Emergency will be discussed in the context of the COVID-19 pandemic. Some post-Emergency development will be dealt with until current.

2.1 The Prevention and Control of the Infectious Diseases Act 1988 (PCID)

The PCID deals with the control of the spread of infectious disease in Malaysia. Section 11(1) of the PCID provides that if the Minister is satisfied that there is an outbreak of an infectious disease in any area in Malaysia, or that any area is threatened with an epidemic of any infectious disease, he may, by order in the Gazette, declare such area to be an infected local area.

Under Section 11(2) the Minister may, by regulations made under the PCID, prescribe the measures to be taken to control or prevent the spread of any infectious disease within or from an infected local area.

One area of concern is the use of the phrase *infectious disease within or from an infected local area* in the PCID and whether other areas not so infected would not be covered. However, it is submitted that the phrase that "any area is threatened with an epidemic of any infectious disease" in Section 11(1) of the PCID is enough to cure the lacuna. Accordingly, the Minister has by order in the *Gazette* declared all States and Federal Territories in Malaysia to be infected local areas under Prevention and Control of Infected Diseases (Declaration of Infected Local Areas) Order 2020 [P.U. (A) 87/2020] (Federal Government Gazette 17th March 2020).

The Minister then introduced regulations as measures to control the spread of the COVID-19 virus. These came mainly in the form of The Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas (No 2) Regulations 2020.

Section 22 of PCID provides:

Any person who –

(a) Obstructs or impedes, or assists in obstructing or impeding, any authorised officer in the execution of his duty;
(b) Disobeys any lawful order issued by any authorised officer;
(c) Refuses to furnish any information required for the purposes of this Act or any regulations made under this Acts; or
(d) Upon being required to furnish any information under this Act or any regulations made under this Act, gives false information, commits an offence.

Section 24 provides:

Any person guilty of an offence under this Act for which no specific penalty is provided shall be liable on conviction –

(a) In respect of a first offence, to imprisonment for a term not exceeding two years or to fine or to both;
(b) In respect of a second or subsequent offence, to imprisonment not exceeding five years or to fine or to both;
(c) In respect of a continuing offence, to a further fine not exceeding two hundred ringgit for every day during which such offence continues.

The above two sections provide for the offences and penalties during the Movement Control Order. Section 22 provides the specific circumstances of how an offence is committed whereas section 24 provides for a calibration of the offence into first, subsequent and continuing categories expressed in terms of imprisonment and fine.

The Director-General and/or public officer authorized by him can also compound the offence under the PCID but not exceeding one thousand ringgit.

2.2 Use of the Police Act 1967

Section 3(3) of the Police Act 1967 stipulates inter alia that the Police Force shall be employed for the maintenance of law and order and the preservation of peace and security of Malaysia. However, the police do not qualify as authorized officer under the *PCID*. Their role is separately provided under Section 5 of the *PCID* to render such assistance as any authorized officer may request for the purpose of enabling him to exercise the powers vested in him by the *PCID* and the regulations thereunder. It is therefore doubtful if the police can render such assistance without any request from such an authorised officer.

2.3 Impact on the Constitutional Fundamental Rights

The entire country was placed under travel restrictions during the MCO. At least travelling from one state to another would have to get the special permission of the Police. Malaysians were barred from leaving the country and restrictions placed on the entry of foreign visitors and tourists to the country. These measures impact on the normal constitutional rights of movement of Malaysians under Article 5 of the Federal Constitution which provides for the right to life and personal liberty. They also impact the constitutional right under Article 9 which provides citizens the freedom of movement and the right not to be excluded or prohibited from any part of the country. The constitutional right to move out of Malaysia was also impacted. However it must be noted that the Constitution allows these restrictions under a number of exceptions namely national security, public order, public health or for punishment of offenders. (Article 9 Federal Constitution)

This constitutional right to freedom of worship and business activities was is also impacted as all places of worship and business premises must be closed and gatherings prohibited, except for outlets catering to essential services, supermarkets, groceries or other like establishments.

Intrinsic to the right to life under Article 5 is the right to livelihood. No one can as easily and normally ply a trade or render services as all government and private premises must be closed.

One Rule of Law issue and also a common occurrence is the compounding of offences by the police purportedly under the regulations that are promulgated under *PCID*. For example, under the Prevention and Control of Infectious Diseases (Measures within

Infected Local Areas) (No 2) Regulations 2020 under which people are charged with. *Section 11(1) states:*

> "Any person who contravenes any provision of these Regulations or any direction of the Director-General or an authorized officer commits an offence and shall, on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both." It is doubtful whether offences under these Regulations are compoundable.

This is because Section 25 of the *PCID* uses the phrase "*prescribed by regulations as compoundable*". It is apparent that the Regulations cited aforesaid did not contain a prescription as to whether it is compoundable. To the knowledge of the writer, no serious challenge has been taken so far on this ground in Court.

2.4 Court Cases on the PCID during the Pandemic in Malaysia

A glean at the reported cases on the *PCID* would show that various aspects of law including civil litigation where some link to the *PCID* is discernible. The non-constitutional rights aspects and the cases that are linked to it collaterally need not detain us here. The other limitation to note here is there is a dearth of reported cases on people charged under *PCID* or its regulations because many, if not all, were charged in the lower courts which cases are not normally reported in the law journals. However, two cases I cite here would shed some light on the Courts' approach in balancing public interest against mitigating factors in arriving at not too harsh decisions especially for those in the lower income group charged under the *Regulations.*[1]

In the case of Chin Chee Wei and Anor v Public Prosecutor [2020] MLJU (Unreported) the facts were as follows:

> Two accused persons were caught fishing at a fish pond and were told to go home by the authorities in view of the MCO. However they refused to do so though they knew that they cannot be out due to the MCO. Both the accused persons cannot afford to pay the fine and were willing to be imprisoned, if sentenced by the Court.

Both the accused pleaded guilty and were sentenced to 3 months imprisonment by the learned Magistrate. However, the learned Judicial Commissioner (JC) of the High Court came across this case in the media and called for the file to exercise his powers of revision. The two accused were wage-earners and in their plea in mitigation they cannot afford to put food on the table for their families to feast. The learned JC decided that the sentence of a fine or jail was inappropriate under the circumstances and substituted it with a non-custodial punishment of a Compulsory Attendance Order to perform compulsory work at the Perak Compulsory Attendance Centre. The learned JC further note that what is of public interest under the circumstances would be flattening of the curve of transmission of the infectious deadly disease and jailing the accused would not serve that purpose as social distancing is almost impossible.

The current trend seems to be the strict standard to be observed in proffering a charge under the *Regulations* pursuant to the *PCID*. In the case of Pendakwa Raya v Khairil

[1] Note that the term "*Regulations*" in this article refer to regulations made pursuant to the PCID.

Azman Bin Khairil Norosli (2020) 8 MLJ 518, the learned Judge opined that the essence of the operative phrase of the Regulations must be stated otherwise the entire charge is defective, hence cannot be sustained. For example Regulation 3(1) under the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No 2) Regulations 2020, has the operative phrase:

> "No person shall move from one place to another place within any infected local area or from one infected local area to another infected local area except for the purposes under subregulation (2)".

It is therefore not enough in the charge to just state the places that an accused has been found.

3. The Relentless Rise in COVID-19 Cases in the Aftermath of the Sabah Elections Leading to the Proclamation of Emergency

In September 2020, a State Election was held in the State of Sabah in East Malaysia. This is a significant development as it was reported that major upswings in the rise of COVID-19 cases have resulted in cases hovering at four-digit figures daily. In the State of Sabah, there was 808 cases reported on nomination day, Sept 12th, 2020. By polling day on Sept 26th, 2020 the figures jumped up to 1547, an increase of 91.5%. By October 24th, the cumulative figures in Sabah alone was 11,285. Meanwhile clusters of new cases were forming in workplaces and dormitories in West Malaysia. This sets the tone for tougher measures.

3.1 The Proclamation of Emergency

On 11th Jan 2021 the YDPA proclaimed an Emergency on the advice of the 8th Prime Minister and his Cabinet. Article 150 read with Article 40 of our Constitution confers sweeping powers on the Government to proclaim an Emergency, if satisfied that a grave emergency exists whereby the security or the economic life, or public order in the Federation or any part thereof is threatened. The Privy Council case of Stephen Kalong Ningkan v Government of Malaysia (1968) 2 MLJ 238 has established that an emergency can cover a very wide range of situations and occurrences.

The exact wordings of Article 150(1) spell out the powers of the YDPA to make such a Proclamation. According to Article 150(1),

> "If the Yang di-Pertuan Agung is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect"

Whereas Article 40(1) reads,

> "In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agung shall act in accordance with the advice of the Cabinet, except as otherwise provided by this Constitution; …"

The immediate consequence of a Proclamation of Emergency is that the Government

(not Parliament, it must be noted) can legislate by ordinances having the same effect as an Act of Parliament provided the Government is satisfied that certain circumstances exist which render it necessary to take immediate action. I am using the term "Government" here to refer to the Prime Minister and his Cabinet (the Executive) though in our Constitution it refers to the basis that the King acts on the advice of the Prime Minister and his Cabinet.

3.2 Further Erosion of Fundamental Liberties and Rule of Law

The other immediate consequence of an Emergency is any ordinances pursuant to the Proclamation can override fundamental liberties and Rule of Law.

It is not out of place however to say that in the entire history of Malaysia, a large part has come under the emergency powers of the Constitution. We had an Emergency lasting from 1948-1960 dealing with communist insurgency. This was followed by another Emergency in 1964 dealing with the Indonesian Confrontation, another in 1969 dealing with racial riots and one in 1977 dealing with political upheavals in the north-eastern State of Kelantan.

But this does not mean being ruled by emergency laws most of the time. What it does mean is its existence in parallel with the regular system of laws and to use emergency laws as an option whenever it suits the powers that be. Many of the Emergency laws remained unrepealed for a long time even after the event. Parliament came to the rescue of Rule of Law on 24th November 2011 when it revoked all Emergency Proclamations and in the result hundreds of emergency laws were dumped into the bin of our history.

So, we did not have a state of Emergency from 2011 until 11th Jan 2021 when an Emergency was proclaimed to last until 1st August 2021. This was followed by the issuance of an ordinance known as the *(Emergency Essential Powers) Ordinance 2021*. The rationale for this is to contain and arrest the COVID-19 problem caused by the deadly virus.

It is my view that this is not justified because we have more than enough of non-emergency laws such as the Prevention and Control of Infectious Diseases Act 1988 to deal with it. This Ordinance has many human rights and Rule of Law ramifications chief of which is the removal of the 2nd pillar of our Constitution (that is Parliament) which was done in one fell swoop.

Clause 14 of the said Ordinance for example literally suspends Parliament by rendering all provisions relating to summoning, proroguing and dissolution of this institution having no effect with powers granted to the YDPA to decide when to reinstitute Parliament, besides cancelling all meetings of Parliament with immediate effect. It is highly questionable if such suspension of an institution of State, namely Parliament, is constitutional.

Malaysia is a Federation of thirteen (13) states namely Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Trengganu. (Article 1(2) Federal Constitution). Each state has its own State Legislative Assembly on the basis of division of powers between the Federal and State Governments. So the Legislature of a State may make laws for the whole or any part of that State. (Article 73(b) Federal Constitution). Clause 14 of the Ordinance was also similarly worded in Clause 15 of the Ordinance to apply to each State Legislative Assembly. In short, a suspension of all the State Legislative Assemblies.

From the foregoing the effect of all this is constitutionally crippling. We now have only two pillars left in our Constitution the executive and the judiciary. The other pillar Parliament and the corresponding State Legislative Assemblies were removed almost immediately by the passing of this Ordinance. This in my view is deleterious to the observance of a vibrant democracy in our Constitutional Order.

Under Article 13 of our Coonstitution, the right to property is guaranteed. It effectively states "no person shall be deprived of property save in accordance with the law" Our Constitution also protects its citizens from compulsory acquisition or use of property without adequate compensation. (Article 13(2) Federal Constitution). By the introduction of the Ordinance, the violation of this right can be seen from two perspectives. The first perspective is it allows for temporary possession of land, building and movable property to be vested in the YDPA or anyone authorized by the YDPA, if it is so expedient. The second perspective allows the use of resources as the YDPA or anyone authorized by the YDPA deems necessary. The Ordinance does say "compensation" in respect of both possession or utilization of land or resources to be assessed by a person (not the Court) authorized by the YDPA. However, it does not state "adequate compensation" which is the language used in the Federal Constitution. This violates the basic fundamental right to adequate compensation as guaranteed under the Federal Constitution. The end result is the probability of being compensated but inadequately.

3.3 Exclusion of the Role of the Courts under the Ordinance

Section 5(2) of the Ordinance excludes the role of the Courts when it comes to assessment of the quantum in respect of the question of adequate compensation for compulsory possession or utilization of resources under the Ordinance. It says *"the assessment of compensation under subsection (1) shall be final and conclusive and shall not be challenged or called in question in any court on any ground."*

Further Section 10 of the Ordinance states " no action, suit, prosecution or any other proceeding shall lie or be brought, instituted or maintained in any court against the Government, any public officer or any person appointed under subsection 6(1) in respect of any act, neglect or default done or omitted by it or him in good faith, in carrying out the provision of this Ordinance."

The effect of these provisions means very limited room for aggrieved litigants to mount an action against the Government as long as there is good faith shown in carrying out these provisions.

3.4 Additional Offences under the Ordinance

This means additional offences as a result of non-compliance to any demand or direction from the YDPA or any person authorized by the YDPA in respect of the sweeping power to possession of land or resources granted by the Ordinance. These offences are applicable to both individual persons as well as body corporate and also a wide range of business entities. (Section 5 of the Ordinance)

As can be gleaned from the above Section 9, "a fine not exceeding five million ringgit or to imprisonment for a term not exceeding ten years or to both" is extremely excessive. The said Section 9 created many categories of person/persons that can be charged and held

liable. It includes vicarious liability and to be exonorated the burden imposed on an individual is extremely onerous in that he has to prove, having regard to the nature of his functions in that capacity and to all circumstances, that the offence was committed without his knowledge and that the offence was committed without his consent or connivance and that he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence. The burden as to guilt or innocence is thus shifted unto the accused person from the State.

The important point is the alarming potential of powers under the Ordinance. Will the Courts as the last remaining bulwark be able to act as any kind of check on their exercise? Some cases were filed, and challenges mounted.

4. The Role of the Courts: Constitutional Law and Judicial Review

A flurry of lawsuits was filed to test the invalidity and constitutionality of the Proclamation of Emergency and the Ordinance that was promulgated under it. They came from various stakeholders, among them Members of Parliament, civil society organisations and even the Malaysian Bar. The arguments were ventilated through the instrument of Judicial Review seeking various remedies such as declarations and mandamus. (Paragraph 1 of the Schedule to the Courts of Judicature Act 1964)

A number of these cases have been heard at the High Court at least at the leave stage. Most of the constitutional points raised share a common similarity, and the decisions of the Court basically were that the prayers and remedies sought for were not amenable to Judicial Review.

In the case of *Datuk Seri Salahudin bin Ayub and Ors v Perdana Menteri Tan Sri Dato' Hj Mahiaddin Bin Md Yassin & Anor (2021) 12 MLJ 1*, the issues that arose for determination were whether (i) Article 150(6) and Article 150(8) were unconstitutional and as a result null and void and of no legal effect (ii) whether the respondents were under a constitutional duty, pursuant to Article 150(3) of the Federal Constitution, to advise the Yang di-Pertuan Agung to summon a meeting of the Parliament for the Proclamation of the Emergency and the Ordinance before both Houses of Parliament for all necessary and appropriate resolutions to be passed (iii) whether mandamus could be issued to direct the 1st respondent to lay the Proclamation of Emergency and the Ordinance before both Houses of Parliament for all necessary and appropriate resolutions to be passed and (iv) whether mandamus could be issued to direct the 1st respondent to advise the Yang di-Pertuan Agung to summon a meeting of Parliament for the Proclamation of Emergency and the Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions.

The Court held among other reasonings, that based on the Hansard, the intention of the legislators was clear. The insertion of Article 150(6) and Article 150(8) was meant to shut the challenge of the Proclamation of Emergency by the Yang di-Pertuan Agung. Article 150 (8) was constitutional and no judicial review could be made to challenge the decision of the Yang di-Pertuan Agung under Article 150(1) and 150(2B) of the Federal Constitution.

The application for Judicial Review was thus dismissed.

Another case deserving of consideration is *Dato' Seri Anwar Ibrahim v Tan Sri Dato' Haji Muhyiddin bin Hj Md Yassin (Prime Minister of Malaysia) & Anor [2021] 12* MLJ 834. This is another judicial review application pursuant to Order 53 of the Rules of Court

2012 that came up for hearing at the Kuala Lumpur High Court. The Prime Minister and the Government of Malaysia declared a Movement Control Order (MCO) followed by a Proclamation of Emergency by the YDPA made pursuant to Article 150(1) of the Federal Constitution. The constitutionality and validity of section 14 and 18 of the Ordinance were challenged.

The Court dismissed the application holding inter alia that:

i) Article 150(6) and 150(8) of the Federal Constitution expressly prohibited any challenges to the validity of the Ordinance in any form or on any ground.
ii) The Court has no jurisdiction to entertain the nature of the judicial application under the Federal Constitution.
iii) The advice by the Prime Minister and/or the Cabinet to the YDPA was not a decision within the ambit of Order 53 Rule 2(4) of the Rules of Court 2012 for judicial review.

The third case challenge came from a Parlimentarian and State Assemblyman, heard by the High Court in Johor Bahru, in *Hassan Bin Abdul Karim v Perdana Menteri, Tan Sri Dato' HJ Mahiaddin Bin Md Yassin and Anor [2021] 11 MLJ 1*. The applicant file an application for judicial review seeking a) a declaration that section 11 and section 14-15 of the Ordinance were invalid, unconstitutional, null and void being inconsistent with provisions in the Federal Constitution, b) a declaration that Article 150(8) of the Federal Constitution (an ouster clause) was unconstitutional, null and void and of no effect for being inconsistent with Article 4(1) and 121(1) of the Federal Constitution; alternatively Article 150(8) does not preclude the Court from judicially reviewing the exercise of power under the Ordinance; c) a declaration that the respondents were duty-bound under 150(3) of the Federal Constitution to advise the YDPA to summon Parliament for the Proclamation and the Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed in accordance with Article 150(3); and d) orders of mandamus directing the respondents to lay the Proclamation and the Ordinance before both Houses of Parliament in accordance with the provisions of Article 150(3).

The Court dismissed the application for leave for judicial review, and held inter alia that since the impediments of clauses (6) and (8) of Article 150 of the Federal Constitution were not capable of being surmounted, the Court was unable to allow the applicant's leave application. It went on to say that Article 150(8) appeared to provide a double bar to judicial scrutiny as it was prefaced with the words "Notwithstanding anything in this Constitution" indicating that Article 150(8) not only prevailed over any other law, but that it also superseded any other provision in the Federal Constitution.

5. Conclusion and What Lies Ahead?

The role of the Courts in Malaysia in the context of Rule of Law and issues that arose during the COVID-19 pandemic, must be clearly understood. Generally, the role of the Court is to interpret the laws so as to reflect the intention of Parliament in order to enforce the rights of the parties. Hence there is no question about what is the court attitude towards rule of law after COVID-19 or before. The Courts in Malaysia operates on an adversarial system on the basis of the evidence which is then applied to the laws. The Courts in

Malaysia, unlike the Supreme Court of India do not have *sua motu* powers. Cases must be brought before it by the parties concerned and the Courts do not call up cases on their own accord in Malaysia since they have no such powers.

The Courts in Malaysia operate generally in three realms, namely public law, criminal law and civil law. Public Law has to do with constitutional or administrative law where the alleged transgressor is the State. The Courts can strike down any law which is inconsistent with the Federal Constitution. (Article 4(1) Federal Constitution). The Courts also have additional powers under paragraph 1 of the Schedule to the Courts of Judicature Act 1964 to issue to any person or authority directions, orders or writs for the enforcement of the rights under the Constitution.

This is how the Courts in Malaysia operate, independently, in the scheme of separation of powers when deciding the cases under the Ordinance namely a consideration of the constitutional provisions and the evidence. In the matter of criminal law, the Courts cannot decide without regard to the evidence. If for example, the prosecution has no credible evidential backing, the Courts will have to decide on the evidence as presented and acquit and discharge the accused accordingly.

Mention needs to be made of a key problem during the COVID-19 pandemic. The Regulations mentioned do not contain a prescription of allowing an offence to be compoundable as provided for in the PCID. Issues related to the principles of *nullum crimen sine lege* (no crime except in accordance with the law) and *nulla poena sine lege* (no punishment without legal authority) were not taken up and seriously challenged.

Lastly under civil law the Courts are empowered to adjudicate into dispute between private persons (including the State) for remedies such as injunctive relief or monetary compensation but as discussed earlier much of its efficacy has been curtailed by the Ordinance.

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7. COVID-19 and the New Zealand Courts: Navigating the Tensions Between Necessity, Legality and the Rule of Law

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1. Introduction

The COVID-19 pandemic has seen governments around the world deploy strong – often unprecedented – public health measures to keep their communities safe, with varying degrees of success. A substantial public health response was necessary to combat an infectious and dangerous virus. At the same time, governments have also needed to ensure their responses were legally mandated and faithful to the rule of law. Again, there have been varying degrees of success in preserving the rule of law in this extraordinary time in global history.

In Aotearoa New Zealand, the government's response to the pandemic has been one of the most successful in protecting the health and wellbeing of people in the community. Hefty public health measures were deployed, successfully keeping infections and deaths at very low levels, at least until the end of 2021 when this chapter was completed. At the same time, a number of cases have been brought against the government, testing the legality of public health measures and the government's respect for the rule of law. The cases have included challenges to the legal underpinnings of the nationwide lockdown, management of border isolation and quarantine, approval of vaccines, implementation of workplace vaccination mandates and refusal to disclose health data to Māori welfare agencies. The government has successfully defended many of the challenges to its community-wide public health measures, such as the legality of the lockdown, but has been criticised for its treatment of some quarantined individuals and some aspects of its vaccination programme.

In this chapter, we examine the various legal cases up until the end of 2021 – explaining the nature and outcome of the litigation, along with the legal, political and health context in which they arose. Before doing so we briefly set out the nature of the response to COVID-19. We conclude by offering some lines of reflection about this set of cases, making a number of observations about what the cases might tell us about New Zealand's response to the pandemic and the role litigation has played in testing its legality.

2. COVID-19 in Aotearoa New Zealand

Leveraging New Zealand's geographical isolation from the rest of the world, the

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Government had until late 2021 successfully employed an elimination strategy of zero tolerance for COVID-19 in the community. We have set out in other places New Zealand's general approach to COVID-19 (McLay, 2021; Knight, 2021a; Knight, 2021b). The principal mechanism for the strategy was the employment of what would be seen in many other countries, especially those with traditional western liberal constitutions, to be harsh lockdowns. Since the arrival of the virus in early 2020, there have been two national lockdowns where almost all New Zealanders, except those in essential industries, were required to essentially stay-at-home. In addition, there were several regional lockdowns, most notably in Auckland, which as New Zealand's major port has been most exposed to incursions of COVID-19. These measures have been accompanied by a range of other public measures such as mask wearing, contact tracing and physical distancing – measures regularly encouraged and sometimes legally mandated.

The strategy was remarkably successful in the first 18 months of the pandemic. The first national lockdown in March and April 2020 resulted in New Zealand being COVID-19 free for almost six months. Some doubted the legal mechanisms used to effect this first nationwide lockdown and the matter eventually made it to court, as we explain below. Two significant but temporary, regional lockdowns followed in Auckland in August 2020 and February 2021 after the virus appeared and then was stamped out. New Zealand was otherwise free of the virus in the community and relatively restriction-free – until the Delta variant infiltrated the country in August 2021. The resulting national lockdown in August and early September 2021 succeeded in eliminating the virus in all New Zealand regions except Auckland. Much of New Zealand enjoyed relative freedom with limited restrictions on gatherings in hospitality. Auckland remained in lockdown for the latter part of 2021, joined by parts of two adjoining provinces (Waikato and Northland).

Towards the end of 2021, the government's strategy began to transition from elimination to suppression. The move away from elimination in Auckland became inevitable as the Delta variant took hold; outside Auckland, the "keep it out, stamp it out" posture synonymous with the elimination strategy remained. Overall, the government's focus was to maintain as much as possible the status quo by limiting the impact of the virus through restrictions but also encouraging vaccination and aiming to get at least 90% of the eligible population inoculated. Despite its late start, New Zealand's rates are now comparatively high internationally (as of 31 Dececember 2021, the rate was 77% of the total population (Our World in Data, 2022)).

In October 2021, the government announced a new COVID-19 protection framework that saw a move away from lockdowns and New Zealand reopening internally and eventually to the world (Ardern, 2021a). This "traffic light system" – with green, orange and red settings – involved graduating particular restrictions depending of presence of COVID-19 in the community and the community's vaccination rate. This framework came in effect on 15 December 2021 (COVID-19 Response (Vaccinations) Legislation Act 2021; COVID-19 Public Health Response (Protection Framework) Order 2021).

The switch in approach led to criticism from those with different risk tolerances. Some would prefer quicker shifts in settings back to "normal life", the ability of New Zealanders to return from overseas and ultimately for New Zealand to resume its extremely lucrative tourism business (Orsman, 2021). Others feared that relaxation of restrictions too quickly

would lead to the virus killing more people and overwhelming the health system as has occurred in other countries (Cardwell, 2021).

Leaders of the indigenous Māori community have been particularly vocal about fears that their communities are significantly less vaccinated than the general population. Māori argued that they more susceptible to the ill effects of the virus, reflecting systemic issues in both New Zealand generally and the vaccine rollout in particular (Waitangi Tribunal 2021b). And history fortifies their concern. Māori do not forget the spectre of the 1918 influenza epidemic that gravely and disproportionately affected their communities. Previously, the Waitangi Tribunal had released a significant report pointing to the inequalities in health outcomes that Māori suffer (Waitangi Tribunal, 2021a). The Tribunal is the expert body charged with investigating claims about the government's compliance with its obligations to Māori under te Tiriti o Waitangi (Treaty of Waitangi) – a treaty agreed when New Zealand was settled by the British, under which the Crown agreed to respect the Māori sovereignty and protect their interests. The Tribunal attributed this inequity to government failures to honour its obligations to Māori under te Tiriti and recommended an approach to the health system that would give more significant resources to Māori to make their own decisions about health services.

At the same time as the Delta variant tested the New Zealand response to COVID-19 when it arrived in New Zealand, courts have been the forum for an increasing number of legal challenges to various measures, requirements and restrictions. Delta and the apparent demise of the elimination strategy created considerable tension that tore at the social consensus. The growing length of the pandemic has meant that measures that might have been acceptable for short periods are becoming less acceptable. The most obvious example is the border quarantine requirement that has seen the vast bulk of returning New Zealanders staying in state-managed isolation and quarantine hotels (originally for a fortnight; from late 2021, shorter periods; and eventual abolition in early 2022, as the Omicron variant made the restriction futile after domestic cases rose into the thousands). This became contentious as it is had the effect of denying many New Zealanders the right to return home.

The presence of the Delta variant, along with the looming prospects of the more contagious Omicron variant, coincided with the government's acceleration of its vaccination programme and moves to mandate vaccination for aspects of public life – initially for border workers and subsequently the health and education sector. This has led to a spate of challenges for those who wish to continue in their jobs but are not prepared to get vaccinated, for whatever reason.

3. Legal Response and Constitutional Settings

3.1 Legal Framework and Tools

The government has used a particular mix of legal tools to structure and implement its response, as we have explained elsewhere (McLay, 2021; Knight, 2021a; Knight, 2021b). Many of the restrictions, including national and regional lockdowns, have been implemented through secondary legislation or administrative directives: health orders under the Health Act 1956 and COVID-19 orders under the COVID-19 Public Health Response

Act 2020.

Rather than enacting particular statutory provisions in late March 2020, the government initially preferred to rely on pre-existing public health powers in Health Act and the Director-General of Health's power to issue directive health orders. Some argued that these powers were not appropriate for a general population-wide lockdown, which led to the *Borrowdale* litigation (Geddis and Geiringer, 2020; compare McLay and Knight, 2020).

Notably, too, many of the early New Zealand restrictions were in fact "nudges" – encouraging compliance with public health measures but without those requirements being expressed in law. Indeed, as we explain below, improper reliance on nudges, absent legal underpinnings, was successfully challenged in the *Borrowdale* case (see, *Borrowdale v Director-General of Health*; [2020] NZHC 2090, [2020] 2 NZLR 864). The government also passed some statutes dealing with specific problems created by COVID-19, often relating to time frames for statutory processes that could not be carried out face to face (see, eg, COVID-19 Response (Urgent Management Measures) Legislation Act 2020).

Just before the first nationwide lockdown was lifted, Parliament addressed some of the concerns about reliance on the general Health Act regime by enacting the COVID-19 Public Health Response Act 2020. This regime replicated a framework for promulgation of COVID-19 orders, generally ministerial, and authorised restrictions only in the most general of terms. In other words, ministers could fashion orders and restrictions as necessary to respond to the circumstances of the pandemic as they arose.

There are two important features of the COVID-19 Public Health Response Act 2020. The first was to ensure parliamentary control by requiring any orders to be subsequently approved by vote in the House (COVID-19 Public Health Response Act 2020, s 16). The second was that the legislation sets out the orders that might be made in very general terms. There are obvious practical reasons for doing so, given the uncertainty of how best to respond to COVID-19, as well as some concerns that the old Health Act powers were too narrow to appropriately deal with COVID-19. Indeed, the orders made under the COVID-19 Public Health Response Act 2020 have becoming increasingly sophisticated and nuanced as the response has evolved. In the Delta outbreak, various geographical restrictions were imposed, for instance, that do not necessarily align with the rather loose sense of geographical divisions in New Zealand. Legislative style and traditions also meant drafters were more concerned about drafting in principled, rather than a detailed, fashion.

The result was two key measures central to the government's response during 2021 – border quarantine/MIQ and vaccination mandates – were not expressly provided for in the COVID-19 Public Health Response Act 2020 when it was passed in May 2020. These measures were implemented through COVID-19 orders; in other words, as secondary legislation. Amendments passed in November 2021 now expressly authorise border quarantine/MIQ in primary legislation (COVID-19 Public Health Response Amendment (No 2) Act 2021). And the shift to the COVID-19 protection framework also introduced amendments fortifying the power to impose workplace and community-wide vaccination mandates through COVID-19 orders (COVID-19 Response (Vaccinations) Legislation Act 2021), even though vaccination mandates for specific workplaces were earlier introduced as secondary legislation under the general empowering provisions.

3.2 Constitutional Role of the Courts

The courts have played an important role in scrutinising the executive's use of the various legal tools to combat COVID-19, especially policing the legality and rights-consistency of health and COVID-19 orders.

The New Zealand judiciary is closely modelled on that of the United Kingdom (Palmer and Knight, 2022). Just as in the United Kingdom, there is no complete, written constitution. However, High Court judges have consistently emphasised their crucial constitutional role in maintaining the rule of law. While the lack of a formal supreme constitution means that judges do not have the power to strike down primary legislation, judges often emphasise their essential role in ensuring that the law is interpreted, as far as possible, in line with common law understandings of rights. More recently, judges have also said they have the same role to reflect tikanga Māori (Māori customary law and traditions) and to ensure the Crown's obligations under te Tiriti are reflected, to the extent possible, in governmental decision-making (*Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, 2021] 1 NZLR 801). Judges also play a key role under the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) to promote individual rights. The Bill of Rights Act sets out rights and freedoms common to many liberal democracies but is an ordinary statute that does not have the status of supreme law. Judges are directed to interpret other laws consistently with the Bill of Rights Act unless the statute requires it or the limitation of rights is demonstrably justifiable in a free and democratic society. There has been considerable academic and judicial debate about the methodology as to how to conduct such an exercise (see, eg, *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1; *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551).

Rights implications have been central to the legality of the government's response for two interrelated reasons. Most of the key measures and rules have been in secondary legislation, rather than being restrictions being prescribed in primary legislation. Secondary legislation is directly subject to the Bill of Rights Act and, as a consequence, judges must confront whether the secondary legislation is demonstrably justified in a free and democratic society as required by section 5 of the Bill of Rights Act. The fact that judges apply this justification calculus without having to consider whether Parliament has overridden that right means that this litigation has taken on a different tinge from much rights litigation; in other contexts the focus is often on whether it is possible to interpret a statute somehow consistently with the Bill of Rights Act. In the COVID-19 litigation, courts have acted in many ways like a constitutional court might act in other jurisdictions. There have been recent developments in cases outside the context of COVID-19 that have impacted the way judges have approached this more constitutional style of interpretation (D (SC 31/2019) v New Zealand Police [2021] NZSC 2, [2021] 1 NZLR 213, *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, 2021] 1 NZLR 801, *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551).

4. Court Challenges to COVID-19 Response

The pandemic has seen a handful of challenges to government actions combating the virus. Challenges to the underpinnings of the lockdown largely failed, as did attempts to upset vaccination mandates. Challenges to individualised refusals to visit dying relatives or

for bespoke quarantine arrangements, in contrast, had some success. The government faced challenges to its vaccination programme, including to the mechanism used to approve, on an expedited basis, the vaccine and its refusal to share individualised health information to Māori health groups involved in the roll-out of the vaccine. We look at each below.

4.1 Lockdown Underpinnings

The most high-profile legal challenge during the pandemic was *Borrowdale*, a challenge to the legal underpinnings of the first nationwide lockdown in the early days of the pandemic (*Borrowdale v Director General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864; [2021] NZCA 520, d). The legal mechanism to effect the lockdown was health orders issued by the Director-General of Health under the Health Act 1956. Doubts and concerns emerged about whether this existing framework and its legal tools for combating infectious diseases were adequate to mandate stay-at-home and closure of premises measures, especially in the light of mobility rights enshrined in the Bill of Rights Act (Geddis and Geiringer, 2020; Knight and McLay, 2020; McLean 2020). Borrowdale's challenge to the lockdown, heard and determined after the lockdown was lifted, largely failed. A full bench of the High Court (Thomas, Venning, Ellis JJ) rejected his claim that the health orders were ultra vires but accepted that some early messages to stay at home lacked the necessary legal underpinning. On appeal, the Court of Appeal (French, Cooper and Collins JJ) agreed the health orders were validly made under the Health Act (the government did not appeal the ruling about the unlawfulness of early messaging).

Borrowdale's main argument was that the power in section 70(1)(f) of the Health Act to "require persons … to be isolated [or] quarantined" could not be used by the Director-General of Health to require the entire population to stay at home in their household bubbles. He argued the power should be read as an individualised power – only used on a case-by-case basis to isolate or quarantine those infected or suspected of being infected. Similarly, Borrowdale argued that the power in section 70(1)(m) to close premises of "any stated kind or description" and to prohibit "congregation" could not be used to close all premises or prohibit people gathering generally, albeit these measures were expressed subject to conditions.

Both the High Court and Court of Appeal rejected these arguments, ruling that the orders could universally require all people to stay-at-home, all premises other than those essential could be closed, and public congregation subject to distancing requirements could be prohibited. The special, emergency character of the long-standing Health Act regime provided a crucial backdrop of the interpretation of the Director-General's powers. For example, the Court of Appeal at [144] said, the "breadth of the authority conferred upon the Director-General … reflects Parliament's appreciation that the special powers in s 70(1) are exercised by highly qualified health experts and that the circumstances in which the special powers may be exercised will cover a wide range of scenarios, some of which cannot be fully anticipated". It followed, in the view of both courts, that the powers should be interpreted generously: broad powers were needed to deliver on the purpose of the regime and any limitation of individual rights while doing so was deliberately contemplated by the legislature (*Borrowdale* HC, [155]; *Borrowdale* CA, [129]). Both courts also observed that the lockdown and concomitant limitations of rights were justified, even though *Borrowdale*

had acknowledged and not contested the justifiability of the measures taken (*Borrowdale* CA, [159]). The Court of Appeal said that limits on mobility rights were "clearly justified in a free and democratic society to protect the health and wellbeing of members of society by preventing and limiting the impact of contagious diseases, such as COVID-19", noting that Borrowdale would have faced "an insurmountable hurdle" to argue otherwise (*Borrowdale* CA, [160] and [162]). The Court declared in its formal relief that the lockdown was "a necessary, reasonable and proportionate response to the COVID-19 crisis at that time" (*Borrowdale HC*, [292]).

Borrowdale made an important rule of law argument about the way in which "essential business" were treated in the health order closing premises. The language and structure of the order was messy. The closure order exempted premises "necessary for the performance or delivery of essential businesses" and defined those as "businesses that are essential to the provision of the necessities of life and those businesses that support them, as described on the essential services list on the covid19.govt.nz internet site maintained by the New Zealand government" (Section 70(1)(m) closure notice, 25 March 2020). But that website list proved to be unstable, changing dynamically during the life of the lockdown as governmental officials updated it to reflect their developing assessment of what businesses should be treated as essential. Both the High Court and Court of Appeal seemed troubled by these shifting sands but benevolently read the health order in a way that preserved the legality of the exemption practice. The High Court said the controlling definition in the health order was meaning of "essential to the provision of the necessities of life" and the reference to the website was for advisory purposes only and therefore redundant (*Borrowdale* HC, [275]). The Court of Appeal rejected the High Court's interpretation but still ruled the exemption process was lawful because the Director-General did not, in fact, delegate the decision about which businesses were listed as essential (*Borrowdale* CA, [186]). First, the Director-General effectively approved a draft list and stayed in the loop about subsequent changes to that list. Secondly, in any event, the Director-General provided sufficient guidance to officials about the standards and principles to be applied when preparing the list of essential business; the administrative task of collating the list therefore did not amount to objectionable sub-delegation.

Borrowdale also argued – successfully – that the government's messages to stay at home during the first nine days of lockdown (before a health order formally directing people to stay-at-home was issued) were unlawful. Urging people to stay at home in media briefings and speeches, the High Court ruled, limited their mobility rights under the Bill of Rights Act without the necessary legal mandate (*Borrowdale* HC, [191]). In constitutional terms, the limitation on people's freedom of movement was not *prescribed by law*, as it needed to be if it was to operate as a justified limitation on protected rights (even though, in substantive terms, the limitation *was* justified). Central to this ruling was the crucial finding that the words of the Prime Minister, Director-General and Police Commissioner came with normative force; in other words, the messages were "replete with commands", "conveyed that there was a legal obligation on New Zealanders to comply" and were not merely advisory statements counselling voluntary compliance (*Borrowdale* HC, [184]). The government did not appeal this ruling. Only a declaration was issued by the High Court on this point as the proceedings did not seek to directly impugn any enforcement actions based

on those messages. Notably, a later High Court ruling in a criminal appeal took a different – more favourable – view of the police's ability to apply and enforce case-by-case directions under civil defence legislation consistently with the government's early urging for people to stay at home (*Maddigan v New Zealand Police* [2021] NZHC 1035).

The arguments made by Borrowdale about the scope of the section 70 powers and their ability to support community-wide lockdowns became less important after the COVID-19 Public Health Response Act 2020 in June 2020 because that regime provided a more explicit and robust means to effect stay-at-home and other public health measures. Thus, the challenge became a sort of historic relic, lagging well behind the pressing issues about the legality and propriety of the government's response to the pandemic.

The *Borrowdale* litigation was preceded, in the early days of the first nationwide lockdown, by a couple of attempts from self-represented litigants to challenge the lockdown through application for habeas corpus (*Nottingham v Arden* [2020] NZCA 144, [2020] 2 NZLR 197; *Prescott v New Zealand Government* [2020] NZHC 653). Habeas corpus applications allow those detained by government to test the lawfulness of their detention. These applications failed, with the courts ruling that the stay-at-home measures did not amount to detention and/or attempts to challenge government measures through habeas corpus were inappropriate.

4.2 Compassionate Quarantine Exemptions

During the first nationwide lockdown, two cases challenged the government's refusal to grant compassionate exemptions to family members from quarantine restrictions so they could visit dying relatives. Both judges were critical about the government's decision-making processes.

In the first, *Christiansen*, a returnee was refused exemption from quarantine requirements in MIQ to visit his father who was dying of brain cancer (*Christiansen v Director-General of Health* [2020] NZHC 887). The applicable health order provided for exemptions for travel on "compassionate grounds" and in "exceptional circumstances" (Section 70 isolation or quarantine order, 9 April 2020, cls 5(g)(i) and 5(i)). However, officials refused his request because he did not satisfy the categories of permissible travel (medical transfers or serious medical conditions not capable of being managed in quarantine) that the health ministry has identified in a framework published on its website. However, Walker J ruled this amounted to an error of law and failure to take into account mandatory relevant considerations because the framework officials based their decisions off "did not reflect the wording in the empowering Order"; in other words, it was "unlawful to blindly follow a policy if that policy is not reflective of the actual position in law" (*Christiansen*, [48])

In the second, another returnee sought an exemption from quarantine requirements to visit his dying father. However, his request was refused after applications for exemptions were suspended due to an incident where two other returnees had left quarantine for compassionate reasons without the expected negative virus tests. Sadly, the man's father died before the application was considered but Muir J issued a minute warning officials that the blanket suspension seemed to amount to unlawful abdication of discretion (*Hattie v Attorney-General* (CIV-2019-404-303)).

4.3 Managed-Isolation and Quarantine Regime

A key feature of the government's response was a long-running and blanket requirement that people arriving in New Zealand needed to be quarantined at the border for a fortnight before joining the community (Knight, 2021b). In practice, this regime – known as managed isolation and quarantine (MIQ) – amounted to tightly-controlled detention in state-managed hotels and subjection to a series of health checks. While this border control was central to the country's elimination strategy, the disruptive effect of quarantine fell heavy on individuals wishing to return to New Zealand, especially as capacity in MIQ fell well short of demand. Numerous challenges to the regime were slated by individuals unsuccessful in obtaining a spot in MIQ or refused exemptions for compassionate reasons such as to visit dying relatives; challenges that did crystalise often were resolved before hearing. A broad challenge to the regime as a whole – brought by a representative group, Grounded Kiwis, and anchored on citizen's right of return in the Bill of Rights Act – is to be heard in the early 2022 (*Grounded Kiwis Group Ltd v Ministry of Health*, CIV-2021-485-556).

One of the rare cases to come to a hearing, *Bolton*, was brought in October 2021 by a business person seeking to avoid MIQ when returning from business travel abroad. Bolton successfully challenged government officials' refusal of his and his partner's request to quarantine at their home, rather than in state facilities (*Bolton v Chief Executive of the Ministry of Business, Innovation and Employment* [2021] NZHC 2897). The quarantine requirement was set out in a health order and conferred the power to determine the place of quarantine on the chief executive of the Ministry of Business, Innovation and Employment in conjunction with medical officers of health (COVID-19 Public Health Response (Isolation and Quarantine) Order 2020). In particular, the chief executive determined which facility a returnee was to be quarantined in but an exception under clause 12(2) also allowed a medical officer of health to determine "for any reason (for example, for medical evacuation)" that a particular person needed to isolate or quarantine at "any other facility or place".

Venning J ruled that officials had – erroneously – read the place of quarantine power too narrowly, solely on health grounds. Properly constructed, he said, the power anticipated a broader assessment of whether a returnee's needs necessitated quarantine elsewhere than state-managed MIQ facilities and a balancing against the health risks. In Bolton's case, this demanded consideration of his need to attend a business meeting abroad, the couple's vulnerability to contracting the virus in MIQ, their vaccination status, the prevailing circumstances in the community at the time and the degree of risk associated with quarantining at home: the objective of the regime "will be met if the decision maker can be satisfied that the needs of the applicant (not restricted to health needs) can be met by the applicant self-isolating at home in a way and on conditions that prevent and limit the risk of the outbreak or spread of COVID-19" (*Bolton*, [59]). Importantly, officials also needed to factor into their assessment the couple's right of return as citizens; the justified limitations calculus in section 5 of the Bill of Rights expected some form of proportionality assessment. The refusal of permission to self-isolate at home solely on health grounds was therefore tainted by an error of law and failure to consider mandatory relevant considerations.

Reconsideration was directed and, in due course, the couple was granted permission to self-isolate on return. But the ruling opened a large crack in the administration of MIQ, potentially flipping to individual assessment from a narrow exception to a general rule.

4.4 Vaccine Approval

The approval of the Pfizer vaccine was contested by judicial review in early 2021 (*Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107). The Minister of Health granted provisional consent for the Pfizer vaccine to be used to vaccinate all those over the age of 16. The Minister relied on a power in the Medicines Act 1981 allowing expedited approval of new medicines "on a restricted basis for the treatment of a limited number of patients" (albeit relying on the substantive evidence submitted for a parallel application for full approval) (Medicines Act 1981, s 23). An anti-vaccination group applied for interim orders stopping the vaccination roll-out, because approval was not restricted to treatment of a limited number of patients.

The High Court refused to grant interim orders; it acknowledged that, first, the provisional approval did not generate undue safety risks and, secondly, stopping the rollout would have caused adverse public health consequences and undermined the legitimacy of the vaccination campaign. However, Ellis J accepted the anti-vaccination group had a point about the class restriction and it was reasonably arguable that approval for treatment on a wider basis was unlawful.

The government moved swiftly to address Ellis J's obiter doubts about the legality of expedited approval. Within a week of the judgment, Parliament passed an amendment to the Medicines Act 1981. The words qualifying the provisional approval power that cast doubt over vaccine approval were removed and the Pfizer vaccine (and other medicines similarly approved) was deemed to be validly approved under the provisional approval power (Medicines Amendment Act 2021).

4.5 Vaccination Mandates

Several cases unsuccessfully challenging (workplace specific) vaccination mandates have been bought before the court (*GF v Minister of COVID-19 Response* [2021] NZHC 2526, [2022] 2 NZLR 1; *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 and *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65). The Minister for COVID-19 Response issued health orders mandating that only vaccinated workers could work in particular sectors (border services such as aviation security and customs; health services; and schools) (COVID-19 Public Health Response (Vaccinations) Order, 2021). Workers from these sectors challenged the validity of the orders on a representative basis. In each case, High Court judges found the health order mandating vaccination could lawfully be made by the Minister for COVID-19 Response and did not unlawfully undercut the right to refuse medical treatment in the Bill of Rights Act.

The core argument in these cases was whether the vaccination order was validly made under the COVID-19 Public Health Response Act 2020, when read in conjunction with rights-protections in the Bill of Rights Act. It was common ground that the vaccination orders implicated the right to refuse medical treatment in s 11 of the Bill of Rights Act: as

the government conceded, the adverse consequences for unvaccinated employees were so serious that the liberty to choose underscoring s 11 was countermined. Therefore the vaccination order needed to be demonstrably justified in terms of s 5 of the Bill of Rights Act. While the Bill of Rights Act does not allow invalidation of primary legislation, secondary legislation is not so protected and can be invalidated if it unjustifiably limits rights (COVID-19 Public Health Response Act 2020, s 13(2); *Drew v Attorney-General* [2002] 1 NZLR 58). However, each case had a slightly different emphasis, especially in the way human rights arguments connected with common law administrative law arguments.

A wide-ranging challenge was mounted in *GF*, with the applicants arguing various deficiencies meant the order was ultra vires and/or unreasonable (none of which succeeded). The main argument was the minister's order was too blunt, especially in the light of the significant burden individuals suffer, and failed to adequately grapple with the effect on the right to refuse medical treatment. Churchman J rejected the claim that the minister had failed to grapple with rights implications of the order and alternative ways of achieving the public health objectives. "The evidence", he said, "establishes the scientific support for the efficacy of vaccinations in reducing the spread and harm of COVID-19 [and] supports an inference that they are significantly more useful in achieving the objective than alternative measures" (*GF*, [86]). Other claims about discriminatory effect, breach of te Tiriti and improper execution by associate minister were also rejected.

In *Four Aviation Security Service Employees*, the core argument was about whether, as a matter of fact and evidence, the vaccination order was demonstrably justified in a free and democratic society, as well as an argument that the primary legislation did not squarely authorise the making of orders mandating vaccination. Cooke J disposed of the vires argument quickly, concluding that the general words in the empowering legislation were broad enough to authorise vaccine mandates in this context (although expressing some surprise that the empowering legislation did not explicitly signal the possibility of vaccination mandates). On the question of whether the order was demonstrably justified, Cooke J noted that assessment was for the Court itself to make: "there is no question of defence" (*Four Aviation Security Service Employees*, [82]). However, he accepted that there is "a limit on the Court's ability to address the issues in an evidential sense", especially, as here, there was a contest of expert evidence about the sciences – crucially about whether Pfizer vaccine reduced the risk of transmission of the virus (*Four Aviation Security Service Employees*, [84]). Cooke J ultimately concluded that he was "satisfied that it is likely that vaccination contributes to preventing the risk of transmission", at least on current scientific evidence, and it followed that the vaccination mandate was proportionate and demonstrably justified (*Four Aviation Security Service Employees*, [110]).

In *Four Midwives*, the question before Palmer J was solely about whether the power to make orders in the COVID-19 Public Health Response Act 2020 adequately authorised the making of vaccination mandates. In other words, should the power to make orders, expressed in general terms, be read narrowly due to the potential effect on rights such that making vaccination orders needed to be explicitly spelt out? Palmer J ruled that the text of the empowering legislation, read in light of its purpose and context, envisaged the making of COVID-19 orders mandating vaccination for some workers – so long as the orders were justified in terms of s 5 of the Bill of Rights Act. As the applicants did not argue the orders

were unjustified limits, it followed that the vaccination order was not ultra vires. The principle of legality and similar interpretative direction in s 6 of the Bill of Rights Act did not require a different interpretation.

4.6 Indigenous Co-Governance

The place of Māori – New Zealand's indigenous peoples – in governmental decision-making about the response to the pandemic has a site of contest (Knight, 2021b). Highlighting these tensions was a successful legal challenge to the government's refusal to share vaccination data with Māori organisations wishing to target Māori individuals for inoculation (Te Pou Matakana Ltd v Attorney-General [2021] NZHC 2942, [2022] 2 NZLR 148). Central to this challenge was the significance of te Tiriti o Waitangi (Treaty of Waitangi) to that decision. Te Tiriti contemplated a partnership or some degree of sharing of governance between the government and Māori; in modern terms, this anticipates ongoing authority for Māori over certain resources and taonga (treasures), together with an expectation of similar protection by the government. In what will be remembered as a major decision about the impact of te Tiriti on governmental operations, the High Court ruled that health officials had failed to give due regard to te Tiriti when refusing to provide individual data of unvaccinated Māori to Māori health providers. This failure stymied the ability of these providers to target delivery of COVID-19 vaccinations in their preferred "for Māori, by Māori" way.

Te Pou Matakana, a Whānau Ora Commissioning Agency, – been contracted by Te Puni Kōkiri (Ministry of Māori Development) to provide assistance and support to Māori whānau (families) during the pandemic. Te Pou Matakana is one of three agencies contracted by government as part of the Whānau Ora programme: a major government-wide initiative that devolves funding for, and delivery of, whānau wellbeing and development to Māori agencies in a whānau centred way. In the latter stages of the vaccination programme, on the back of increasing concerns about low vaccination rates amongst Māori, Te Pou Matakana requested the Ministry of Health enter a data sharing agreement to provide them with relevant details of unvaccinated Māori. The Ministry of Health agreed to this, but on a partial basis. Only details of Māori individuals previously delivered services through Te Pou Matakana and its Whanau Ora partner agencies would be provided; privacy concerns meant access of details of other Māori individuals who had not previously engaged with Whānau Ora were refused.

The High Court ruled the refusal was unlawful. First, Gwyn J ruled the ministry had misinterpreted its obligations under the governing Health Information Privacy Code 2020. The ministry failed to undertake an evidence-based assessment of whether disclosure of the information was necessary, especially compared to the efficacy of its more limited form of information sharing (*Te Pou Matakana (No 1)*, [77]). The judge was concerned (without formally determining the point) about inconsistency, given the ministry had supplied similar data to some other contracted (non-whānau ora) agencies. Secondly, Gwyn J ruled that the ministry was obliged to exercise its powers relating to data sharing consistently with te Tiriti o Waitangi and its principles (*Te Pou Matakana (No 1)*, [116]). The ministry signaled its commitment to honour te Tiriti in its response to COVID-19 and the vaccination programme in particular. The Court said that created an actionable legitimate expectation

that it do so (although the Court's reliance on the legitimate expectation doctrine was perhaps unnecessary given the Supreme Court's recent ruling that the principle of legality required conformity with te Tiriti principles if the governing legislation so allowed (*Trans-Tasman Resources*)). The refusal implicated several te Tiriti principles, including the principle of options (Māori able to pursue a direction based on their choices), principle of partnership (the need to afford Māori the capacity and space to exert their tino rangatiratanga (authority) in the primary health care system) and principle of active protection (the Crown's duty to actively protect the health rights of Māori). Gwyn J concluded that the ministry "did not have adequate regard to te Tiriti and its principles, as informed by tikanga [Māori customary practice]" (*Te Pou Matakana (No 1)*, [133]). In particular, she expressed concern about the generalised nature of the assessment about the need for disclosure, as well as the lack of a "sharp focus" on obligations under te Tiriti and how they applied to the particular request: "it is difficult to see how that decision could have been informed by the principles of partnership and options, in particular" (*Te Pou Matakana (No 1)*, [133]).

Following the decision, the ministry reconsidered its decision. After consulting with pan-Māori and iwi organisations, it declined to make the data available on a blanket basis. Instead, the ministry considered whether disclosure was necessary on a "rohe by rohe" (region by region) basis, after engaging with iwi in that region; as a result, data was made available for some, but not all, regions. The failure to provide all the data requested was challenged again and was again found to be unlawful (*Te Pou Matakana Ltd v Attorney-General (No 2)* [2021] NZHC 3319, [2022] 2 NZLR 178). Gwyn J ruled that the ministry continued to apply an erroneous threshold for disclosure and misconstrued its assessment of the privacy implications. In addition, the judge criticised the consultation process with iwi. The consultation process effectively introduced an authorisation requirement for disclosure (something contrary to tikanga and inconsistent with the statutory test). Interestingly the Court was persuaded by evidence from a leading Māori legal academic that tikanga required taking all measures to protect people's health. There was also inconsistent treatment because consultation had not been undertaken for disclosure to other organisations without a special Māori mandate or disclosure of other data in other circumstances. The failure to include Whānau Ora in the plenary consultation meetings amounted to a breach of natural justice as well. The judge again directed the refusal be reconsidered and this time the ministry decided to release all the data requested.

5. Lines of Reflection

In our concluding comments, we reflect on the themes or lessons that can be drawn from the legal issues that were litigated and how the cases were decided. There are a number of ways the cases can be explained and we float a handful of lines of reflection on an exploratory basis. However, while the number of cases is relatively modest, the cases seem to support a number of observations – sometimes interrelated – about the legal framework, practice and culture in Aotearoa New Zealand.

5.1 Volume of Cases

First, the *volume of cases* is significant in its paucity, even if the number of challenges

rose towards the end of 2021. For much of the pandemic, the judiciary not been a significant player in reviewing the legality of various public health measures restrictions. *Borrowdale* was an exception but it lagged behind the response. More cases have emerged as time goes on, as the government changed its strategy from elimination to suppression based heavily on vaccination. The lack of other significant litigation, both in terms of quantity and seriousness, perhaps reflects the high degree of social consensus over the government's response to COVID-19, especially in the early days of the pandemic. Part of this was the sophisticated way in which the government employed both legal requirements and non-legal nudges – inviting the community to "do the right thing", by protecting themselves, their communities but especially their whānau (family). The lack of resort to the courts to contest the legality of the government's actions is not atypical (Knight, 2022). An appellate judge has previously noted that, as a small democracy, New Zealand tends to "only have an irregular supply of cases" and single judicial review cases "have a disproportionate impact" (*Lab Tests*, [396]-[397]) – something that probably holds true in the case of legal challenges during the pandemic. The absence of a multiplicity of legal challenges also says something about New Zealand's constitutional culture: a high degree of trust in government and an instinct to contest policy through political means (Palmer and Knight, 2022).

5.2 Judicial Deference to the Executive

Secondly, the cases say something about the ebb-and-flow of *judicial deference to the executive*. One is a highly deferential approach to the government's justification of various population-wide restrictions. In general, New Zealand courts have generally deferred to the executive's assessment of necessity and the balance between public interest and effect on individuals (even if at least one judge, Cooke J, preferred not to use that term, reiterating that the weighing process in section 5 was a matter of law). In other words, the courts have not seriously second-guessed the government's expertise on how to fight COVID-19 and what was necessary in terms of restraint on everyday freedoms. But that deference perhaps lessens when an individual presents a disproportionate personal impact and is able to offer credible alternatives to mitigate public health risks. The courts' general deference has been shared by Parliament, seen in its ratification of the orders made under the COVID-19 Public Health Response Act 2020. Typically, those ratifications have been done unanimously and with little of debate about the particular measures, although as time has gone on, there has been considerable debate.

The deferential posture is seen in many of the cases. In *Borrowdale* (HC and CA), the courts were not required to judge the reasonableness of the measures adopted during the first lockdown because the focus and the applicant's case was on the legality of the restrictions, that is, whether the statutory provisions authorised them. Borrowdale conceded that the conditions were reasonable. It has also been suggested that the courts were unduly deferential when determining whether the measures were legally authorised (Geddis and Geiringer, 2021).

The vaccination mandates cases have been remarkably unsuccessful. In those cases where the applicants have sought to show that the various vaccination mandates were not demonstrably justified in a free and democratic society, the courts have comprehensively

accepted the general public health approach favouring universality of vaccination in the particular employment area over the assessment of individual circumstances. This is perhaps clearest in *Four Aviation Security Service Employees* where the applicants were not "on the front line".

The one major exception in the courts has been the MIQ cases – *Christiansen* and *Bolton*. One way of reconciling the more aggressive approach in the MIQ cases is these cases presented judges with fact situations in which the applicant seeking relaxation of the rules did so only in a particular case where the applicant was able to point to comprehensive measures that the applicant was prepared to take to mitigate public health issues. In *Christiansen*, the applicant had tested negative for the virus, was prepared to wear complete protective equipment and the visit to his dying father could be easily accomplished. In *Bolton*, the applicant presented a range of measures, including private air transport and the demonstrated ability to self-isolate upon return to New Zealand. Also, unlike cases like *Borrowdale*, the MIQ cases could point to very particularized harm, in *Christiansen* not seeing a dying father and in *Bolton* not being present in a critical business meeting in the United States. The vaccination mandate cases had similar features, especially in terms of the effect of the restrictions on the individuals who would lose their jobs if not vaccinated; however, the result of allowing the applicants' claims in those cases would have been to have put the general public health approach in jeopardy.

At one level the *Te Pou Matakana* case presents a challenge to the conclusion that the courts have deferred to the government's assessment of how to respond to the pandemic. Gwyn J expressly rejected the government's decision to restrict the release of Māori vaccination information. But, at another level, the judge might be taken as deferring to the broader government approach to encouraging vaccination. There is a sense in the way that the applicant had framed the case, and in the judgment, that it was the government's own pro-vaccination approach that was being undermined by a restrictive interpretation of the information sharing and privacy rules.

5.3 Population-Wide Public Health and Individual Liberty

Thirdly, the cases disclose a possible *dichotomy between population-wide public health and individual liberty rights*. As well as reflecting a general deference to administrative decision-making, we wonder if the cases can also be seen through a rubric of population-wide public health concerns on the one hand and a more legalistic focus on individual rights on the other. Public health sometimes demands blanket measures that do not necessarily take into individual circumstances. Lawyers often take an opposite approach to rights. The courts have tended to have accepted the public health approach, with a somewhat secondary approach to individual rights. The vaccination mandates cases are good examples of accepting that blanket rules might be appropriate, even it were possible to have built great account for individual rights. In the *Four Aviation Security Service Employees* case, the possibility that the mandate might have been more restrictively scoped so as to exclude the affected workers without perhaps completely undermining the public health imperative did not seem important in upholding them mandate. However, the MIQ cases are perhaps examples where the legal focus on the effect on the individual captured the attention of the courts and judges could see how the implementation of the rules could

still protect public health while at the same time protecting the rights of the individuals.

5.4 Changing Times and Fluctuating Social Licence

Fourthly, one way to read the cases is across dimensions of *changing times and fluctuating social licence*. A persistent theme in the success of the response to COVID-19 has been the social consensus that the elimination approach was the best one for New Zealand to pursue. That gave a certain licence to those making the COVID-19 rules. But as we have suggested, that consensus has frayed somewhat as the pandemic wore on and Delta made elimination in Auckland seemingly impossible. At the time of writing at the end of 2021, the public mood post-elimination strategy and in the light of the arrival of the Omicron variant was uncertain.

The more permissive approach to New Zealand's COVID-19 rule-making in the courts corresponds often to times of consensus over what should be done. *Borrowdale* accepted that there was no alternative to the rules of the first lockdown. The vaccination mandate cases reflect a high degree of consensus (while not ignoring some high profile vocal opposition) that community vaccination is the only real way forward. Again the MIQ cases perhaps show that that consensus has not been uniform across all measures at all times. *Christiansen* was early in the days of the system before the difficulties of running the MIQ system were rarely fully understood really by anyone – especially the difficulties in taking into account individual circumstances when set against the large volume of demand. *Bolton* came towards the end of the MIQ system, when the virus was unfortunately endemic in Auckland and when the government itself was beginning to experiment with ways of making it less restrictive. Indeed it was the failure to incorporate Bolton into the self-isolation experiment that led to the litigation.

5.5 Interrelationship Between Common Law Interpretation and Statutory Rights-Protection

Fifthly, the cases reveal a *complex methodological debate* about the interrelationship between common law interpretation and statutory rights-protection – a debate anchored around the "principle of legality" and vociferously debated by a small coterie of judges, scholars and lawyers. Perhaps contrary to a stated orthodoxy, the courts have allowed intrusive restrictions to be authorised by broad legislative words. Judges have read general words – first those in the Health Act and then the COVID-19 Public Health Response Act 2020 – widely in order to maintain the delivery of the purpose of the legislation, despite these powers quite seriously implicating rights protected under the Bill of Rights Act.

This generous interpretation during the pandemic is especially notable because, in doing so, the courts have rejected attempts to limit the meanings of those words by reference to the legality principle; that is, that only clear and specific wording can take away, or authorise the taking away of, fundamental freedoms or human rights. While the legality principle has been popularised recently, especially in the United Kingdom (Varuhas, 2021; 578-614), it reflects a deeper understanding of the importance of interpreting statutes as not taking away from common law rights unless the language is clear. However, what is lacking in much of the literature is a reconciliation of the desire to protect critical common law rights with the reality that the administrative state in which we all live necessarily

involves some modification of those rights. Statutes are written within that broader context as well. Moreover, Wilberg has made well the point that in natural disaster or emergency legislation, the legality principle itself ought to be subject to a reasonable limitations. (Wilberg, 2020; 384-390; Wilberg, 2017; 139-165). In the New Zealand context, the legality principle is referred to in the Legislation Design and Advisory Committee's guidelines; the expectations of the guidelines is that "legislation will be construed and applied in light of these abiding values" (Legislation Design and Advisory Committee, 2021).

The leading example of inclusive interpretation is the *Borrowdale* litigation. At the time of the *Borrowdale* litigation in the High Court, there was an active debate over whether the comprehensive restrictions of the first lockdown could have been imposed under the Health Act, which arguably seems to focus on more targeted interventions than a general community-wide lockdown (Geddis and Geiringer, 2020; Knight and McLay, 2020). The question was whether closing all premises could be authorised by a provision that simply talked of closing premises, or whether a power to prevent gatherings in public places could be used to impose a nationwide lockdown. This argument was at the heart of the applicant's case in both the High Court and Court of Appeal. Comparing the two decisions, this argument lost quite a degree of purchase over the year between the decisions. The Court of Appeal judgment is almost dismissive of the linguistic attempts to restrict the way in which the Health Act is to be interpreted. Both the High Court and the Court of Appeal appeared to accept that it was perhaps only a modern sensibility that read the words as restricted to more individual situations. Both courts accepted that the language used by the Health Act 1956 had been put in place to deal with the previous pandemics, and their application had always intended to be wide. The principle of legality, indeed, does not really even feature in the Court of Appeal's analysis, which focuses much more on the interpretation of particular words within the context within which they were enacted. So "premises" in s 70(1)(m)(i) could be interpreted as applying to all premises, and "isolation" or "quarantine" in s 70(1)(f) could be construed as requiring people to stay at home or observe "social distancing in public places".

In the vaccination mandate cases, High Court judges accepted that the general power in s 11 to require specific actions – expressed broadly with a wide-ranging preamble and a list of illustrative (but not limiting) examples – authorise the requirements of vaccination even though it was not explicitly spelt out. Once Cooke and Palmer JJ accepted this, the principle of legality played little role. For example, Cooke J rejected the attempt to limit his interpretation by reference to constitutional or human rights protections, even though it might have been surprising that a "a very substantial measure is being implemented through a generally expressed empowering provision", without express mention of vaccination (*Four Aviation Security Services Employees*, [76]-[77]). Palmer J's analysis in the *Four Midwives* case was more complex but to the same basic effect. While Palmer J accepted that the principle of legality was part of New Zealand's common law, his view was that it did not add much to the role played by s 6 of the Bill of Rights Act, which prefers legislative meaning that is, so far as possible, consistent with rights. But the Bill of Rights Act analysis (and, thus, the question of whether an order could validly be made under s 11) turned on the justifiability of the order (*Four Midwives*; [50]): "No order can be made under the empowering provision that limits the right unless it is reasonable, prescribed by law and can

be demonstrably justified in a free and democratic society under s 5 of the Bill of Rights." This approach had a particular bite because, in the argument in the *Four Midwives* case, the applicants had not contested the demonstrable justification of the vaccination order (some conceding the point; others deferring that argument for later hearing and adjudication).

5.6 Challenges Framing and Arguing Public-Interest Cases

Finally, the cases *reflect the challenges lawyers have framing and arguing cases*, mixing together human stories with sophisticated constitutional arguments. New Zealand has little tradition of running big constitutional cases or experience in curating a case with the appropriate levels of abstract rights-centred argument and the right level of focus on the concrete injustice for individuals. The problems were most acute in the most important case, *Borrowdale*. *Borrowdale* was a good citizen testing the generality of provisions. But we wonder if his case might have been stronger with evidence of a particular restriction on his liberty, beyond that experienced by us all. Or perhaps even a different plaintiff that might have shown how the ad hoc approach taken to the listing of essential business had caused real harm. Similarly, the applicants in the vaccine mandate cases lost the narrative contest, even though they did point to the reality that they would lose their jobs as a result. Their general pleas of injustice and the need for rights-consistency also failed to grapple with the complexity of interpretation in constitutional cases. In contrast the plaintiffs in the MIQ and lockdown exemption cases won the narrative battle – the injustice. One lesson for future litigation is that abstract argument over rights is not necessarily the best way to win these cases.

6. Conclusion

In this chapter, we have sought to set out and explain the New Zealand courts' approach to the challenges arising from the government's response to COVID-19. The issues that have confronted the courts have, like the issues that confronted government, been largely unprecedented. We have sought to explain the rather permissive approach of the courts by reference to different factors. There is little question that the approach of the courts was shaped by the extraordinary circumstances. But the cases we have examined present a somewhat complex picture that can only really be explained by reference to on-going, and pre-existing debates about the role of the courts in constitutional cases. This might account on the one hand for the courts active engagement with a range of COVID-19 cases but ultimately their deference to the overall shape of the government's response on the other.

That has not meant that the courts did not have an impact. Ellis J's doubts about the legality of the provisional approval of the vaccine led to an immediate statutory change. Gwyn J's decisions in *Te Pou Matakana* resulted in the government releasing some vaccination information. The courts most important role may not, however, have been in their actual decisions but in shaping the implementation of the government's decisions. A familiar theme of the government's response in litigation was to acknowledge that its approach must be judged by its proportionality – and, by-and-large, the courts have accepted the proportionality of the public health and legal measures.

The Delta variant upturned the general New Zealand approach to COVID-19. While it

is hoped that high vaccination rates will protect New Zealanders, nothing about COVID-19 is certain. Inevitably there will be more litigation, perhaps again informed by whatever social licence forms around the government's approach. How New Zealand courts will respond to our changed reality of complex rules to deal with living with COVID-19 remains to be seen.

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8. The Critical Role of Philippine Courts in Addressing Environmental Challenges in the Time of Pandemic

Rose-Liza Eisma-Osorio

1. Introduction

Courts play a key role in ensuring the enforcement of environmental laws to its fullest extent. With the Philippines facing varied challenges in environmental compliance and enforcement especially in the time of the COVID-19 pandemic, it is important that the courts remain steadfast in ensuring environmental rule of law. This includes the continued recognition and enforcement of environmental rights as a means to transform environmental destruction into conservation. When the COVID-19 pandemic broke out in early 2020, nationwide lockdowns were immediately enforced by the Philippine government (See, 2021). The President declared a state of public health emergency (Presidential Proclamation 922 2020). This was followed by declarations of strict quarantine measures through the Inter-agency Task Force headed by the President to exercise plenary powers to decide on lockdown measures throughout the country, including stay-at-home orders for 100 percent of the population (Inter-Agency Task Force Resolution 30 2020). Although these measures were intended to mitigate and contain the rapid transmission of COVID-19, there were questions raised from the public due to the sweeping coverage of emergency powers, including the questioned trustworthiness of government officials (Navallo 2020). Experts have argued that with the pandemic, there was greater consolidation of power in the executive branch and a further weakening of the separation of powers because of the lack of oversight coming from the legislative branch and the exercise of powers which stretched the limits of the laws and the Constitution (Atienza 2021).

This raises a concern as to the role of the judicial branch of government, which exercises judicial review of the emergency powers. The court's exercise of this function becomes more important in times of emergency or other crisis as it serves as a venue for the challenge of arbitrary executive or legislative actions (International Commission of Jurists 2020). The court's importance becomes all the more important as the country is now at a critical juncture where state policies are now aimed at economic recovery. Congress has legislated laws aimed at rolling out comprehensive economic relief measures. At the same time, a recent pronouncement of the President lifted the moratorium on mining (Bayanihan Act 2020). Clearly, these economic stimulus and recovery measures are carried out without keeping environmental protection in mind.

This article seeks to examine the critical role of courts in paving the way towards sustainable recovery. The Philippines has a strong constitutional framework to ensure the full protection of the right to a healthy environment. A robust national environmental law framework also exists. While the Philippines has progressive environmental laws to check executive action even in times of emergency or other crisis, many of these remain on paper. Likewise, the Supreme Court has made available legal remedies such as the writ of

kalikasan (nature) to protect against large-scale environmental destruction, however, access by citizens and civil society organizations of these remedies have become increasingly challenging. Hence, if the government insists on regressive policies. Courts can play a more prominent role in environmental compliance and enforcement. Hence, this article seeks to critically examine trends in court decisions in the time of the pandemic and will identify issues and recommendations to improve access to environmental justice in the Philippines.

2. The State of the Environment Before and After the Time of Pandemic

2.1 Before the Pandemic

The right to a safe, healthy and sustainable environment is recognized in the Philippine Constitution. The Supreme Court recognized this right for every citizen, including the unborn, in accordance with the principle of intergenerational equity (Oposa v Factoran 1993). The Supreme Court has ruled that,

> "While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation – aptly and fittingly stressed by the petitioners – the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. x x x."

In 2015, the Supreme Court decided on a landmark case in order to protect more than 500,000 square kilometer Seascape which is home to 14 out of 30 cetacean species found in the country. Here, the Court ruled that whales and cetaceans in a marine protected area as represented by their human stewards, have legal standing to sue in court to stop the seismic surveys and oil drilling in this area (Resident Marine Mammals and other cetacean species v Secretary of Energy 2015). This is the case where locus standi in environmental cases has been given a more liberalized approach. According to the Supreme Court In this case, while developments in Philippine legal theory and jurisprudence have not progressed as far as the paradigm of legal standing for inanimate objects, the current trend in this jurisdiction moves toward simplification of procedures and facilitating court access in environmental cases through the promulgation of the Rules of Procedure for Environmental Cases (RPEC) in 2008. In these Rules of Procedure, the writ of kalikasan (nature) has been institutionalized, as afore-mentioned, along with other remedies, such as, environmental protection order, citizen suit, and the writ of continuing mandamus.

2.2 After the Pandemic in 2020

The Philippines is one of the highest biodiversity hotspots in the world. Simply put, it is widely understood as a country with a wide variety of flora and fauna but heavy losses in biodiversity is evident. There is significant exploitation of wildlife species along with rampant deforestation, habitat destruction, and uncontrolled development that encroach on

and deplete natural habitats. Despite calls on nature-based solutions as vital tools for stimulus and recovery efforts during the pandemic, the Philippine government focused on a major infrastructure development approach called 'Build, Build, Build' program. This program is the Duterte administration's ambitious plan to build thousands of projects all over the country. With infrastructure projects dominating the government's programs, cabinet secretaries have proudly reported that 212 airport projects, 446 seaport projects, 10,376 flood mitigation structures, 26,494 kilometers of road, and 5,555 bridges have already been completed under the "Build, Build, Build" Program; Likewise, a total of 102 airport projects, 117 seaport projects, 1,090.30 kilometers of railway, 2,587 flood mitigation structures, 2,515 kilometers of road, and 1,020 bridges are currently under construction (Philippine News Agency 2021).

Many of these projects were rolled out with the aim of improving the flailing economy during the pandemic in mind. However, these projects are not without controversies; foremost of which is the failure to address major environmental concerns. It likewise failed to recognize carefully crafted environmental laws and policies that safeguard the right to a healthy environment.

It is evident that the Philippines had one of the strongest legal frameworks to enable citizen stewardship of nature even before the pandemic. Thus, the question that should be asked is whether the court's role has been strengthened or weakened in the time of the COVID-19 pandemic. Likewise, we also need to ask whether the pandemic played a key role in changing such a situation? This will be discussed in the next section which focuses on the trends in the Supreme Court decisions.

3. Available Legal Remedies to Address Environmental Issues

By virtue of the Rules of Procedure for Environmental Cases (Administrative Matter 09-6-8-SC 2008), several remedies were made available to address environmental issues starting 2010. Hence, even before the pandemic, these paved the way for the filing of a host of environmental cases because innovative legal remedies were made available. Aside from these, liberalized standing was institutionalized for environmental cases.

An extraordinary remedy that was recently introduced by the RPEC is the writ of kalikasan (translation: nature). Considered as a special civil action, it can be filed on behalf of persons whose constitutional right to a balanced and healthful ecology is violated or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces (Rule 7, Rules of Procedure for Environmental Cases 2008). This has been utilized in many cases, even before the pandemic, to question, for instance, in favor of three residents requiring the mining company to environmentally remediate the areas in and around the mine site that are alleged to have sustained environment impacts (Hernandex v Placer Dome 2011). The Supreme Court also issued a writ of kalikasan following the leak in the oil pipeline owned by First Philippine Industrial Corporation (FPIC) in Makati City (West Tower Condominium Corp v First Philippine Industrial Corporation 2015). In issuing the writ of kalikasan, the court determines the presence of three (3) requisites:

(1) There is an actual or threatened violation of the constitutional right to a balanced and healthful ecology;
(2) The actual or threatened violation arises from an unlawful act or omission of a public official or employee, or private individual or entity; and
(3) The actual or threatened violation involves or will lead to an environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in 2 or more cities or provinces.

It bears noting that to enable the issuance of the writ, the extent of damage must extend beyond one city or province while a causal link between the acts or omissions involved and the actual or threatened violation of the right to environment must be present. This was emphasized by the court in another case involving the issuance of an environmental compliance certificate (ECC) for the construction of a coal fired thermal power plant (Paje v Casiño 2015). The Supreme Court stressed,

> "For the writ to apply, there must be a causal link between the irregularities in the ECC issuance and the negative environmental impacts. A mere listing of the perceived defects or irregularities in the issuance of the ECC is sufficient reason to disallow the court to resolve such issues in a writ of kalikasan case."

The writ of kalikasan is considered as a powerful tool that was introduced by the Supreme Court to protect the constitutionally guaranteed right to environment as it empowers ordinary citizens to ensure accountability for any malfeasance, misfeasance or nonfeasance of governmental authorities. It can also be used to demand the restoration of the environment against any damage that affects a large portion of the population. As the courts remained open during the time of the COVID-19 pandemic, citizens were able to challenge any questionable government policies and actions using this remedy.

However, there were new challenges encountered by ordinary litigants in a number of writ of kalikasan cases filed during this period. This will be further discussed in the succeeding sections.

4. Trends in Environmental Law and Jurisprudence in the Philippines

4.1 The 'Golden Years' for Environmental Law and Jurisprudence

From the late 1980s towards early 1990s, this was considered the golden age for environmental law and jurisprudence in the Philippines. Following the heels of the People Power revolution and the subsequent adoption of a Constitution in 1987, a strong emphasis on the recognition of the fundamental right to a healthy environment was evident. This was later strengthened with the landmark decision of the Supreme Court in Oposa v Factoran where the Court recognized the enforceability of environmental rights. With this strong legal framework, a catena of cases followed that fortified environmental rights and liberalized locus standi for environmental cases.

In the case of Hernandez v Land Transportation Franchising and Regulatory Board and the Department of Transportation and Communications (2006), petitioners asked the Court to require public utility vehicles (PUVs) to use compressed natural gas (CNG) as

alternative fuel. Here the Court recognized petitioners' standing to bring their case before the Supreme Court. This petition focuses on one fundamental legal right of petitioners, their right to clean air, and the court acknowledged that the right to clean air not only is undeniably an issue of paramount importance to petitioners for it concerns the air they breathe, but it is also impressed with public interest. Hence, since the consequences of the counter-productive and retrogressive effects of a neglected environment due to emissions of motor vehicles immeasurably affect the well-being of petitioners, the Court held that the legal standing of the petitioners deserves recognition.

The expansive notion of locus standi by the Supreme Court continued in subsequent cases of Arigo v Swift (2014) as well as the landmark decision in Resident Marine Mammals of the Protected Seascape of Tañon v Secretary Reyes (2015).

In the Resident Marine Mammals lawsuit was brought before the Supreme Court by petitioners who were collectively referred to as the "Resident Marine Mammals" in the petition, i.e., the toothed whales, dolphins, porpoises, and other cetacean species, which inhabit the waters in and around the Tañon Strait. They were joined by Gloria Estenzo Ramos (Ramos) and Rose-Liza Eisma-Osorio (Eisma-Osorio) as their legal guardians and as friends (to be collectively known as "the Stewards") who allegedly empathize with, and seek the protection of, the aforementioned marine species. In its ruling, the Court held,

> "... in our jurisdiction, locus standi in environmental cases has been given a more liberalized approach. While developments in Philippine legal theory and jurisprudence have not progressed as far as Justice Douglas's paradigm of legal standing for inanimate objects, the current trend moves towards simplification of procedures and facilitating court access in environmental cases" (Resident Marine Mammals of the Protected Seascape of Tañon v Secretary Reyes 2015).

The Supreme Court clearly allowed the petition to be filed on behalf of non-human plaintiffs by recognizing that the Court has already taken a permissive position on the issue of locus standi in environmental cases. Moreover, the Court stated that "... the need to give the Resident Marine Mammals legal standing has been eliminated by our Rules, which allow any Filipino citizen, as a steward of nature, to bring a suit to enforce our environmental laws" (Resident Marine Mammals of the Protected Seascape of Tañon v Secretary Reyes 2015).

4.2 Positive Trend in Procedural Questions Continues

Despite the seeming positive trend in terms of procedural issues, e.g., locus standi, for environmental cases, the Court seems to be heading towards an opposite direction when it comes to dispensing of questions related to substantive issues especially in writ of kalikasan (nature) and/or writ of continuing mandamus cases. The trend seems to continue even during the COVID-19 pandemic.

A review of the writ of kalikasan cases would show that there has been relatively little success achieved so far. Environmental lawsuits that have 'won' in the highest court have been quite few. For instance, the West Tower Condominium Corporation v First Philippine Industrial Corporation (FPIC), First Gen Corporation (FGC) and their respective Board of Directors and Officers, et al. case managed to get a favorable decision in favor of the

petitioners. Two (2) key holdings can be taken from this. First, the Court noted that "the filing of a petition for the issuance of a writ of kalikasan under Section 1, Rule 7 of the Rules of Procedure for Environmental Cases does not require that a petitioner be directly affected by an environmental disaster. The rule clearly allows juridical persons to file the petition on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation. Second, following the filing of the petition, the Court immediately issued "the writ of kalikasan, with a Temporary Environmental Protection Order (TEPO) requiring respondents FPIC, FGC, and the members of their Boards of Directors to file their respective verified returns. The TEPO enjoined FPIC and FGC to: (a) cease and desist from operating the WOPL until further orders; (b) check the structural integrity of the whole span of the 11 7-kilometer WOPL while implementing sufficient measures to prevent and avert any untoward incident that may result from any leak of the pipeline; and (c) make a report thereon within 60 days from receipt thereof" (West Tower Condominium Corporation v First Philippine Industrial Corporation 2015).

Similarly, an earlier case seeking for an Environmental Protection Order in the nature of a continuing mandamus was also successfully filed against a planned reclamation of land bordering the strait between Caticlan and Boracay wherein petitioners assailed in their petition because of its adverse effects to the frail ecological balance of the area (Boracay Foundation, Inc. v The Province of Aklan 2012). Here, the Court ruled that the new Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, provides a relief for petitioner under the writ of continuing mandamus, which is a special civil action that may be availed of "to compel the performance of an act specifically enjoined by law" and which provides for the issuance of a TEPO "as an auxiliary remedy prior to the issuance of the writ itself." The Rationale of the said Rules explains the writ in this wise: "Environmental law highlights the shift in the focal-point from the initiation of regulation by Congress to the implementation of regulatory programs by the appropriate government agencies" (Supreme Court Annotation to the Rules of Procedure for Environmental Cases 2008).

Thus, its emphasis was on making the remedy of the writ of continuing mandamus available against government's inaction of the tasks to which the writ pertains: the performance of a legal duty. The Court also explained further that the writ of continuing mandamus "permits the court to retain jurisdiction after judgment in order to ensure the successful implementation of the reliefs mandated under the court's decision" and, in order to do this, "the court may compel the submission of compliance reports from the respondent government agencies as well as avail of other means to monitor compliance with its decision" (Supreme Court Annotation to the Rules of Procedure for Environmental Cases 2008).

As the agency with the expertise and authority to state whether this is a new project, subject to the more rigorous environmental impact study requested by petitioner, or it is a mere expansion of the existing jetty port facility, the respondent agency, DENR-EMB (Region VI) must thoroughly and sufficiently evaluate the project in accordance with its mandate under the Philippine Environmental Impact Statement System Act (Presidential Decree 1586). Further, the Court stated that "the very definition of an Environmental Impact Assessment (EIA) points to what was most likely neglected by respondent Province as project proponent, and what was in turn overlooked by respondent DENR-EMB RVI

(Boracay Foundation, Inc. v The Province of Aklan 2012). Lastly, the Court emphasized that,

> "To be true to its definition, the EIA report submitted by respondent Province should at the very least predict the impact that the construction of the new buildings on the reclaimed land would have on the surrounding environment. These new constructions and their environmental effects were not covered by the old studies that respondent Province previously submitted for the construction of the original jetty port in 1999, and which it re-submitted in its application for ECC [Environmental Compliance Certificate] in this alleged expansion, instead of conducting updated and more comprehensive studies."

Thereafter, the Court remanded the matters back to the respondent agency (DENR-EMB Region VI) for them to do the following: (1) to make a proper study, and if it should find necessary, to require respondent Province to address these environmental issues raised by petitioner and submit the correct EIA report as required by the project's specifications; (2) to complete its study and submit a report within a non-extendible period of three months; and (3) to establish to the Court in said report why the ECC it issued for the subject project should not be canceled (Boracay Foundation, Inc. v The Province of Aklan 2012).

Another case which ruled in favor of the request for a writ of kalikasan is the case regarding the closure of a dumpsite. In Osmeña v Garganera (2018), the Supreme Court affirmed the Court of Appeals decision granting the writ in favor of petitioners for sufficiently establishing the grant of the privilege of the writ of kalikasan. Here, the Court noted that,

> "Expectedly, the Rules do not define the exact nature or degree of environmental damage but only that it must be sufficiently grave, in terms of the territorial scope of such damage, so as to call for the grant of this extraordinary remedy. The gravity of environmental damage sufficient to grant the writ is, thus, **to be decided on a case-to-case basis**." {Emphasis added}

Clearly, there were no exact standards set by the court as to the gravity of environmental damage required. However, it was convinced from the evidence on record that the respondent has sufficiently established the aforementioned requirements for the grant of the privilege of the writ of kalikasan. The evidence presented before the court consists of government technical reports on the City's compliance of air and water quality standards.

4.3 Downward Trend in Environmental Cases

In contrast, recent Supreme Court cases have shown judicial restraint or a more stringent judicial review process for writ of kalikasan and/or continuing mandamus cases. In Paje v Casino (2015), one of the issues raised was whether the validity of an Environmental Compliance Certificate (ECC) can be challenged via a writ of kalikasan. The Supreme Court ruled that "determination of the validity of the ECC is within the scope of the writ of kalikasan. The Rules on the writ of kalikasan was issued by the Court pursuant to its power to promulgate rules for the protection and enforcement of constitutional rights,

in particular, the individual's right to a balanced and healthful ecology." It further emphasized that in case of any irregularity in the issuance of the ECC, a writ of kalikasan can be directly issued by the Court. Hence,

> "An example of a defect or an irregularity in the issuance of an ECC, which could conceivably warrant the granting of the extraordinary remedy of the writ of kalikasan, is a case where there are serious and substantial misrepresentations or fraud in the application for the ECC, which, if not immediately nullified, would cause actual negative environmental impacts of the magnitude contemplated under the Rules. This is mainly because the government agencies and local government units (LGUs), with the final authority to implement the project, may subsequently rely on such substantially defective or fraudulent ECC in approving the implementation of the project."

However, the Court in this case did not issue the writ of kalikasan and instead, provided stringent guidelines for its issuance. According to them, for the writ to apply, there must be a causal link between the irregularities in the ECC issuance and the negative environmental impacts. A mere listing of the perceived defects or irregularities in the issuance of the ECC is sufficient reason to disallow the court to resolve such issues in a writ of kalikasan case. This was not evident in the case at hand. In fact, the Court found that no such causal link or reasonable connection was shown or even attempted relative to the aforesaid second set of allegations; there was a mere listing of the perceived defects or irregularities in the issuance of the ECC.

Further, the Court held a similar finding in the case of Segovia v The Climate Change Commission (2017). This is a petition for the issuance of writs of kalikasan and continuing mandamus to compel the implementation of the following environmental laws and executive issuances - Climate Change Act (2009), Clean Air Act (1999), Executive Order 774 (2008) creating the Presidential Task Force on Climate Change, and related regulations. Accordingly, the Petitioners sought to compel: (a) the public respondents to: (1) implement the Road Sharing Principle in all roads; (2) divide all roads lengthwise, one-half (½) for all-weather sidewalk and bicycling, the other half for Filipino-made transport vehicles; (3) submit a time-bound action plan to implement the Road Sharing Principle throughout the country; (b) the Office of the President, Cabinet officials and public employees of Cabinet members to reduce their fuel consumption by fifty percent (50%) and to take public transportation fifty percent (50%) of the time; (c) Public respondent DPWH to demarcate and delineate the road right-of-way in all roads and sidewalks; and (d) Public respondent DBM to instantly release funds for Road Users' Tax.

However, the Court dismissed the petition because "apart from repeated invocation of the constitutional right to health and to a balanced and healthful ecology and bare allegations that their right was violated, the petitioners failed to show that public respondents are guilty of any unlawful act or omission that constitutes a violation of the petitioners' right to a balanced and healthful ecology." In essence, the Court emphasized the well-settled rule that a party claiming the privilege for the issuance of a writ of kalikasan has to show that a law, rule or regulation was violated or would be violated.

Moreover, the Court did not issue the writ of continuing mandamus in favor of

petitioners because it stressed that there was no showing of unlawful neglect on the part of the respondents to perform any act that the law specifically enjoins as a duty – there being nothing in the executive issuances relied upon by the petitioners that specifically enjoins the bifurcation of roads to implement the Road Sharing Principle. The Court ruled that "[A]t its core, what the petitioners are seeking to compel is not the performance of a ministerial act, but a discretionary act – the manner of implementation of the Road Sharing Principle" (Segovia v The Climate Change Commission 2017).

4.4 During the Pandemic

The downward trend in writ of kalikasan cases seems to continue in the time of the COVID-19 pandemic. This is evidenced by two recent decisions on reclamation projects. In a petition filed by an international advocacy organization together with fishermen, church representative, and a local organization, the group sought for the issuance of a Writ of Kalikasan to stop respondent San Miguel Corporation's construction of a domestic and international airport in Bulacan called the "Aerocity Airport Project" that will be built on a 2,500-hectare foreshore area (Manila Standard 2020). The petitioners also asked the High Court to issue a writ of kalikasan directing the government and the developer to preserve, rehabilitate, or restore the environment in the areas covered by the P740-billion airport project citing that the construction, "which requires the destruction of mangrove forests and covering the bay, wetlands, fisheries and marine habitats with millions of cubic meters of filling materials," violated and would continue to violate environmental laws, rules, and regulations (Lagrimas 2020).

However, the Supreme Court quickly dismissed the petition in a minute resolution stating that it was not sufficient in form and substance (Rey 2021). The Court in resolving the petition stated that the requirements for the issuance of the writ which include, among others, the environmental law or rule violated, the complained act or omission and the environmental damage caused to the inhabitants of two or more cities or provinces in accordance with the rules of procedure for environmental cases. The Court specifically pointed out that there is no showing that the approval or disapproval of the airport project is already ripe for determination by public authorities (referring to the Department of Environment and Natural Resources, Department of Transportation and DENR-Environmental Management Bureau in Region 3). Similar to the previous cases, the Court also emphasized that "the illegal act or omission of the private respondents which amounts to a violation of the right to a balanced and healthful ecology was not established as the mere signing of an agreement between the private corporation and public authorities does not by itself present or can cause environmental damage which warrants the issuance of the writ of kalikasan" (Alvarez v Department of Environment and Natural Resources 2021).

Following the same line of argument, the court also recently rejected the petition seeking for a writ of kalikasan in the case of a petition filed by Senator Cynthia Villar and others to stop the reclamation in an area close to the Las Piñas Parañaque Wetland Park (formerly known as the LPPCHEA), a wetland included in the Ramsar Convention list of Wetlands of International Importance, along the coastline of Manila Bay. In this case of Villar, supported by 315,849 residents of Las Pinas City v. Alltech Contractors, Inc., et al. (2021), the Court ruled against the issuance of the writ of kalikasan because Villar failed to

establish the causal link between the issuance of Alltech's ECC to justify resorting to the extraordinary remedy of filing a petition for a writ of kalikasan. It stated that the alleged irregularities, such as the use of an improper form of assessment study, lack of public hearing and consultation, and absence of a project alternative, are not material and necessary due to the nature of the proposed project, hence, no compelling reason was presented to warrant the intervention of the court. Following this decision, the petitioners are currently moving for a reconsideration of the case (Torregoza 2021).

It would seem, therefore, that following these recent pronouncements, the Court has clearly presented the necessity by any litigant to overcome the presumption of regularity of government actions by public authorities in alleging any illegal act or omission which is tantamount to a violation of the constitutional right to a balanced and healthful ecology. As the court stressed, the party claiming the privilege of the writ bears the onus of proving the presence of the three requisite elements, as follows:

(1) there is an actual or threatened violation of the constitutional right to a balanced and healthful ecology;
(2) the actual or threatened violation arises from an unlawful act or omission of a public official or employee, or private individual or entity; and
(3) the actual or threatened violation involves or will lead to an environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces (Section 1, Rule 7, Rules of Procedure for Environmental Cases 2008).

Courts play a critical role in ensuring the enforcement of environmental laws. Judicial review of government actions are essential in not only ensuring the proper check and balance between the three branches of government as well as enabling environmental laws to be implemented to its fullest extent. Effective enforcement of environmental laws in the wake of the COVID-19 pandemic was just as crucial as the imposition of lockdown and emergency procedures. While courts remained opened even during the pandemic and true to their mandate of ensuring access to environmental justice, there were challenges in terms of its defining role in increasing environmental protection. As many governments have used the COVID-19 pandemic crisis to curb environmental protections for communities and ecosystems (Nyekwere 2020), it is important that courts remain steadfast at ensuring that appropriate environmental standards and increased monitoring activities associated with development projects are still in place and implemented by public authorities to avoid unmitigated losses of critical ecosystems and biodiversity.

5. Conclusions and Recommendations

States have the legal obligation to build back better under international human rights and environmental laws. Understandably, there were critical challenges faced by the government during the pandemic. It responded by instituting a state of calamity and setting in place public health emergency measures, with scant attention to none given to natural ecosystems and biodiversity protection. As it transitioned to post-pandemic stimulus and recovery efforts, the government's attention focused on a build, build, build program,

wherein infrastructure development dominated most of its plans. Instead of taking on the timely opportunity to envisage a more resilient, sustainable environment, it seems that a business-as-usual approach is taking place. This brings significant concerns relating to potential violation of the constitutional guarantee and protection of environmental rights.

Even before the pandemic, the Philippines has progressive environmental laws to check executive action even in times of emergency or other crisis, many of these remain on paper. Likewise, access by citizens and civil society organizations of those available legal remedies under the Rules of Procedure for Environmental Cases (A.M. 09-6-8-SC) such as the writ of kalikasan (nature) to protect against large-scale environmental destruction have become increasingly challenging. After the pandemic in 2020, it is evident that state policies are aimed at economic, rather than sustainable recovery. The government mantra of 'build, build, build' regresses from the need to adopt a precautionary and intergenerational approaches in ensuring a sustainable future. Hence, if the government insists on regressive policies, courts can step in and play a more prominent role in environmental compliance and enforcement.

The trends in a catena of court decisions in the time of the pandemic would show that there was a positive trend in environmental cases. The Court adopted a more liberalized locus standi wherein minors, in representation of future generations, as well as non-human plaintiffs, as represented by their human stewards, were allowed to pursue legal actions. But even before the landmark Resident Marine Mammals ruling, the Court had, time and again, relaxed the rules on locus standi in environmental cases. This is illustrated in the cases of Hernandez v Land Transportation Franchising and Regulatory Board and the Department of Transportation and Communications (2006) and Arigo v Swift (2014), Moreover, the issuance of the special rules for environmental cases facilitated speedy access to courts through the extraordinary remedies of the writ of kalikasan, writ of continuing mandamus, and the like. These protective writs were likewise issued in many cases with ease before the pandemic. This is demonstrated in the case of West Tower Condominium v First Philippine Industrial Corporation (2011), Paje v Casiño (2015) and the like. However, as government struggled in its efforts to address the pandemic and decided to take on a more aggressive approach towards infrastructure development in order to drive the country better towards economic recovery, the courts began to exercise restraint in writ of kalikasan cases in 2021. As shown in the cases of Alvarez v Department of Environment and Natural Resources (2021) and Villar v Alltech Corporation (2021), the Supreme Court restricted the application of the writ in cases where there is a nexus between the environmental damage and the illegal act or omission sought to be prevented.

While their inherent power of judicial review can be exercised, courts should strike a balance between the sweeping executive powers to dictate economic progress with that of environmental protection. With the road taken by the government towards recovery from the pandemic may seem to be focused too much on economic development, there is a clear and present danger on the integrity of natural ecosystems as well as the lives and livelihoods of communities who are directly dependent on them. It bears stressing that the fundamental rights of the people to a healthy environment as enshrined in the Constitution and national framework laws must be protected. Thus, it is the bounden duty of the court to safeguard these rights at all times.

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9. The Role of the Judiciary in Combating COVID-19 in South Korea: Focusing on Freedom of Religious Gathering

IkHyeon Rhee

1. Introduction

The COVID-19 pandemic has influenced all areas of our life to a degree unmatched in our history. The judiciary is not an exception. On top of the strain of day-to-day functions under the crisis (Law Times 2020), it is plagued with new types of cases (Moon 2020; Kim 2020) as well as the problems of an increased caseload due to the pandemic (Ku & Choi 2020).

The conventional understanding of the judiciary would be that it is passive in crisis. The executive branch takes some sort of exceptional and leads efforts to overcomes the crisis. Legislative schemes are also premised on this wisdom. Usually, crises are short-lived and geographically limited. The emergency caused by COVID-19, however, differs from other crises in its scale and time. It has no end in sight. The entire world has been affected. Unpredictability is becoming the norm. The ability to keep the government functioning normally is in question.

As the emergent situation prolonged and restrictions on basic social life became pervasive, the issue of rule of law and the protection of fundamental rights emerged as realistic issues. Even in a crisis, power should be exercised according to the constitution and laws. Exceptional power is more likely to be abused under the pretext of a crisis and the monitoring function is more demanded. In this context, the proper role of the judiciary is more urgently required in the unprecedented COVID-19 crisis.

The judiciary does not actively make policies, but plays an equally important role as the last arbiter of law and guardian of fundamental rights. The Constitution endows the judiciary with the power to interpret the Constitution and law, and the duty to ensure the rule of law. The aim of rule of law is to minimize the exercise of arbitrary power. It is not a disabling restraint, rather serves to protect unalienable rights which might otherwise be neglected in times of crisis.

Korea has overcome the COVID-19 crisis in accordance with normal procedures without taking extreme measures such as nationwide lockdowns or declaring a state of emergency. The measures the Korean government has taken were praised as effective and successful. However, there were not a few conflicts and issues in this process, which might be ignored in the midst of all the praise of successful control of the pandemic. Massive collection of information came at the expense of privacy rights (MINBYUN 2020). As the pandemic prolonged, socially disadvantaged groups became more vulnerable. Due to prolonged social distancing, a growing number of small businessmen were on the verge of bankruptcy (Kim 2021), and people were not allowed to attend church and hold assemblies

to express their opinions (Kang 2021).[1] The COVID-19 crisis and countermeasures have scrambled ideological preferences and rights enshrined in the legal system. The most strongly protected right so far were all of the sudden, subject to the most severe restrictions. Particularly, as religious facilities were clusters of group infection, Christian communities became centers of battle against COVID-19 (Justin McCurry 2020, The Guardian).

Against this background, I would like to examine the role of the judiciary in combating COVID-19 especially as it pertains to gatherings for religious activities. Examinations of how COVID-19 spread in Korea and the measures the Korean government has taken will be provided. The government measures, legal basis and issues will be briefly overviewed. The legal scheme and theory to protect freedom of religion and assembly in general will be briefly introduced. The rationale restricting these rights and relevant laws will be examined. Finally, what role the courts have played and can play will be reviewed based on both lower court decisions and cases of preliminary injunction. The pandemic is still ongoing, and there are no comprehensive data yet. Therefore, a comprehensive review of the role of the judiciary in overcoming the coronavirus will still have to wait.

2. An Overview of Government Measures and Controversies

2.1 Timeline of COVID-19 Outbreak in Korea

In Korea, the spread of COVID-19 in the early stages can be characterized by a group infection taking place through the operation of places such as religious facilities, fitness centers, and nightclubs. This characteristic was reflected in formulating government measures and implementation strategies.

On December 31, 2019, the Chinese government officially announced that the country had some cases of pneumonia with an unknown cause (KDCA 2020a).[2] In Korea, the first patient, a Chinese woman who visited Wuhan, China, was reported on January 20, 2020 (KDCA 2020b) and three days later, a man, who worked in Wuhan, was the first Korean citizen found to be infected (KDCA 2020c).

Between then and February 17, 2020, 30 cases were reported (KDCA 2020d). With the 31st patient as a starting point, the situation in Korea changed dramatically. The 31st patient, a member of the Shincheonji religious organization (hereinafter "Shincheonji") was confirmed on February 18 (KDCA 2020e). She attended gatherings of Shincheonji even after symptoms appeared. Many of the patient's contacts turned out to be infected, triggering the first outbreak of COVID-19 in Korea. As the unique way of gathering in Shincheonji became known, and as confirmed cases continued to appear among the

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1 According to the data obtained by the Dasan Human Rights Center and the Korean Progressive Network JINBONet, etc. by requesting information disclosure from the National Police Agency, the number of assembly bans in 2020 was 3,865, or 11% of the 34,944 reported cases. In comparison, out of 29,592 and 36,551 assemblies reported to the police in 2018 and 2019, only one was banned (0.2% and 0.3%), respectively.

2 KDCA means Korea Disease Control and Prevention Agency (KDCA). KDCA used to be called KDCD as the Centers for Disease Control and Prevention under the Ministry of Health and Welfare, but after becoming an independent central administrative agency on September 12, 2020, it is now called KDCA. Press Release, 8 September 2020. https://www.korea.kr/news/policyNewsView.do?newsId=148877177.

members, public demands asking to test all members was heightened (Choe 2020a). A test of all members (230,000) of Shincheonji was carried out and about 9,000 were found as showing symptoms of the virus. According to KDCA, the number of patients associated with Shincheonji group totaled 4,482 infections, accounting for 62.8 percent of the total confirmed cases to that point (KDCA 2020f). On February 20, the first death was reported in Cheongdo Daenam Hospital (KDCA 2020g).

The River of Grace Community Church was found to have a new cluster of COVID-19 in March 2020. As of April 1, about 72 church members have been identified as infected with the virus (KDCA 2020h). On March 25, at Manmin Central Church in Guro, Seoul, the first patient was reported (Kim 2020), and on April 1, 35 patients were known to be infected (KDCA 2020h). In other church facilities and nursing homes, cluster infections continued to appear in several cities (KDCA 2020h).

A night club in Itaweon, Seoul was reported as a new epicenter of COVID-19 in early May (KDCA 2020i). A patient was found to have visited several nightclubs in the area during the late night hours of 1 May and early in the morning of 2 May (Ock 2020a). The number of cases related to the nightclub has reached over 245 (Kim 2020).

After the first outbreak, as the number of new patients decreased, government regulations became relaxed to some extent, and there were cases in which social distancing and quarantine rules were violated. In August 2020, the Sarang Jeil Church in Seoul, which kept ignoring the government guideline and carried out large scale in-person worship services became a new center of infections, triggering the second outbreak of COVID-19 (9News 2020). On August 15, 2020, thousands of people gathered in downtown Seoul, and the pastor and members of Sarang Jeil Church also attended the rally (Ock 2020b). As a result, the rally was criticized for being a conduit for infection (Ock 2020b).

The number of new cases, which subdued after the second wave, increased in December again, and the third outbreak began. On December 27, 2020, the KDCA confirmed that a new strain of COVID-19 entered the country through a family that traveled from the UK to Korea (Shin 2020). After showing a stable trend in the number of confirmed cases, the number of new cases increased in April, 2021, raising concerns about a fourth wave (Chang 2021). Since then, the number has steadily increased, and finally, the government raised social distancing to level 4, the highest level, in Seoul and Daejeon on 12 July, declaring the fourth outbreak of COVID-19 (KDCA 2020j; Ministry of Culture, Sports and Tourism 2020). Since then, the government has repeatedly extended the period of level 4 social distancing. As of November 21, 2021, Korea had 3,120 new patients, with a cumulative total of 415,425 and 78.90 percent of the population has been fully vaccinated. The media is leaking the policy of “living with COVID-19” (Central Disaster Management Headquarters 2021), and there are also reports that Korea's quarantine intensity is the lowest among the G20 countries (Lee 2021).

2.2 The Government Measures to Combat COVID-19 and Their Legal Basis

COVID-19 is an unprecedented disaster and emergency. It is the constitutional duty of the state to protect people from disasters. The Constitution prescribes that the state shall endeavor to prevent disasters and to protect citizens from harm therefrom (§ 34(6)). The

Korean government has overcome the emergency according to normal procedures without taking constitutionally exceptional measures. The judiciary, like the legislative and executive branches, continued to function even under the limited strain of COVID-19. The measures that the government has taken are summarized as 3Ts (Test, Trace and Treat), social distancing and mask wearing (TFT 2020 p.20-23, 111). Based on protocols and experience in the Middle East Respiratory Syndrome (hereafter "MERS") crisis, Korea, from the early stage of the COVID-19 outbreak, proactively conducted testing. A Nationwide campaign was carried out to reduce testing hesitancy, and diverse methods were invented to facilitate testing and to prevent people from contacting patients or suspected patients while taking the test. Relevant laws endowed the authorities with needed powers to take necessary measures (Kim 2020). Main laws are the Framework Act on the Management of Disasters and Safety and the Infectious Disease Control and Prevention Act (hereafter "IDCPA"). The former stipulates common matters such as the establishment of a control tower, alert system, and responsible organization according to the type of disaster. IDCPA is the main law regulating COVID-19. It authorizes the health authority with powers to exercise measures such as 3Ts and social distancing to combat COVID-19.

Tracing the route of infection was recognized as an effective and necessary way to contain the spread of the virus. After the first outbreak of the virus, a historically massive scale of tracing was conducted with the support of an advanced IT infrastructure. After failing to respond to the outbreak of MERS, the government has continued to reform IDCPA supplementing provisions such as those relating to epidemiological investigations and disclosure of infectious disease related information (Lee 2018 p.41-49). For epidemiological investigations, the health authorities were given the power to collect mobile phone location information, credit card transaction data, and CCTV footage, as well as the right to request information from telecommunication companies (§ 76-2). In order to effectively utilize limited medical resources, provisions such as designation of dedicated hospitals (§ 36), classification of patients according to the severity of symptoms (§ 41), quarantine measures (§ 42) and compensation provisions (§ 70, § 70-3, and § 70-4) have been prepared.

Social distancing and mask wearing were major non-medical measures to prevent the spread of the virus. The measures are based on articles 46 and 49 of IDCPA, and usually issued in the form of administrative order. At first, the government sought voluntary cooperation from people, and people were willing to cooperate with the government. As the situation has been prolonged, the legislature prepared a clear legal basis, and social distancing has been systematically implemented in accordance with law. On March 22, the government implemented a high-intensity three-tiered social distancing (Ministry of Health and Welfare 2020). In November 2020, it was re-divided into a five-tiered system (Ministry of Culture, Sports and Tourism 2020). Finally, in April, 2021, it was readjusted to a four-tiered social distancing guideline (Ministry of Health and Welfare 2021). The details of restrictions for each stage are determined by the local governments reflecting the development's analysis of the situation.

As we have seen above, after the mass infection of Shincheonji and a number of other churches, Christian communities became the center of pandemic controversy (Kim 2021). Religious facilities and activities became the main subject of regulation. In addition to the

normal in-person worship, many religious gatherings established in Korean churches such as small-scale bible studies, prayer meetings, and meals services were banned or limited.

2.3 The Government Measures and Controversies

The widespread use of administrative orders as a means of overcoming COVID-19 has raised questions by some scholars. There is a debate about whether an administrative order is a rule or a disposition. The majority seem to view it as a general disposition (Rhee 2021 p.56-57; Lee 2021 p.12-14). Some argue that legal forms such as the administrative order is not recognized in the Korean constitution and legal system (Lee 2021 p.5-6). Unlike a presidential decree or ministerial ordinance, an administrative order is not a form of legal source enumerated by the Constitution, and is not duly controlled ex ante or ex post by the National Assembly, and therefore lacks democratic legitimacy. However, there are a number of rules and regulations issued in this form according to the mandate of statutes. Many scholars argue that statutes may create a new form of legal source not enumerated in the Constitution (Kim 2021: p.162-163, 189-190; Park 2009 p.178, 202-215). The General Act on Public Administration recognizes these rules and regulations as a type of laws (subparagraph 1(a)(iii) of § 2).[3] Yet some scholars argue that the statute mandating an administrative order should be prescribed more clearly and in detail (Lee 2021 p.8-12; Chung 2021 p.17).

Korean pandemic control efforts have been evaluated as effective and successful (Oh 2020) not least because the people voluntarily complied with the government's measures (Lee & Kim 2021 p.2-3). According to the data of the National Assembly, in the case of Korea, it has been reported that there is no case of violating the rule of law in the process of coping with the COVID-19 crisis (Huh 2020 p.6). However, with the prolonged COVID-19 outbreak, a number of legal disputes have increased in both the local courts and the Constitutional Court.

Massive collection of information triggered a group of people to file a constitutional complaint on the ground that said information gathering infringes people's constitutional right based on an obscure provision of law (MINBYUN 2020). Demanding the submission of entire lists of church members revealing their identity and imposing mandatory testing for all members of Shincheonji led to suspicions of undue abridgement of the freedom of religion (Burke 2020). Further, as social distancing continues for a long time and becomes routine, a group of small businessmen and civic organization filed constitutional complaints arguing that the measures of social distancing without compensation for economic loss were unconstitutional (Yonhap News 2021a). As the church emerged as a hotbed of group infection and became the main subject of regulation, the conflict between religious

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[3] Article 2 (Definitions) of the General Act on Public Administration
The terms used in this Act are defined as follows:
1. The term "statutes or regulations, etc." means the following:
(a) Statutes or regulations: Any of the following:
(iii) Directives and administrative rules, public notices, etc. prescribed by the heads of central administrative agencies (referring to central administrative agencies established under the Government Organization Act and other statutes; hereinafter the same shall apply) as mandated under subitems (i) and (ii).

gatherings and government measures has been heightened (Choe 2020b). In particular, the fact that contents that restrict rights and impose duties on people such as restrictions on gathering, movement, business hours, and mask wearing are determined by administrative order – as we saw above, is a cause of concern.

Most of the cases mentioned above, especially constitutional complaints, are still pending in court, and there are few precedents. Regarding religious gatherings, thanks to a group of pastors and lay persons who have continuously raised issues, a series of preliminary injunctions have been accumulated.

3. Freedom of Religion under the Pandemic and the Possibility of Restriction

3.1 The Scope of Freedom of Religion and Assembly

Gathering is a basic aspect of various social activities such as religion, assembly, sports, and commerce. In particular, in that it is impossible to think of an assembly or worship service without gathering, it can be said that gathering constitutes an essential element for freedom of religion and assembly. Freedom of religion is a fundamental right strongly protected by the Constitution. The Constitution ensures freedom of religion (§ 20(1)) and freedom of assembly (§ 21). Licensing of assembly and association shall not be recognized (§ 21(2)). The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association emphasized that it is imperative that the crisis not be used as a pretext to suppress rights in general or the rights of freedom of peaceful assembly and of association in particular, and it is vital that any limitations imposed be removed and that full enjoyment of the rights of freedom of peaceful assembly be restored when the public health emergency caused by COVID-19 ends (Voule 2021).

An assembly is an act where two or more people (MOLEG 2007a p.635; Sung 2003 p.397)[4] gather in a specific place to express their common will (Chung 2011 p.604), and it is an indispensable form of human life (Huh 2000 p.532). Freedom of assembly is also recognized as an essential functional element of a democratic community (MOLEG 2007a p.637). Its legal guarantee is considered to be necessary for the purpose of forming common opinions, an essential element for democracy, and protecting for the rights and interests of minorities (MOLEG 2007a p.637; Huh 2000 p.532-533). Therefore, gatherings for assembly have been more strongly protected than gatherings for other purposes. Religious assembly is more strongly protected in a special position than in general freedom of assembly (Chung 2011 p.550). Indoor assembly is more strongly protected than outdoor assembly (Yang 2020 p.5-7), and in this way, indoor religious assembly and gathering have enjoyed wider freedom.

The freedom of gathering for religion and assembly, however, is not limitless. Article 37 of the Constitution prescribes that the freedom and rights of citizens may be restricted by Act (statute) only when necessary for national security, the maintenance of law and order or for public welfare (MOLEG 2007b p.1185; Huh 2000 p.386-387; Chung 2011 p.546-562).

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[4] There are opinions that at least three people must be gathered in order to become an assembly stipulated in Article 21 of the Constitution. See MOLEG (2007a) p.635; SUNG (2003) p.397.

No disagreement has been found that the COVID-19 crisis falls under "maintenance of law and order" and "public welfare", which are the conditions that can limit the basic rights under Article 37. The above statement by UN Special Rapporteur is also understood to recognize COVID-19 as a legitimate excuse to restrict freedom of assembly.

Even when such restriction is imposed, however, no essential aspect of the freedom or right shall be violated (§ 37(2) of the Constitution). The purpose and means of restriction must not only serve justice, but also observe the principle of proportionality (MOLEG 2007b p.1188). Restriction is possible only by Act (statute) (§ 37(2) of the Constitution). Here "only by Act" does not mean that every detail has to be prescribed by statutes. Articles 75 and 95 of the Constitution allow for a delegation to subordinate legislations such as presidential decrees or ministerial ordinances. In the case of delegation to subordinate legislations, the scope and limits should be clearly defined, and comprehensive delegation is not permitted (MOLEG 2007b p.1214). Re-delegation is also construed as being acknowledged (Kim 2018 p.79-82; MOLEG 2012 p.688). Therefore, determining details in the sub-legislation or regulation such as administrative regulations based on the provision of statutes which delegates such powers after defining their scope and degree is not a violation of the "only by Act" provision in § 37(2) of the Constitution.

3.2 Applicable Laws to Regulate the Gathering for Religion and Assembly

The basic law regulating gathering (assemblies) is the Law on Assemblies and Demonstrations. The purpose of the Act is to achieve an appropriate balance between the guarantees of the right to assemble and demonstrate and public peace and order by guaranteeing the freedom of lawful assemblies and demonstrations and protecting citizens from unlawful demonstrations (§ 1). Article 15 prescribes that Articles 6 through 12 shall not apply to assemblies of religion, rituals, and ancestral worship, and national ceremonies. Therefore, according to this law, the religious gathering can be held freely without ex-ante or ex post limitation. Article 5(1) of the Assembly and Demonstration Act prohibits an assembly held or a demonstration staged in an attempt to obtain the achievement of objectives of a political party that has been dissolved by the decision of the Constitutional Court, an assembly or demonstration which clearly poses a direct threat to public peace and order by inciting collective violence, threats, destruction, arson, etc. Thus, religious gatherings are not regulated by this law, as long as they do not attempt what is enumerated in Article 5 of the Act. As religious gatherings are not thoroughly regulated by this law, legislative bills have been proposed to provide for the basis of restrictions in case the religious activity falls under the provision of IDCPA (Chung 2020).

Currently, the law regulating gatherings for religious activities under the pandemic is IDCPA. IDCPA endows the Minister of Health and Welfare and the local government with the power to ban and close religious facilities. Article 47 prescribes that in order to prevent the further spread of an infectious disease during an epidemic the KDCA and the local governments, for places where patients of an infectious disease are present or in places deemed contaminated with the infectious pathogens, shall take measures such as temporary closure, prohibition of entry of the general public, restriction on movement into the relevant places and other measures for passage blocking. Article 49 prescribes that in order to

prevent infectious diseases spreading, KDCA, the local governments, and Minister of Health and Welfare take measures of complete or partial control of the flow of traffic in the jurisdiction, and restricting or prohibiting performances, assemblies, religious ceremonies or any other large gathering of people, and ordering the managers, operators, users, etc. of places or facilities with a risk of spreading infectious disease to comply with the disease control guidelines, such as preparing a list of visitors and wearing a mask.

The specific contents of restriction are determined in the form of an administrative order issued by the local governments. Most administrative litigations and cases seeking an injunction against the government measures are against this type of administrative order.

4. The Role of the Judiciary and Religious Gatherings under COVID-19

4.1 In General

While the COVID-19 crisis is expected to spawn a large number of legal disputes including new types of lawsuits, cases challenging government measures are thus far fewer than expected (Lee & Kim 2021 p.3). It may be that the government's law enforcement has been exercised legally, or that people have accepted and complied with the government's measures as legitimate. Past experience of MERS might have encouraged people to voluntarily comply with the government measure. According to a survey conducted by a polling agency, people strongly supported the government's measures such as proactive testing, massive epidemiological investigations and strict social distancing, while opposing large-scale assemblies and in-person worship gatherings (Jeon 2021).[5] Owners of small business who have filed a constitutional complaint against social distancing have at the same time acknowledged that government measures were necessary. They only argued that the lack of a compensation provision for economic loss caused by social distancing was unconstitutional (Korea Herald 2021). Without comprehensive statistical data produced by the judiciary, however, it is impossible to know exactly how many cases are contesting government measures.

In the case of a request for adjudication of the Administrative Appeal's Commission, a public officials in charge of an administrative adjudication service said that there were only about 20 cases related to COVID-19 in 2020.[6] Cases filed to the Constitutional Court regarding COVID-19 reportedly increased significantly in 2020 (Park 2021). There are, however, no cases seeking adjudication on the constitutionality of statutes by ordinary courts, most of them are presumed to be constitutional complaint cases under Article 68(2) of the Constitutional Court Act which are directly filed by an individual. The adjudication

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5 According to a survey conducted in March 2020 by "Realmeter", a public opinion polling agency, on "for and against the temporary ban on religious gatherings and events," 75.5% of the respondents were in favor of the ban. A survey conducted by the same organization in September and October last year, respectively, on the National Foundation Day drive thru assembly and the Hangeul Day city rally, showed that the opinion in favor of banning the activities was at 70.9% and 56.4%, respectively, is dominant.

6 The official in charge said in a phone call that there are no official statistical data, but about 20 cases were raised in 2020 related to COVID-19.

on the constitutionality of statutes starts when ordinary courts request a judgment of the Constitutional Court, while the latter is filed directly by an individual whose basic rights guaranteed under the constitution have been infringed upon by governmental power (Constitutional Research Institute: p.8-9). This lack of court cases may be because it takes more time for the ordinary court to seek the judgment of the Constitutional Court after determining the constitutionality of laws related to COVID-19, or it may be because the ordinary court finds the relevant laws and regulations constitutional.

4.2 Cases Regarding the Legality of Administrative Orders

As opposed to the debate in academia, the courts do not appear to be interested in whether an administrative order is a general disposition or an abstract rule. According to the provision of the IDCPA, the term "administrative order" prescribes that medical personnel, the heads of medical instruments etc. shall comply with the administrative orders issued by the Minister of Health and Welfare and the local governments (§ 5(2)). This seems to add confusion about the nature of administrative orders. There are two precedents found for the legality of administrative orders.

Gwangju Metropolitan City issued an administrative order banning gathering and in-person worship in religious facilities to prevent the spread of infectious disease to the community. The defendant had in-person worship service with 67 people violating the administrative order, and was therefore prosecuted for violating IDCPA and the administrative order based thereon. The defendant argued that the administrative order was unconstitutional as it violated the essential provision of religious freedom and violated the principle of proportionality.

The Gwangju District Court held that the administrative order was not unconstitutional or unlawful, saying that the administrative order was issued pursuant to the mandate of Article 49 (1) 2 of IDCPA, and that the measure banning gathering and in-person worship service was to prevent the occurrence and spread of infectious diseases, and the necessity and appropriateness of the purpose were recognized. In addition, the court argued that religious freedom could be restricted for the sake of public welfare, and considering the fact that infectious diseases could be spread through in-person gathering for religious ceremonies, banning gatherings was recognized as an appropriate means for the purpose of preventing infectious diseases. Restricting a particular form of worship had nothing to do with the inner freedom of religion and did not infringe on essential parts of religious freedom. Therefore, the principle of proportionality was not violated.

The court declared that the administrative order was issued under the mandate of the law as the main reasons for its judgement, and the contents did not infringe the essential rights of freedom of religion, and did not violate the principle of proportionality. Although not explicitly mentioned, the court seemed to presuppose that the principle of non-delegation and the principle of clarity were not violated.

Some criticis take a precedent from the Seoul Administrative Court as an example to argue for the unlawfulness or unconsitutionality of administrative orders, that is, the administrative orders are mainly grounded on the obscurity or ambiguity of the delegating law and the legal process for comprehensive delegation (Lee 2021 p.8-12; Chung 2021 p.17). Gangnam-gu office of the Seoul Metropolitan Government ordered a 7-day

suspension of business for a restaurant because the kitchen staff violated the duty of mask wearing. The court held that the administrative order requiring 7-days of suspension was unlawful on the grounds that the provisions of IDCPA imposing a disadvantage of business suspension were not enforced in case of violating the duty, and therefore the administrative order had no legal basis. This is not the case, critics claim, as the court explained, because the provisions of the IDCPA were not in force at the time the administrative order was issued. It has nothing to do with obscurity or ambiguity of the mandating law. In addition, neither case addressed the issue of the form of the administrative order. Rather, scheme and contents are both accepted as lawful and constitutional.

It's important to remember that, in contrast with many other democratic countries, the Constitution of Korea divides the power to judge unconstitutionality among the lower courts and the Constitutional Court. Judgment on the constitutionality of laws (statutes) is the jurisdiction of the Constitutional Court ((§ 111(1)(a)), but the power to adjudicate the constitutionality of subordinate statutes rests with the ordinary courts (§ 107(2)). Because of the complexity of such adjudication on the constitutionality, it sometimes causes confusion and tension with the jurisdictions of both the Constitutional Court and the ordinary courts.

According to this division of duties, if the administrative order is a general disposition that sets specific prohibitions rather than prescribing abstract rules (Rhee 2021 p.56-57; Lee 2021 p.12-14), the court has no power to adjudicate the constitutionality of administrative orders. If the court finds that the mandating provision of the IDCPA is unconstitutional, it may suspend the proceedings and request that the Constitutional Court determines whether the provision is unconstitutional or not. If the court finds that the mandating law is constitutional but the contents of administrative order is unconstitutional, it may decide that the case is unlawful, violating the scope of its mandate. Conversely, if the administrative order is a form of subordinate statute, then can the courts decide the administration order as unconstitutional? When reading the Constitution literally, the courts may decide, but it is not clear judging from the precedents above mentioned.

Given previous decisions, the courts at least accept administrative order as lawful schemes regardless their natures.

4.3 A Criminal Case Against Shincheonji

Although a criminal case against Shincheonji is not directly related to religious gatherings, I introduce it here because it is a case that has received social attention, through that the unique way of gathering became publicly known, and negative public opinion was intensified. In addition, the outcome of the case will affect the direction and intensity of the government's law enforcement going forward.

Initial confidence of the Korean government in controlling COVID-19 virus was shattered by the first spike of COVID-19 at Shincheonji. As Shincheonji became the epicenter of the first wave, its way of assembly, and the secret bonds between Shincheonji members were thought to be the main factors that spread the virus nationwide (Korea Times 2020). These reports produced a public opinion that an epidemiological investigation should be conducted on all members of Shincheonji. Accordingly, the authorities requested the submission of a list of all members. Shincheonji is a church that is treated as a cult in

Korea. Therefore, believers were reluctant to reveal that they were members of the church. In particular, as social criticism escalated, the list was not provided for some of the members who had civil service status. Political leaders publicly blamed the group and demanded investigation and prosecution. Prosecutors arrested and indicted the leader of Shincheonji and other church officials on charges that they had obstructed the government's efforts to fight the epidemic by not fully disclosing the number of worshipers and their gathering places (BBC 2020).

On January 13, 2021, a judge in the district court of Suwon, ruled on the defendant's side on the charge of violating IDCPA, arguing that a failure to provide a full list of worshipers and church facilities did not amount to impeding the government's disease control efforts, and said "we cannot punish someone on charges of obstructing antivirus efforts for leaving out certain data, when (the request) had more to do with data collection than an actual epidemiological survey. (BBC 2021; Yonhap News 2021b)" On November 30, 2021, an appellate court upheld a lower court's ruling and said "It is also difficult to conclude the accused deliberately omitted requested data," noting that the church later submitted all requested data to the government (Yonhap News 2021c).

The district court's decision was made amid negative public opinion on and in the context of strong criticism against Shincheonji. Therefore, the court was in an environment where independence and fairness could be affected. Since the decision was released, there were people who were disappointed with the results, however, no view that criticized the fairness and independence of the court has been found. The rulings can be said to show that the government's law enforcement was hasty, and will make the government's enforcement of the law more prudent and considerate of the people. The court is seen as having proved its independence and proper functioning in this case.

4.4 Orders Restricting Religious Gathering and Preliminary Injunctions

Both the first and the second outbreaks of COVID-19 originated in religious facilities, and as several group infections occurred through religious gatherings, religious facilities, in-person worship and gatherings became major regulatory targets in combating COVID-19. In 2020, uncertainty about COVID-19 spawned anxiety and fear, anxiety and fear led to the ban on gatherings, and people generally welcomed the government measures as necessary. As a corollary, in early 2020, there were not many disputes in court related to religious gatherings. As the COVID-19 crisis lasted longer than expected and uncertainty about the virus gradually diminished, people began to provoke conflicts with government measures. The Christian community has protested and raised lawsuits against the government measures on the grounds that the government measures discriminated against secular activities, singled out and handled Protestant churches differently than other religions, and treated all churches uniformly without considering the specific circumstances of individual churches (Martin 2020).

4.4.1 Request for Suspension of Banning Rallies on Independence Day in Seoul (Partly Granted)

The rally on Independence Day was not related to religious gathering even though pastors of a number of churches and their devotees applied to participate. Nevertheless, the

decision is considered worth reviewing because it is possible to estimate the court's position on the freedoms of gathering and assembly at the time of 2020 through an examination of said case.

The government measures, which had been eased due to the decrease in the number of confirmed cases, were reinforced again with the second wave triggered by Sarang Jeil Church in August 2020. On August 13, 2020, the Seoul Metropolitan Government issued an order of social distancing that prevented the gathering of large-scale gatherings in downtown Seoul, applied in particular to 22 organizations (Seonam Today 2020). Some organizations, including Sarang Jeil Church, announced that they would carry out the assembly despite the administrative order, and reportedly the president ordered institution of measures to strengthen the church's quarantine while respecting religious freedom (Park & Lee 2020). Ten organizations applied for an injunction suspending the order, and the court granted the request for two cases.

The Seoul Administrative Court (Chamber 11) granted an injunction on the ground that rather than allowing a limited assembly by specifically instructing the venue, method, number of people, and quarantine rules, the entire banning on assembly was difficult to qualify as the minimum necessary to eliminate the risk of infection, and therefore such measures were likely to be illegal. The court said that it was not certain for the gatherings to cause rapid spread of the virus, pointing out that despite the recent large-scale rallies in the city center, there were no confirmed cases. The court added that it was difficult to assert that the virus would spread due to the assembly at this point, given the possibility that those in charge of the assembly would comply with the quarantine rules, and considering the cases of outdoor assemblies comprehensively. In addition, the court took an example in which conservative groups prepared and implemented their own quarantine measures at their assemblies (Hwang 2020).

The Seoul Metropolitan Government insisted that administrative force should be levied against assemblies, and that, in case of infection, a lot of administrative force should be put into epidemiological investigations, etc. It also argued that a ban on gatherings was the only way, because if a large number of small rallies were held at the same time, it would be no different from the participation of a large number of people in a large rally.

As a result, contrary to the expectation of the court, a group of confirmed cases occurred through the assembly. People at the rally did not follow the quarantine rules such as maintaining personal distance and restricting the number of participants. Large-scale gatherings in the city center and the subsequent worsening of the second epidemic stirred up criticism of the courts, and people demanded that the judge be fired (Ser & Lee 2020). As public criticism grew stronger, concerns have been raised that excessive criticism of the court's decision would undermine independence of the judiciary. The court expressed its position and the rationale of the decision by releasing the full text of the decision (Financial News 2020; Yang 2020). Following this decision, requests seeking an injunction of the measures banning large gatherings such as rallies on Hangul Day and on the 3.1 Movement rallies in Seoul area were not allowed.

4.4.2 Request for Suspension of Orders Closing Churches and Banning In-Person Worship in Busan (Denied)

Christian community has continuously raised an objection to the government's restriction on religious gatherings (Lim 2020) on the basis of the principle of excessive prohibition, the principle of equality, the principle of proportionality, and the principle of self-responsibility (Song 2021).

On January 3, 2021 Busan Metropolitan City Government extended an administrative order of social distancing and changed its contents to ban in-person worship and, in principle, declared that only on-line worship was allowed. Segyero Church carried out in-person worship violating the order, and the city government ordered the closure of the facility, but as the church continued to defy it, it ordered the church to be closed indefinitely from January 12, 2021. Segyero and a group of churches in similar situation filed an administrative lawsuit against the dispositions and applied for a preliminary injunction to suspend the disposition and the order banning in-person gathering at church (Lee 2021a).

On January 15, the Busan District Court rejected the request of injunction, saying that banning in-person worship had nothing to do with freedom of inward faith, it only restricts the place and way of worship, not freedom of religion itself. The court also argued that it was now facing the severe local and regional spread of the pandemic, and that freedom of religion could be restricted for the sake of the public welfare (Kim 2021). A few days after the court dismissed the church's request, the Busan Metropolitan City Government voluntarily lifted the disposition of indefinite closure (Lee 2021b).

4.4.3 Request for Suspension of Orders Banning In-Person Worship in Seoul (Granted)

Seoul area went into a semi-lockdown under the highest level of social distancing in the wake of a spike of confirmed cases from July 12, 2021. Under level 4 of social distancing, gatherings of more than two people were banned after 6 p.m. while religious organizations were not allowed to have in-person gatherings (only on-line service was allowed). Worship Restoration Free Citizen's Solidarity, a group of pastors and lay members of 7 churches in Seoul filed a petition to enjoin the measure (Shin 2021).

The Seoul Administrative Court (Chamber 11) took the side of the church, putting the brakes on Seoul's measures. The court allowed religious groups to hold worship services at 10 percent capacity, given that the gathering consists of fewer than 20 people, arguing for the inequality of the city's prohibition of religious services in comparison with department stores, wedding halls and funeral homes which were allowed to continue operations in a restricted manner. The court said "the all-out ban on on-person religious events is feared to have a potential to fundamentally infringe upon basic rights because there are religious groups practically unable to provide online services due to a lack of material or personnel resources." The religious organizations with past records of violation, however, were not allowed to resume limited in-person services (Jeon 2021).

Worship Restoration Free Citizen's Solidarity welcomed the court's decision, saying the government could no longer use the word "worship" for describing non-face-to-face worship (GMW 2021). The Seoul Metropolitan Government announced it would improve the quarantine rules in accordance with the purpose of the court's decision, and revised it

through consultation with relevant government ministries and the religious community.

4.4.4 Request for Suspension of Orders Closing Churches (Granted and Denied)

Eunpyeonggu-office imposed a 10-day suspension of operation against Eunpyeong Jeil Church from July 22, 2021 on the ground that the church had in-person worship services violating the level 4 social distancing order. The church had a history of being shut down in the past for violating social distancing orders. The church applied for preliminary injunction arguing that retraction of the order is necessary to prevent irreparable damage. On July 29, the Seoul Administrative Court (Chamber 3) issued an injunction saying that the continuation of the suspension of operation was expected to cause irreparable damage, and there was also insufficient evidence that the suspension of the disposition would have a significant impact on the public welfare (Min 2021).

Meanwhile, the Seoul Administrative Court (Chamber 14) rejected the request for suspension of the disposition of facility closure order filed by Sarang Jeil church on July 26, 2021. The church was the epicenter of the second wave. In accordance with level 4 of social distancing in the Seoul area, in-person worship was prohibited but the church continued in-person worship violating the ban. The Seongbuk-gu Office of the Seoul Metropolitan Government ordered them to suspend operations. The church, however, kept carrying out in-person worship, and the office ordered the closure of church facilities. The church filed a lawsuit and applied for an injunction. The court admitted that irreparable damages might occur due to the closure of church facilities, and the urgent need to prevent irreparable damage was acknowledged. The court, however, argued that in this case, the public interest to be achieved was greater than the damage that the applicant would suffer from the closure measures. Therefore, the suspension of the disclosure measures was not accepted because it may seriously affect the public welfare (Lee 2021).

4.4.5 Request for Suspension of an Orders Limiting Number of People Who May Gather (Denied)

The Seoul Metropolitan Government has extended the term of level 4 of social distancing, and accepting the court's decision on July 16, some restrictions on in-person worship were relaxed. According to this, the number of religious activities is limited to 19 people or 10 percent capacity, whichever is lower, and the institutions with past records of violation were not allowed to have in-person worship. The 19 pastors and members of the Worship Restoration Free Citizen's Solidarity applied for an injunction.

The Seoul Administrative Court (Chamber 14) rejected the request, arguing that at a time when more than 1,000 new patients were being found every day and infection by a new variant of virus was confirmed, suspension of government's measures partially restricting in-person worship might have a significant impact on the public welfare. The court added that in-person worship was not entirely prohibited, and even small churches that could not have the necessary equipment for online worship were limited, but that in-person worship was possible (Hwang 2021a).

4.5 The Constitutional Court and Religious Gatherings

In the end, it seems that the legal standards for religious gatherings will have to depend on the decisions currently pending in the Constitutional Court. In many cases, churches have already filed constitutional complaints in cases they have lost in ordinary courts.

On January 3, 2021, when the Busan Metropolitan City Government issued an administrative order for the extension the social distancing and banning in-person worship, a group of pastors filed a constitutional complaint. A lawyer defending the pastors argued that the measures of the Busan Metropolitan City Government violated the essential aspect of freedom of religion, the principle of proportionality, the principle of equality, and the principle of self-responsibility. He argued that in-person gathering is the essential content of belief, the church was discriminated against compared with similar secular activities, and all churches have been unduly regulated due to violations of a few irresponsible churches (Song 2021). On January 12, 2021, Worship Restoration Free Citizen's Solidarity had an interview before the Constitutional Court and filed a constitutional complaint on the ground that it is unconstitutional for the government to ban in-person worship for groups of more than 20 people, including video production teams, regardless of the size of the church (Hwang 2021b). On January 23, 2021, the National Special Prosecutor's Office said that they were filing a constitutional complaint, arguing that the ban on in-person worship violated the principle of proportionality, prohibition of essential infringement, and the principle of equality (Song 2021). As the pandemic situation stretches indefinitely, there is a possibility that similar constitutional complaints will be raised in the future. As such, the constitutional complaints about the ban on in-person worship are still pending in the Constitutional Court, and it will take time for final decisions.

Meanwhile, in academia, the pros and cons of its constitutionality are conflicting. At a conference held on March 5, 2021, by the Korean Constitutional Law Association, a scholar of constitution who made a presentation on "COVID-19 and Freedom of Religious Gathering" said that religion is essentially socialization and friendship, so freedom of religious gathering comes from the essence of religion, therefore, banning religious gatherings is equivalent to denying religion. He also argued that questions may be raised about the uniform ban on in-person worship without micro-adjustment depending on the nature, content and method of gathering (Song 2021 p.31-51). Another constitutional scholar contended that banning in-person worship is unconstitutional on the grounds that it was an excessive exercise of power, a violation of the essential part of religion, and a violation of the principle of equality (Kim 2021). However, many other scholars argue that even entire in-person worship is constitutional on the grounds that the risk of infection from gatherings is high, and the degree of risk to life and health is high, in addition to that these possibilities are supported by scientific researches and statistical data, the government's restrictions are temporary, and the freedom of religion is not limitless (Song 2021 p.40-44). A professor teaching in the Department of Law and Graduate School of Canon Law said that all rallies, including religious gatherings, can be limited in situations where the nations's order and people's lives and public welfare are threatened, such as COVID-19 situation (THE FORUM 2021).

4.6 In Summary: Role of the Judiciary Played in Religious Gathering

Korean courts begin to act only when lawsuits are filed. As observed in some jurisdictions, the courts cannot first make an order against the executive branch, nor can it initiate and lead a dialogical review. Public interest litigation is not well developed, and the standing requirement is also rather strict. Therefore, it can be said that it is passive in responding to a crisis. This does not mean that the courts do not play a role. The unprecedented COVID-19 crisis was a great challenge for the judiciary as well. The Supreme Court has recommended the courts to be suspended three times in 2020 alone. However, as we have seen above, the courts have functioned in difficult circumstances and have influenced the policy formationand implementation of the government.

In the Shincheonji case, the court served as the final interpreter of the law and protector of rights. The court's ruling not only proves that the government's law enforcement was not prudent, but also strongly demanded the government to enforce laws in fair and careful manner even in a crisis situation. Regarding the nature and its legality of administrative order, the court did not address these issues as the main merits, and held that administrative orders issued pursuant to the mandate of the IDCPA were legal, and bans on gatherings or on in-person worship were also considered necessary and proportionate for the purpose of the public health. The constitutionality of the administrative order itself and the underlying law, that is, Article 46 of the IDCPA, will have to wait for the Constitutional Court ruling. With regard to in-person worship or gatherings for religious activities, however, the court generally sided with the churches on the issue of entirely banning in-person worship, claiming that the total ban seems to be recognized as a risk of infringing on essential aspects of religious freedom. As we examined above, in accepting the court decision, the Seoul Metropolitan Government revised the contents of social distancing guidelines. Stricter regulations on religious activities other than worship, such as bible study and meal services, was recognized as legitimate in light of the goal of preventing infectious diseases. The court also pointed out that religious activities should not be treated as discriminatory as compared to similar secular activities. Understandably, past violations were taken into consideration for balancing interests. The court appeared to abstain from second-guessing and respected the judgment of the executive as to whether it is appropriate to allow a certain degree of in-person worship. Whatever the court's decisions were, through the litigation process, the government has explained, reconsidered, and amended the purposes and rationales of the policies. As the vaccination rate increased, social distancing was reorganized starting from November 1, 2021, and in-person worship and gatherings were allowed up to 50% of the facility capacity, not exceeding 100 people, but up to 500 people were allowed when only vaccinated people gather. The preliminary injunctions we have seen, are not a judgment on the merits, whether there is an irreparable damage or an urgent need are decisive factors. Considering that cases on the governments measures are still under consideration and the constitutional complaints are pending, the judiciary is expected to play a more important role in the days to come.

5. Conclusion

COVID-19 is an unprecedented disaster, and every country is undoubtedly in a state of emergency. Korea has been overcoming this crisis in the ordinary constitutional order

without taking exceptional measures such as a declaration of the state of emergency. Nor is there a worrisome shift of power to the executive branch. Looking back on the two-year period of COVID-19 thus far, however, it is true that ignorance of COVID-19 in the early days spawned anxiety and fear. Anxiety and fear tended to trigger hasty and excessive actions. Public anxiety increased pressure for a speedy and definite solution and lead to unreasonable and excessive measures. In many cases, it degenerated into an excuse to strengthen the power of political leaders. In such a situation, there is a tendency to easily find a scapegoat, and there is a risk that a socially underprivileged group may become a victim.

When reading articles describing the situation in Daegu, the epicenter of the first COVID-19 epidemic, it can be said that Korea also went through a similar process. The fact that the religious facilities of a particular sect, which is socially shunned, became the epicenter seems to have intensified the development of this situation. Until now, the religious gathering has been a constitutional right that is one of the most strongly protected, more than ordinary freedom of assembly. Going through the first and second waves of the pandemic, gatherings for worship became the most heavily regulated, and the Christian community became the center of controversy.

This social crisis also exposed the conflict between the seemingly harmonious values of democracy and the rule of law. Democracy is often understood as Lincoln's words, politics of the people, by the people, and for the people, and is known as the rule of the majority. Democracy is a precious value that cannot be compromised. The democratic principle may be even more important in an uncertain environment like the COVID-19 pandemic. However, democracy should not undermine the value of the rule of law. Overcoming the crisis without declaring a state of emergency would be an expression of the will to protect the rule of law and the Constitution even in the midst of a crisis.

In the past two years, we have seen conflicts between the majority opinion and religious groups, over basic rights and public opinion. These values have been harmonized within the constitutional framework in peacetime, but they have exposed tensions in times of crisis. It would be the judiciary to harmoniously resolve these tensions and conflicts because the bastion and foundation of the rule of law and constitutionalism is the judiciary. The judiciary also has to make a judgment from a position of uncertainty due to the unpredictable course of the pandemic and this uncertainty and crisis requires a change in the priority of rights which have been well settled and enshrined so far.

The court's injunction order allowing the 15 August 2020, Korean Independence Day rallies, is considered a good example of the role of the court in the pandemic situation. The court pointed out that banning gathering without instructions regarding the specific venue, method, number of people, and quarantine rules to be enforced could not be interpreted as "the minimum necessary measure to protect the public heatlh" and, there for, was likely to be illegal. The court demanded that the executive take measures appropriate to the specific situation rather than a one-size-fits-all regulation. In fact, it is not easy to judge which is more infectious when comparing in-person worship services at churches and permitted activities like riding densely packed subways and visiting crowded shopping malls. Even in the case of churches, the capacity to accommodate people varies widely. If guidelines such as mask wearing and social distancing are followed, it may be argued that uniformly

banning in-person worship gatherings infringes the principle of proportionality. The IDCPA has general provsions on gatherings, which may give the executive broad discretion. At the same time, however, it may be a basis for the court to demand that the executive devise measures alligned to concrete realities. It is still too early to judge the role of the judiciary at the stage where the pandemic situation is still developing. In view of the series of injunctions, however, I dare say that the court has played the required role even under the pressure of critical public opinion. Despite the workload and backlog under the pandemic, the judiciary has not ceased to function. As we have seen in several cases above, the governmental policies were reshaped and refined in the course of litigation. In addition, court decisions are reported to and responded to by people. The whole process would act like public discourse, sometimes confirming government actions, and sometimes reshaping them.

Therefore, as long as the judiciary functions, it will play a role as a defender of rule of law and constitutionalism, steering the government in the right direction and preventing illegitimate power shifts. A numbers of cases are pending in the judiciary, and new types of cases and a significant number of lawsuits after the pandemic ends are expected. Thus, the judiciary is likely to continue to play a more critical role in the years to come. The cases to be dealt with by the judiciary will be a touchstone that can be used in similar crises in the future. Just as the experience of MERS has become a valuable asset in the process of responding to COVID-19, the judiciary's concerns in the process of resolving pending cases will be the wisdom needed to resolve similar cases in the future.

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10. Judicial Review of Pandemic Measures during COVID-19: Focus on the Cases under the Special Act for Prevention, Relief, and Revitalization Measures for Severe Pneumonia with Novel Pathogens of 2021

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1. Introduction

To tackle the health threat induced by the coronavirus disease (COVID-19), executive branch/administration has used its authority to adopt emergency or non-emergency measures with or without clear legal designation. The lack or insufficient participation of parliament has been identified in the literature. (Eisma-Osorio et al., 2021) The latter measures without clear legal authorisation pose a serious threat to the rule of law.

Unprecedented measures against pandemic crises have been adopted by each country. For instance, a large-scale facemask expropriation scheme of 8 million per day and a nationwide compulsory facemask wearing was introduced in Taiwan to avoid the spread of the virus, where both schemes have not been previously implemented. (Gao, 2021) To ensure the implementation of these schemes, high administrative fines or criminal penalties have also been introduced. Despite the existence of the Communicable Disease Control Act (CDC Act) in Taiwan before the COVID-19 outbreak, the 'Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens' (Special COVID-19 Act) was promulgated in 2020 with higher administrative fines or criminal penalties than in the CDC Act. The main enhanced fine issues covered by the Special COVID-19 Act include the *criminal penalty* on 'driving up prices of disease prevention devices, equipment, drugs, medical equipment, or other disease prevention supplies' (Article 12), 'those who fail to abide by the instructions of competent health authorities' (Article 13), 'disseminating rumours or false information' (Article 14) and *administrative fines* on 'violate the isolation/quarantine measures' (Articles 15(1) and 15(2)), administrative fine relating to leaves (Article 16(1)), 'Refusal, evasion, or obstruction of expropriation or requisition the requisition required production equipment and raw materials' (Article 16(2)), and other general measures imposed by the government (Art. 16(3)). The administrative fine for the violation of the isolation measures increases from 60,000–300,000 NTD in Art. 67(4) of the CDC Act to three to four times to 200,000–1 million NTD in Article 15(1) of the Special COVID-19 Act. A similar situation can be observed in criminal charges. Such reinforced and increased penalties draw our attention to investigating the court's decisions in treating and reviewing the cases.

This article aims to compile the administrative law and criminal law cases under Articles 12-16 of the Special Act, introduce interesting cases, and comment on the court's

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decision. Thus, we hope to understand and evaluate whether judicial courts play the role of gatekeepers in the rule of law and scrutinise the implementation of pandemic measures. However, this study has certain limitations. As there is a lack of court cases in certain categories, this article will use the broader meaning of 'judicial review'. For instance, the ruling of non-prosecution by prosecutors may screen and exclude certain cases to be trialed in courts and protect people's fundamental rights. Thus, this article includes such cases. However, due to the lack of official databases for such non-prosecution cases, this article only refers to the News. Finally, the decision of the Administrative Appealing Committee (AAC) would be evaluated under certain categories when there is a lack of court cases. Again, although such an AAC is subject to and established inside the administrative agency, (MOJ 2012) the diverse and professional composition of the members of AAC would make such a committee semi-judicial.[1] Hopefully, such expansion of the definition of judicial review would be helpful for this article to cover more 'judicial' cases under the Special COVID-19 Act.

Table 10-1: Criminal Law and Administrative Law Cases by the End of September 2021

Case Type	Issues	The Numbers of Verdicts	Broader Meaning of Judicial Sector
Criminal Court	1. 'Driving up prices of disease prevention devices, equipment, drugs, medical equipment, or other disease prevention supplies' (Art. 12)	4	Lots of non-prosecution ruling from the news
	2. 'Those who fail to abide by the instructions of competent health authorities' (Art. 13)	1	0 (non-prosecution ruling from the news)
	3. 'Disseminating rumours or false information' (Art. 14)	49	Lots of non-prosecution ruling from the news
Administrative Court	1. Isolation Measures (Art. 15(1))	1	3 (AAC)
	2. Quarantine measures (Art. 15(2))	7 (2 revoke)	77 AAC (3 revoke)
	3. Administrative fine relating to Leaves and Expropriation (Art. 16(1) and 16(2))	0	0 AAC
	4. Violation of General Clause (Art. 16(3)): Violation of suspended business order	0	6 AAC (1 revoke)

(Source: Compiled and calculated by the authors from the Lawbank (https://www.lawbank.com.tw/).)

[1] Article 52(2) of the Administrative Appeal Act: 'The members of an administrative appeal review committee shall be chosen from the agency's senior staffs, righteous gentlemen in the society, scholars or experts; inter alia, the ratio of the righteous gentlemen, scholars and experts shall not less than one half'.

2. Judicial Review of COVID-19 Cases in Criminal Court

2.1 'Driving up Prices of Disease Prevention Devices, Equipment, Drugs, Medical Equipment, or Other Disease Prevention Supplies' (Art. 12)

To secure the supply of COVID-19 related necessities and facilities, those who drive up prices of disease prevention devices, equipment, drugs, medical equipment, or other disease prevention supplies or hoard such items without a legitimate reason instead of selling them on the market may face criminal charges of imprisonment for up to five years and be imposed with a fine of up to 5 million NTD.[2]

Apart from the Special COVID-19 Act promulgated after the outbreak of COVID-19, three previous Acts also govern similar behaviour. Articles 14, 15, and 40 of the Fair Trade Act, that is, Competition Law, are used most frequently. Concerted actions[3] are generally prohibited. Violators would face the following administrative sanctions or fines (Article 40):

1. The competent authority may order any enterprise that violates to *cease* therefrom, *rectify its conduct, or take necessary corrective action* within the time prescribed in the order; in addition, it may assess upon such enterprise an *administrative penalty of not less than one hundred thousand or more than fifty million New Taiwan Dollars.* Shall such enterprises fail to cease therefrom, rectify the conduct or take any necessary corrective action after the lapse of the prescribed period, the competent authority may continue to *order such enterprise to cease therefrom, rectify the conduct, or take any necessary corrective action* within the time prescribed in the order, and every time may successively assess thereupon *an administrative penalty of not less than two hundred thousand or more than one hundred million New Taiwan Dollars* until its ceasing therefrom, rectifying its conduct, or taking the necessary corrective action.
2. The competent authority may impose an *administrative penalty of up to 10% of the total sales income of an enterprise in the previous fiscal year* without being subject to the limit of administrative fines if the enterprise is in serious violation of Article 15.

In addition, Article 61 of the Communicable Disease Control Act also provides criminal penalties for individuals who hoard resources requisitioned by competent authorities for price speculation, or forcing up prices under serious circumstances, to be sentenced to imprisonment from one year up to seven years, and may also be fined up to 5 million NTD. Finally, the facemask was designated as "3.Essential necessities" under the

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2 Article 12(1) of the Special COVID-19 Act.

3 Article 14(1) of the Fair Trade Act defines this term as 'competing enterprises at the same production and/or marketing stage, by means of contract, agreement or any other form of mutual understanding, jointly determine the price, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behaviour that restricts each other's business activities, resulting in an impact on the market function with respect to production, trade in goods, or supply and demand of services'.

Article 251 Criminal Code, a person who stocks up facemasks and refrains from selling to the market, without justification and with the intention of raising the transaction price, shall be sentenced to imprisonment for up to three years, short-term imprisonment; in lieu thereof, or in additional thereto, a fine of up to three hundred thousand may be imposed.

As it is more difficult to prove the 'concerted action' under the Fair Trade Act, criminal charges have been used more often during the pandemic.

This article focuses on the implementation of the Special COVID-19 Act. By the end of September 2021, there were four verdicts: two related to hygiene alcohol and two related to facemasks. However, certain verdicts have been announced in which prosecutors did not prosecute the accused.

2.1.1 Hygiene Alcohol (Sanitizer)

In two cases relating to hygiene alcohol, the violators received the criminal charge for two months and one year, respectively. In the first case, the violator, a person, bought three types of different hygiene alcohol at a price of 40 (300 ml), 45 (350 ml), and 75 (600 ml) NTD, and then resold those on an e-commerce platform at a price of 100/130, 130/135, 190, respectively, which is around two to three times the purchase price. Thus, this person was sentenced to two months in prison, which he could fulfil by paying criminal fines of 1,000 per day.[4] However, a more serious crime is committed by a company by increasing the selling price of alcohol from 298 (A brand, 4,000 ml), 50–53 (75 ml), and 293 (B brand, 4,000 ml) NTD to 2,600–2,730, 400–420, and 2,600–2,730, respectively, NTD. The violator was sentenced to one year in prison, and all alcohol was confiscated.[5] Thus, the criminal offence in the second case is clearly more serious than the first one.

In the second case, the court provided three parameters to evaluate the unreasonable price: 1) compared with the price before the outbreak, 2) compared with the price of other products in the market, and 3) whether such a price increase reflects the cost/where there is a wind fall profit of the defendant.

However, these parameters were difficult to judge. Therefore, certain cases were settled before the prosecutor. For instance, one citizen purchased alcohol at 40 NTD and sold it on an e-commerce platform at 100 NTD. The prosecutor considered this as a 'reasonable price increase under the market supply and demand rule', followed by a non-prosecution ruling.-(Apple Daily 2020) In this regard, the prosecutor seemed *to play a better role in balancing the freedom of business (market freedom) and the needs of public health.*

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4 Taiwan Hsin Chu District Court: Simple Case No. 40. (2020) 臺灣新竹地方法院109年度原簡字第40號(有期徒刑二月) [Online]. Available at: https://law.judicial.gov.tw/FJUD/data.aspx?ro=0&q=bb8daf19e3e84ff5438fc4dd4847f08e&sort=DS&ot=in (Accessed: 26 May 2022).

5 New Taipei City, Taiwan, District Court 2020-Sue No. 942 臺灣新北地方法院109年度訴字第942號判決(有期徒刑一年), https://law.judicial.gov.tw/FJUD/data.aspx?ro=2&q=97d1569d2ba23c74328f302d782149fb&sort=DS& ot=in。

2.1.2 Facemasks

Since February 2020, the Taiwanese government introduced the facemask central rationing system by setting five NTD/per mask and two masks per person each week.[6] Afterwards, there was long queuing every day until mid-April. Therefore, it created a market opportunity to sell facemasks at high prices and in large quantities, related to the selling of facemasks at a price of 14 (small quantity) and 12 (in large quantity). The violator was caught by selling 5,500 facemasks at a price of 12 NTD on 21 April 2021. Finally, he was sentenced to three months in prison, or a criminal fine of 1,000 NTD each day to replace the prison. The 5,571 facemasks were all confiscated.[7] In the second case, the violator was accused of selling 3,150 facemasks purchased at 8 and 9 NTD at a selling price of 14 NTD.

In both cases, the court found them guilty of selling facemasks, twice or thrice the price of the government selling price of 5 NTD. However, at that time, the facemask price allowed by the government in the tax-free shop of airport was set at three pieces for 50. (Taiwan CDC 2020) This is higher than that charged. Indeed, no one dares to bring lawsuits against these shops for violation. Due to the controversies surrounding reasonable selling prices, prosecutors dealt with many cases in the form of non-prosecution. For instance, in one case, the prosecutor investigates a prosecution with 50 pieces for 80,000 NTD. (EtToday 2021) However, this was a typing error of 800 NTD. The 16 NTD/piece is higher than the previous offence cases of 14 and 12. It is difficult to judge whether a price is too high, as consumers can also save a lot of time queuing for the government quota of 2 pieces per person per week. This also seemed to be the normal price-setting practice of other products on the market, such as shoes and mobile phones. Therefore, prosecutors' non-prosecution decisions play an important role in *protecting citizens' freedom of business or balance related to the issue of public health*.

2.2 'Those Who Fail to Abide by the Instructions of Competent Health Authorities' (Article 13)

There is a relatively abstract clause in Article 13 of the Special COVID-19 Act to fine individuals suffering from or suspected of suffering from severe pneumonia with novel pathogens who fail to abide by the instructions of competent health authorities of any level and thus are at risk of infecting others. The criminal penalty involved sentencing to imprisonment for up to two years or criminal detention and a fine of no less than 200,000 NTD and up to 2 million NTD.

As such, the clause is quite abstract and patients usually listen to instructions but there was only one case. The patient was positive and sent to the ICU. Afterwards, the patient became very emotional and used the fire distinguisher to threaten the lives of medical and

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6 The introduction of such facemask rationing scheme, please see: Tai, Y. L., Chi, H., Chiu, N. C., Tseng, C. Y., Huang, Y. N. and Lin, C. Y. "The effect of a name-based mask rationing plan in Taiwan on public anxiety regarding a mask shortage during the COVID-19 pandemic: observational study", in JMIR Formative Research, 2021, 5(1), e21409.

7 Simple No. 42, Tainan District Court, Taiwan (2021) 臺灣臺南地方法院110年度簡字第42號判決(有期徒刑四月), https://law.judicial.gov.tw/FJUD/data.aspx?ro=3&q=305ded1ca1c5816578803af7fe3e02b2&sort= DS&ot=in。

nursing staff in the hospital. It took some time to subdue the patient. He was then sent back to home quarantine for 14 days. Despite two negative tests, he was sentenced to three months in prison, which could be replaced with fines (1,000 NTD each day).[8]

2.3 'Disseminating Rumours or False Information' (Article 14)

The most controversial part of the Special COVID-19 Act is the criminalisation of fake news. However, this Act should be seen in the context of Taiwan government's recent emphasis on *Social Order Maintenance Act* to prosecute those who '5. Spreading rumours in a way that is sufficient to undermine public order and peace' (Article 9). According to the survey by the news media, there were 151 cases, which reached 233 in early 2020. However, interestingly, *the court plays a key role in safeguarding the freedom of speech by not applying a penalty in most cases. In addition, the prosecutor plays a supplementary role in excluding certain cases being transferred from the police.*

Table 10-2: Fake News Cases (Most of the Cases Were Unrelated to COVID-19) under Social Order Maintenance Act

Year	Transfer from Police	Trial	No Penalty
2011	0	2	2
2012	3	7	7
2013	11	3	3
2014	6	8	8
2015	12	8	8
2016	7	8	8
2017	12	11	8
2018	21	21	10
2019	151	146	109
2020 (Jan–May)	233	224	174

Source: Storm Media. Seven times of the cases charged by the police in 2019 (compared with 2018): only 20% were fined (警方「查水表」去年爆增7倍、僅2成開罰　藍委提案刪《社維法》「散布謠言罪」) [Online]., Available at: https://www.storm.mg/article/2883916?mode=whole (Accessed 26 May 2022).

The criminal charge under this Act was relatively low: detention of up to three days or a fine of up to 30,000 NTD. To better control fake news during the COVID-19, the Special COVID-19 Act provides a very high penalty (imprisonment for up to three years and a fine of up to three million NTD) for individuals who disseminate rumours or false information regarding the epidemic conditions of severe pneumonia with novel pathogens, causing damage to the public or others. One can simply find the relationship between these two regulations: First, the constituents of the 'rumour + damage to public or order' are similar. Second, the fine is increased several times from three days to three years and 30,000 to 3

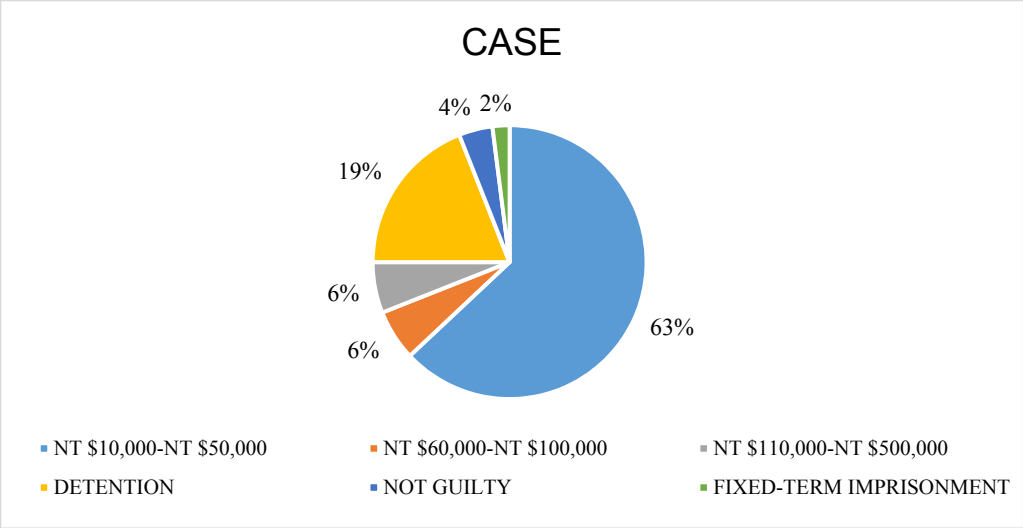
8 Changhua district Court, Medical Easy No. 3 (2020) 臺灣彰化地方法院109年度醫易字第3號判決 [Online]. Available at: https://law.judicial.gov.tw/FJUD/data.aspx?ro=0&q=0b68d4b6ed95e6b057647f09fe17c3cd&sort=DS&ot=in (Accessed: 26 May 2022).

9 Art. 63(5) of the Social Order Maintenance Act.

million NTD.

However, COVID-19 seemed to play an important role in changing the court's attitude in safeguarding freedom of speech and making courts make public health and order a higher priority. Among 51 court decisions by September 2021, the not-guilty rate was 4% (2/51), while most accused were found guilty (49/51). Therefore, it seemed that the court confirmed most of the cases brought by the prosecutors. However, the court seemed to be reluctant to impose a heavy penalty on such a case. The maximum penalty is 3 million NTD, but 63% of the decision is less than 50,000 NTD and no judge gives a penalty higher than 500,000 NTD. A very similar attitude applies to imprisonment. Although the maximum imprisonment was three years, only one case was given a fixed term imprisonment for three months.[10] Most of them face detention between 15 and 55 days and can be replaced criminal fines (1,000 per day).

Figure 10-1: The Criminal Charges of Court in 51 Cases under Article 14 of the Special COVID-19 Act (by September 2021)



(Source: Compiled by the authors from data in Lawbanks.)

However, if the cases were filed based on the Social Order Maintenance Act, the court may maintain the same no-guilty situation as observed above.[11] From this perspective, it

[10] Tainan District Court, Taiwan. Simple No. 2884 (2020) 臺灣臺南地方法院109年度簡字第2884號判決：有期徒刑3月, https://law.judicial.gov.tw/FJUD/data.aspx?ro=1&q=36760393e5da9ce1ba0235628ac60435&sort=DS& ot=in.

[11] See e.g., Taiwan Shilin District Court's Huzhizi No. 35 Ruling (2021) 臺灣士林地方法院110年度湖秩字第35號裁定; Taiwan Kaohsiung District Court's Fengzhizi No. 48 Ruling (2021) 臺灣高雄地方法院110年度鳳秩字第48號裁定; Taiwan Miaoli District t Court's Miao Zhizi No. 16 Ruling (2021) 臺灣苗栗地方法院110年度苗秩字第16號裁定; Taiwan Taipei District Court's Beizhizi No. 206 Ruling (2021) 臺灣臺北地方法院110年度北秩字第206號裁定; Taiwan Taipei District Court's Shop Zhizi No. 47 Ruling (2021) 臺灣臺北地方法院110年度店秩字第47號裁定; Taiwan Taichung District Court's Zhongzhi Zi No. 82 Ruling (2021) 臺灣臺中地方法院110年度中秩字第82號裁定; Taiwan Keelung District Court's Jizhizi No. 46 Ruling (2021) 臺灣基隆地方法院110年度基秩字第46號裁

might be odd to see that the court was more willing to charge the accused guilty under the Special COVID-19 Act and did not change the decision on the constituents confirmed by the police, while the court scrutinised the interpretation of fake news clauses under the Social Order Maintenance Act. As noted above, the constituents of both Acts were quite similar. It may be easier for the court to use the effects to exclude certain cases from the broader effects of 'sufficient to undermine public order and peace', while it is difficult to exclude cases under the narrower effects of 'causing damage to the public or others'.

Finally, *the prosecutor may play a key role in safeguarding citizens' freedom of speech under the Special COVID-19 Act.* There is a wide range of non-prosecution cases related to fake news on COVID-19. The prosecutor tried to interpret the constituent of Article 14 of the Special COVID-19 Act, that is, 'rumours or false information regarding the epidemic conditions of severe pneumonia with novel pathogens' in a relatively narrow manner. Therefore, the interpretation of 'epidemic condition' should be narrowly interpreted to cover mainly the Article 4(1) of the CDC Act: 'Epidemic conditions' implying conditions where the number of cases of a communicable disease occurring in a specific area during a specific time period exceeds the expected number or when clustered outbreaks occur. Under such a narrow interpretation, the news commentator spreads information on the fact that the Minister of Ministry of Health and Welfare is obstructed by China during Taiwan's vaccine purchase and is charged by the police. However, the prosecutor issued a non-prosecution ruling without even summoning the commentator, as the issue at stake is vaccine purchase and does not meet the narrow definition. (UDN News 2021a) A very similar situation is applied to spreading rumours on the special medicine to cure COVID-19 (China Times 2021a); in this case, the prosecutor does not consider it as falling under the narrow scope of 'epidemic condition'.

Therefore, it seemed more likely that the cases would apply only to those spreading fake news on 'confirmed cases' as it would meet the narrow definition of 'epidemic condition'. However, in practice, the prosecutor was very careful in excluding the cases for the reason of 'lack of subject criminal intention' (UDN News 2021b; China Times 2021b) or 'it's fact not fake news' (China Times 2021c; Liberty Times 2021) Even with the footage on spreading rumour and fake news at a workplace, prosecutor used the narrow definition of 'epidemic condition'. (Apple Daily 2021)

The active role of prosecutors in excluding the cases to proceed to the court may be the reason for such a high guilt rate of court decisions under the fake news clause of the Special COVID-19 Act than under the Social Order Maintenance Act.

3. Judicial Review of COVID-19 Cases Administrative Court

3.1 Isolation Measures (15(1))

Article 48 of the Communicable Disease Control Act confers the power to competent authorities (i.e. MOHW) to detain, for the reason of case confirmation, persons who have been in contact with patients affected by communicable diseases or who are suspected of

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定; Taiwan Tainan District Court's Nanzhizi No. 50 Ruling (2021) 臺灣臺南地方法院110年度南秩字第50號裁定; Taiwan New Taipei District Court's Banchizi No. 159 Ruling (2021) 臺灣新北地方法院110年度板秩字第159號裁定。

being infected; when necessary, they may be ordered to move to a designated place for required measures such as examination, immunisation, medication, control of certain designated areas, or isolation. Violators for such detention/isolation for testing, inspection, immunisation, medication, or other necessary measures would be subject to a fine of 60,000 to 300,000 NTD.[12]

Based on this regulation, Article 15(1) of the Special COVID-19 Act enhances administrative fines three to four times (200,000 NTD to 1 million NTD).

Thus far, there has been only one case decided in the Administrative Court.[13] This case is related to the plaintiff who contacted confirmed cases on 25 March 2020 and was issued a home quarantine order by the local government between 25 March and 5 April. He left his home address for testing in a local hospital at 15:10 on 26 March 2020. However, after the testing, he did not return to his home immediately but went to his company and returned home between 17:00 and 19:00. The judge is of the opinion that 2 h would increase the risk of community transfer and infect other people and violate the pandemic measures. Thus, a fine of 300,000 NTD was suitable under the legal range of 200,000 to 1 million NTD.

Moreover, three administrative appeals cases were brought to the AAC. However, in these three cases, the AAC did not change the original administrative decision.

1. The violator left home quarantine for 4 min and was fined 200,000 NTD.[14]

2. The violator left his apartment, took the elevator, and crossed the public activities area with other buildings in the same housing complex twice for more than 2 h. Thus, considering the seriousness of such a violation, the fine was 800,000 NTD.[15]

3. The violator left his home quarantine place and rode motorcycles to shop in the market, mall, and returns home for 30 min. He was fined 400,000 NTD.[16]

3.2 Quarantine Measures (Art. 15(2))

According to Article 58 of the Communicable Disease Control Act, Competent authorities may impose the quarantine measures relating to 'home-based quarantine, concentration-camp quarantine, isolation care or other necessary measures on persons entering from affected areas, contacts or suspected contacts, patients or suspected patients with communicable disease' on persons entering or exiting the country (border). The violator shall be fined 10,000 to 150,000 NTD; if necessary, improvements to this can be made in time as ordered; if not, fine may be imposed each time.[17]

Very similar to the above mentioned increase in administrative penalty after the COVID-19 outbreak, Article 15(2) of the Special COVID-19 Act increases the administrative fine to 7–10 times (no less than 100,000 NTD and no more than NT $1

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[12] Article 67(4) of the Communicable Disease Control Act.

[13] TaoYuan District Court, Taiwan. Simple No. 136 (2020) 臺灣桃園地方法院109年度簡字第136號判決(罰鍰30萬), https://law.judicial.gov.tw/FJUD/data.aspx?ro=0&q=5cc7977dbc4156cfef297af9ff376ef5&sort=DS&ot=in.

[14] MOHW AAC Decision No. 1093160247 (2020) 衛部法字第1093160247號訴願決定書。

[15] MOHW AAC Decision No 1090018216 (2020) 衛部法字第1090018216號訴願決定書。

[16] MOHW AAC Decision No. 1090017130 (2020) 衛部法字第1090017130號訴願決定書。

[17] Art. 69 of the Communicable Disease Control Act.

million NTD).

There are seven administrative court cases related to the enforcement of this provision. Of the seven cases, the court confirmed the decision of the government and the Administrative Appealing Committee by maintaining the decision on the administrative fine. Of the five cases, two were fined with a minimum fine of 10,000 NTD,[18] while three had been fined with 20,000 NTD.[19] In the first two cases, the plaintiff left the home for 10 min to pick up a package downstairs. In Case II, the plaintiff was supposed to take taxi directly from airport to home, but went to a convenience store and was late for home by 11 min. They were fined for the violation of quarantine rule by going out for around 2 h in two cases[20] and 45 min in one case.[21]

However, the *two cases revoked by the administrative court* drew our attention. The reason for revoking the first case is the lack of clear evidence. The CCTV footage is unclear and we cannot see the face of the plaintiff; thus, the court denies this as evidence to fine.[22] In the second case, the issue is whether going out of home to the lobby of the community in the housing complex would constitute a violation. The government's pandemic officer told the plaintiff to come to the lobby to collect the pandemic prevention package without being warned by the officer regarding the violation of this regulation. Thus, it would make the plaintiff believe that they can go to the community lobby under Article 15(2) of the Special COVID-19 Act.

Compared with one digit of cases before the administrative court, there is a wide range of cases (77) in the Administrative Appealing Committee. Of these 77 cases, only seven were brought to the administrative court. Among these 77 cases, most cases were fined with a minimum of 10,000 NTD;[23] only certain cases were fined for 500,000 NTD[24] (e.g.

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[18] Taipei District Court, Taiwan. Simple No. 221 (2020) 臺灣臺北地方法院109年度簡字第221號判決(罰鍰10萬), https://law.judicial.gov.tw/FJUD/data.aspx?ro=0&q=71f30cde8f19254473a97b8d24c65d7c&sort=D&ot=in。
Taipei District, Taiwan. Simple No. 235 (2020) 臺灣臺北地方法院109年度簡字第235號判決(罰鍰10萬), https://law.judicial.gov.tw/FJUD/data.aspx?ro=2&q=fa421839a7c738940756a56a05de588d&sort=DS&ot=in。

[19] New Taipei City, Taiwan. Simple No. 7 (2021) 臺灣新北地方法院110年度簡字第7號判決(罰鍰20萬), https://law.judicial.gov.tw/FJUD/data.aspx?ro=1&q=98f2bf4b55c9355aea170fb8fd05011b&sort=DS&ot=in。
New Taipei City, Taiwan. Simple No. 142 (2020) 臺灣新北地方法院109年度簡字第142號判決(罰鍰20萬), https://law.judicial.gov.tw/FJUD/data.aspx?ro=0&q=88e83df398e5c3c05898b6b65a18828b&sort=DS&ot=in。
Hsin-Chu District Court, Taiwan, Simple No. 39 (2020) 臺灣新竹地方法院109年度簡字第39號判決(罰鍰20萬), https://law.judicial.gov.tw/FJUD/data.aspx?ro=1&q=7eae4534ee9750ca3b5b98e477bfe2ac&sort=DS&ot=in。

[20] New Taipei District Court, Taiwan. Simple No. 7 (2021) (A fine of NT $200,000) 臺灣新北地方法院110年度簡字第7號判決(罰鍰20萬)。
Hsinchu District Court, Taiwan. Simple No. 39 (2020) (A fine of NT $200,000) 臺灣新竹地方法院109年度簡字第39號判決(罰鍰20萬)。

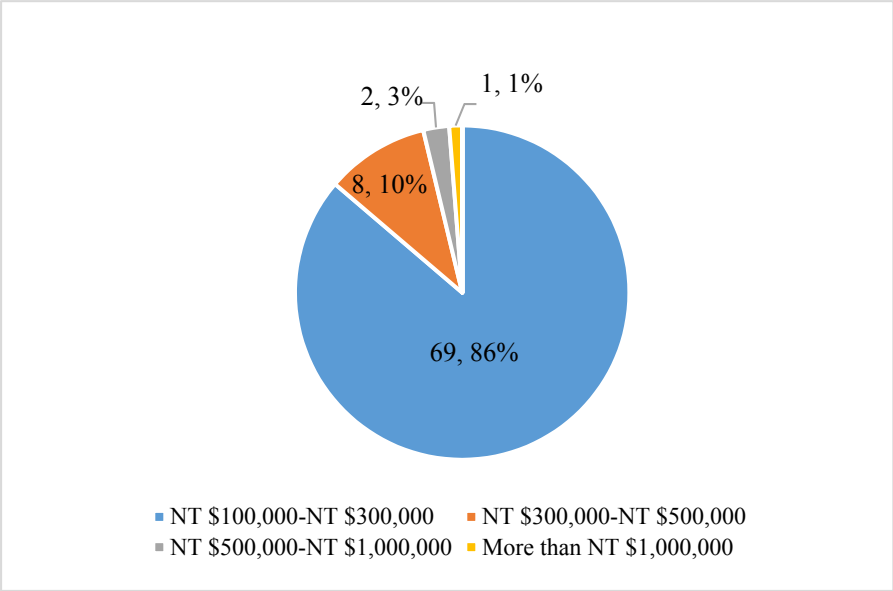
[21] New Taipei District Court, Taiwan. Simple No. 142 (2020) (A fine of NT $200,000) 臺灣新北地方法院109年度簡字第142號判決(罰鍰20萬)。

[22] Taichung District Court, Taiwan. Simple No. 66 (2020) 臺灣臺中地方法院109年度簡字第66號判決。

[23] See. E.g., MOHW AAC Decision No. 1090027130 (2020) 衛部法字第1090027130號訴願決定書 (The

staying at internet café for three days) and a maximum of 1,000,000 NTD (e.g. going to night pubs).[25] The distribution of fines in these cases can be expressed as follows:

Figure 10-2: The Distribution Ratio of Administrative Fine under Article 15(2) of the Special COVID-19 Act among AAC Cases



(Source: Compiled by the authors.)

Japanese came to Taiwan on business but violate the epidemic prevention regulations/A fine of NT $100,000) (日本人來台出差違反防疫規定/罰鍰10萬), https://db-lawbank-com-tw.nthulib-oc.nthu.edu.tw/FINT/FINTQRY04.aspx?id=E%2cFE350236&ro=18&dty=E&ty=Z000&tn=%E8%A8%B4%E9%A1%98%E6%B1%BA%E5%AE%9A%E6%9B%B8&kw=%e5%9a%b4%e9%87%8d%e7%89%b9%e6%ae%8a%e5%82%b3%e6%9f%93%e6%80%a7%e8%82%ba%e7%82%8e%e9%98%b2%e6%b2%bb%e5%8f%8a%e7%b4%93%e5%9b%b0%e6%8c%af%e8%88%88%e7%89%b9%e5%88%a5%e6%a2%9d%e4%be%8b%e7%ac%ac15%e6%a2%9d&opinion=&argument=&judgesort=&filter=。

[24] MOHW AAC Decision No. 1090021785 (2020) 衛部法字第1090021785號訴願決定書 (Staying in the Internet cafe for 3 days/A fine of NT $500,000) (在網咖窩3天/50萬), https://db-lawbank-com-tw.nthulib-oc.nthu.edu.tw/FINT/FINTQRY04.aspx?id=E%2cFE346778&ro=62&dty=E&ty=Z000&tn=%E8%A8%B4%E9%A1%98%E6%B1%BA%E5%AE%9A%E6%9B%B8&kw=%e5%9a%b4%e9%87%8d%e7%89%b9%e6%ae%8a%e5%82%b3%e6%9f%93%e6%80%a7%e8%82%ba%e7%82%8e%e9%98%b2%e6%b2%bb%e5%8f%8a%e7%b4%93%e5%9b%b0%e6%8c%af%e8%88%88%e7%89%b9%e5%88%a5%e6%a2%9d%e4%be%8b%e7%ac%ac15%e6%a2%9d&opinion=&argument=&judgesort=&filter=。

[25] MOHW AAC Decision No. 1090126500 (2020) 衛部法字第1090126500號訴願決定書 (Going to the nightclub/A fine of NT $1,000,000) (去夜店/100萬), https://db-lawbank-com-tw.nthulib-oc.nthu.edu.tw/FINT/FINTQRY04.aspx?id=E%2cFE347555&ro=64&dty=E&ty=Z000&tn=%E8%A8%B4%E9%A1%98%E6%B1%BA%E5%AE%9A%E6%9B%B8&kw=%e5%9a%b4%e9%87%8d%e7%89%b9%e6%ae%8a%e5%82%b3%e6%9f%93%e6%80%a7%e8%82%ba%e7%82%8e%e9%98%b2%e6%b2%bb%e5%8f%8a%e7%b4%93%e5%9b%b0%e6%8c%af%e8%88%88%e7%89%b9%e5%88%a5%e6%a2%9d%e4%be%8b%e7%ac%ac15%e6%a2%9d&opinion=&argument=&judgesort=&filter=。

Although the organizational structure of the Administrative Appealing Committee is subject to the central or local government, the AAC could play a role in rectifying the enforcement of administrative decisions. For instance, *three cases* have been intervened and revoked by the AAC of the local government. In the first case, the plaintiff was an Indonesian citizen and a migrant worker in Taiwan. Thus, he could only understand Indonesian and not English or Chinese. The AAC concluded that the fine should be revoked due to the lack of clear explanation by the competent authority on the details of the quarantine requirement.[26]

In the second case, the plaintiff violated the quarantine requirement by going out to the cremation field for a funeral. The disputed point is whether the relatives of the plaintiff ask questions about going to the cremation field. There is a conflict between the plaintiff and government staff. The government staff insisted on plaintiff's relatives did not ask this question, while the plaintiff's relatives claimed they raised such questions during the government's staff's visit. However, the AAC ruled that the government failed to consider evidence in imposing a fine, thus revoking this decision.[27]

In the third case, the plaintiff arrived in Taiwan on 18 March 2020 but did not receive the Home Quarantine Notification or the detailed requirements of the home quarantine immediately and on 20 March. The plaintiff went out on 19 March and received a mobile text warning of violation of home quarantine requirements. The AAC is of the opinion that despite the 14 days quarantine requirement, the plaintiff is unable to know the details without the notification. Thus, AAC revoked this decision.

3.3 Administrative Fine Relating to Leaves and Expropriation (16(1)) and 16(2)

According to Article 3(3) of the Special COVID-19 Act, the authorities (agencies), enterprises, schools, legal entities, and organisations shall provide disease prevention isolation ***leave*** during the isolation or quarantine period for individuals assigned to home isolation, home quarantine, group isolation, or group quarantine and may not treat them as absent without reason, forcing them to take personal or other leaves, deduct attendance bonuses, dismiss them, or impose other unfavourable penalties. The same applies to family members who take leave to care for isolated or quarantined individuals. If the authorities (agencies), enterprises, schools, legal entities, and organisations failed to do so, an administrative fine of no less than 50,000 NTD and up to 1 million NTD may be imposed under Article 16(1) of the Special COVID-19 Act. However, no cases have occurred in AC and AAC by September 2021.

According to Article 5(1) of the Special COVID-19 Act, to produce disease prevention

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[26] MOHW AAC Decision No. 1090126500 衛部法字第1093160310號訴願決定書(Violating the rights of foreign workers) (外籍勞工權益受損), https://db-lawbank-com-tw.nthulib-oc.nthu.edu.tw/FINT/FINTQRY04.aspx?id=E%2cFE351742&ro=5&dty=E&ty=Z000&tn=%E8%A8%B4%E9%A1%98%E6%B1%BA%E5%AE%9A%E6%9B%B8&kw=%e5%9a%b4%e9%87%8d%e7%89%b9%e6%ae%8a%e5%82%b3%e6%9f%93%e6%80%a7%e8%82%ba%e7%82%8e%e9%98%b2%e6%b2%bb%e5%8f%8a%e7%b4%93%e5%9b%b0%e6%8c%af%e8%88%88%e7%89%b9%e5%88%a5%e6%a2%9d%e4%be%8b%e7%ac%ac%e5%8d%81%e4%ba%94%e6%a2%9d&opinion=&argument=&judgesort=&filter。

[27] MOHW AAC Decision No. 1093160310 衛部法字第1093160310號訴願決定書。

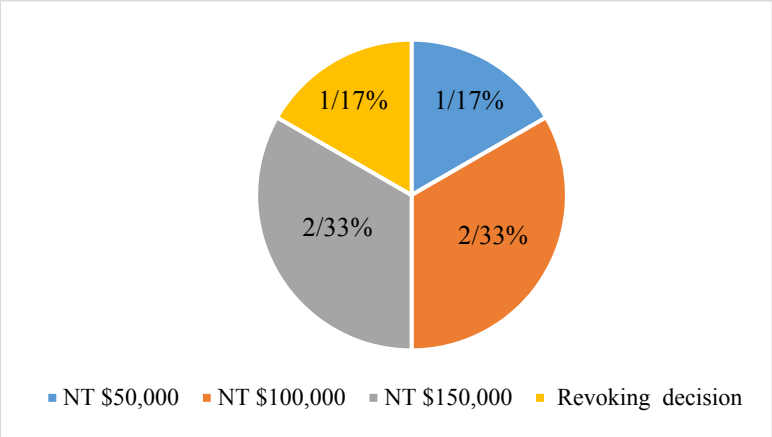
supplies, where necessary, government authorities at all levels may, based on instructions of the Commander of the Central Epidemic Command Center, have the power to expropriate or requisition required production equipment and raw materials and provide appropriate compensation. For those who refuse, evade, or obstruct the expropriation or requisition conducted by a government authority, an administrative fine of no less than 50,000 NTD and up to one million NTD may be imposed a fine under Article 16(1) of the Special COVID-19 Act. However, no cases have occurred in AC and AAC by September 2021.

3.4 Violation of General Clause (16(3)): Violation of Suspended Business Order

Article 7 of the Special COVID-19 Act provides a general clause for the government to adopt a wide perspective to tackle COVID-19 by providing that 'The Commander of the Central Epidemic Command Center may, for disease prevention and control requirements, implement necessary response actions or measures'. A fine of 50,000 NTD and up to one million NTD would be imposed for violating this clause in Article 16(3) of the Special COVID-19.

Theoretically, all the regulations noted above could fall into the scope of this general clause. However, only several measures have been used this 'residual' clause as a legal basis. For instance, the suspended business order was issued by this clause and led to six AAC cases. Despite the possibility of a maximum fine of one million, the administrative agency seemed to be mild in fining the violators.

Figure 10-3: The Distribution Ratio of Administrative Fine under the Article 16(3) of the Special COVID-19 Act



(Source: Compiled by the authors.)

However, of these six cases, one was revoked by the AAC. The AAC revoked this decision for fining the wrong person. The location is a teppanyaki restaurant in the daytime, and the location owner rents the place to the tenant to operate as a night club. Therefore, the real violator is the tenant instead of the landlord.[28]

[28] MOHW AAC Decision No. 1093160286 衛部法字第1093160286號訴願決定書。

4. Conclusion

There are *three main types of fundamental rights* that are affected by the introduction of higher administrative fines and criminal charges under the Special COVID-19 Act. These include the freedom of business (Article 12, 16(3)), freedom of expression (Article 14), and freedom of movement (Article 13, 15(1), 15(2)). There are more cases related to fake news than the rest.

Comparing criminal and administrative law cases, judicial activism cannot be seen in both criminal and administrative cases. Among administrative cases, the administrative courts only intervened in the decisions of the administrative branch under exceptional circumstances, which is similar to criminal law cases. The court became active in revoking fake news charges before the COVID-19; however, this is no longer applicable after the COVID-19 outbreak. Only 2/49 cases were considered not guilty by the court.

However, if we consider the 'judicial sector' broadly, ie., prosecutor as a semi-judicial function, we can draw a slightly different conclusion. The prosecutor has been very keen to use non-prosecution ruling to limit the application of criminal charges against freedom of speech and freedom of business under Articles 12 and 14 of the Special COVID-19 Act. The prosecutors play an active role in safeguarding the freedom of citizens. There is an administrative fine for violation of measures related to the freedom of movement. AAC remains unable to play a role like a prosecutor in correcting the possible overreactions in certain cases.

Therefore, can we draw the conclusion that the court plays no role in safeguarding fundamental rights during the COVID-19 time? The administrative fines and criminal charges decided by the courts clarified that there seemed to be a trend of '*high ratio of relatively low penalty*'. As most penalty increases followed the existing CDC Act and was introduced by the Special COVID-19 Act, it remains unclear whether the court is of the opinion that there is no need to have a larger fine. Therefore, the court adopts a very mild approach to applying both administrative fines and criminal penalties in individual cases.

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11. The Role of Courts in COVID-19 Pandemic in Vietnam

Linh Giang Nguyen & The Hung Dinh

1. Introduction

Starting from January 23, 2020, Vietnam had the first case of COVID-19 infection. Vietnam was considered a successful country in the early stage of fighting against COVID-19 in 2020 (Our World in Data, 2020; UN News, 2020; Dabla-Noriris & Zang, 2021) through the policy of social distancing, bringing F0[1] to the hospital for free treatment and tracing, isolating F1 and F2.[2] However, Vietnam's old anti-epidemic policy is no longer effective in the current period. The community infections in Vietnam in the first two months of 2022 have increased very high, with thousands of cases per day (WHO, 2022). The Vietnamese Government had to apply more robust measures to realize the dual goal of preventing the epidemic and developing the economy simultaneously.

Along with that, strict administrative and criminal penalties will be applied to those who violate the State's epidemic prevention rules. Therefore, many law violations have been handled in current times, such as violating epidemic prevention rules, combating against public officials, and taking advantage of the epidemic situation to cheat and obtain illicit profits in business. In this process, the people's courts at all levels in Vietnam play an essential role.

This chapter will analyze, interpret, and evaluate laws, including criminal and administrative laws punishing crimes and violations related to COVID-19 prevention.

2. Administrative Fines and Criminal Penalties for Violations of Epidemic Prevention Measures

2.1 Administrative Violations and Fines

Measures to handle administrative violations in COVID-19 prevention in Vietnam are complicated, most cited under the Law on Handling of Administrative Violations 2012 (amended and supplemented in 2020) and some sub-law documents (Decrees issued by the Government).

Before the COVID-19 pandemic, penalties for administrative violations in the medical sector of Vietnam were still applied following the Law on Handling of administrative violations of 2012; Law on Prevention and control of infectious diseases of 2007, and Decree 176/2013/ND-CP on November 14, 2013 of the Vietnamese Government on prescribing penalties for administrative violations in the medical sector in 2013. According to these documents, people who violate regulations on disease prevention and control, such as violating regulations on the medical declaration, medical isolation; entering and leaving epidemic areas, violating epidemic control measures; gathering of a large number of people

[1] F0 is a COVID-19 infected person.

[2] F1 are people in close contact with F0; F2 are people in close contact with F1.

at epidemic areas, are subject to administrative or criminal penalties, depending on the seriousness of the violation.

However, since the emergence of the COVID-19 pandemic at the beginning of 2020, it can be seen that these regulations need to be revised and concretized for this context. Therefore, the Vietnamese State has hastily issued new documents or amended previous documents to adjust disease prevention and control activities better. Accordingly, in 2020, the National Assembly has amended and supplemented the Law on Handling of Administrative Violations 2012 (Law No. 67/2020/QH14 on November 13, 2020 amendments and supplements to certain articles of Law on Handling of Administrative Violations); the Government has approved Decree 117/2020/ND-CP on September 28, 2020 on prescribing penalties for administrative violations in the medical sector that replaced the Decree 176/2013/NĐ-CP on November 14, 2013 of Vietnamese Government on prescribing penalties for administrative violations in the medical sector. The Decree 117/2020/ND-CP has covered all issues of disease prevention in the period of the COVID-19 pandemic, such as Violations against regulations on the usage of vaccines and biologicals, violations against prevention of transmission of infectious diseases in health facilities, violations against regulations on medical isolation and coercive medical isolation, violations against regulations on epidemic management measures, violations against regulations on border health quarantine, etc.

Furthermore, to combat other violations in the context of the epidemic, such as the act of dumping face masks in public places, reporting false information about the epidemic, the Government of Vietnam has amended and supplemented several legal documents such as: Decree 55/2021/ND-CP on May 24, 2021 on prescribing amendments and supplements to several articles of Decree 155/2016 ND-CP on November 18, 2016 of Vietnamese Government on Penalties for Administrative violations against Environmental Protection Regulations; Decree 15/2020/ND-CP on February 3, 2020 of Vietnamese Government on Penalties for Administrative violations against regulations on postal services, telecommunications, radio frequencies information technology and electronic transactions that replaced the Decree 174/2013/ND-CP on November 13, 2013 on Penalties for Administrative violations against regulations on post and telecommunications, information technology and radiofrequency.

Moreover, due to the urgency of the COVID-19 pandemic, the Prime Minister has repeatedly issued Directives on the prevention of the COVID-19 pandemic, such as Directive No 15/CT-TTg of the Prime Minister on climax stage of COVID-19 control effort on March 27, 2020; Directive No 16/CT-TTg of the Prime Minister on Implementation of urgent measures for prevention and control of COVID-19 on March 31, 2020; Directive No 19/CT-TTg of the Prime Minister on a new stage of prevention and control of COVID-19 on April 24, 2020. According to these directives, the Provincial People's Committees are responsible for directing and implementing measures to prevent the COVID-19 pandemic in their localities.

According to the new Decrees issued during the COVID-19 pandemic period, such as Decree 117/2020/ND-CP, Decree 15/2020/ND-CP, and Decree 55/2021/ND-CP, administrative violations related to failing to comply with epidemic prevention measures include:

Table 11-1: Administrative Fines for Violations of Epidemic Prevention Measures

	Related Violations	Fine (from Low to High)	Legal Grounds
1	Failing to wear a face mask, failing to keep a safe distance in public places	1 to 3 million VND (USD 45 – USD 130)	Clause 1, Article 12, Decree 117/2020/ND-CP
2	Disposing of used face masks in public places	1 to 2 million VND (USD 45 – USD 90)	Clause 18, Article 1, Decree 55/2021/ND-CP
3	Concealing, failing to report, or delaying the reporting on the status of infection in time of COVID-19 of oneself or another person	10 to 20 million VND (USD 454 – USD 909)	Clause 3, Article 7, Decree 117/2020/ND-CP
4	Failing to carry out the medical tests at the request of a competent medical authority	1 to 3 million VND (USD 45 – USD 130)	Clause 2, Article 7, Decree 117/2020/ND-CP
5	Refusing or evading the implementation of a competent authority's decision on medical isolation or coercive medical isolation	15 to 20 million VND (USD 682 – USD 909)	Clause 2, Article 11, Decree 117/2020/ND-CP
6	Failing to implement decisions on the temporary closure of public dining establishments that may cause the spread of the epidemic in an epidemic zone;	10 to 20 million VND (USD 454 – USD 909); 20 to 40 million VND (USD 909 – USD 1,818) for the organization	Clause 3, Article 12, Decree 117/2020/ND-CP
7	Failing to implement decisions on health inspection, surveillance and control before entering or leaving epidemic areas	20 to 30 million VND (USD 909 – USD 1,363)	Clause 4, Article 12, Decree 117/2020/ND-CP
8	Failing to implement a decision on prohibition of gatherings in an area where the state of epidemic emergency is declared	30 to 40 million VND (USD 1,363 – USD 1,818); 60 to 80 million VND (USD 2,726 – USD 3,636) for the organization	Clause 5, Article 12, Decree 117/2020/ND-CP
9	Failing to organize the dissemination of information and education about prevention and control of epidemic at the request of competent authorities	1 to 25 million VND (USD 45 – USD 1,136) for individuals; 2 to 50 million VND (USD 90 – USD 2,272) for the organizations	Article 5, Decree 117/2020/ND-CP
10	Taking advantage of epidemics for imposing irrational prices of drugs, medical devices, pharmaceutical starting materials, and materials used in the manufacturing of medical devices serving prevention and management of epidemics	20 to 30 million VND (USD 909 – USD 1,363)	Clause 3, Article 14, Decree 117/2020/ND-CP

	Related Violations	Fine (from Low to High)	Legal Grounds
11	Failing to post prices or sell higher than posted prices for goods used for epidemic prevention and control	5 to 10 million VND (USD 227 – USD 454)	Clause 7, Article 12, Decree 109/2013/ND-CP on September 24, 2013 of Vietnamese Government on Penalties for Administrative violations against the Law on pricing fee management and invoicing
12	Posting/distributing false information about the COVID-19 pandemic	10 million to 15 million VND (USD 454 – USD 682) for individuals; 20 to 30 million VND for the organization (USD 909 – USD 1,363)	Article 99 and 101 Decree 15/2020/ND-CP
13	Obstructing authorized person performing official duties, preventing an epidemic	2 - 3 million VND (USD 91 – USD 130) for individuals; 4 to 6 million VND (USD 182 – USD 260) for the organization	Clause 2, Article 20, Decree 167/2013ND-CP on November 12, 2013 of Vietnamese Government on Sanction of Administrative violation in social security, order and safety, prevention and fighting of social evils, fire and domestic violence
14	Helping, harboring, concealing, facilitating foreigners to enter, stay or cross the border of Vietnam illegally	15 to 25 million VND (USD 682 – USD 1,136) for individuals; 30 to 50 million VND (USD 1,363 – USD 2,272) for the organization	Clause 5, Article 17, Decree 167/2013/ND-CP

(Source: Compiled by this authors.)

According to Law on Handling administrative violations of 2012, amended and supplemented in 2020, the main penalties for administrative violations during the COVID-19 pandemic are warning and fines. In addition, depending on the nature and seriousness of the violation, violating individuals or organizations may be subject to additional penalties and forced to remedial measures caused by administrative violations. The additional penalties are removal of business registration certificates, removal of practice certificates, suspend all or part of the operation of business establishments, confiscation evidence, and means related to administrative violations in the medical field (Art. 25, 26). At the same time, the authorities can also apply additional remedial measures such as Implementing measures to clean, disinfect, sterilize, and other measures to prevent and control infectious diseases; forcible or coercive medical isolation, medical examination, and treatment; publicly apologize to the person being discriminated against (Art. 28, 29, 31, 33, 34, 36, 37).

Thus, to ensure epidemic prevention, the system of sub-law documents in Vietnam has prescribed several coercive measures that restrict human rights, such as forced medical isolation at concentrated medical facilities, (Art. 49, Law on Prevention and Control of Infectious diseases in 2007; Art. 8, Decree 101/2010/ND-CP on September 30, 2010 of Vietnamese Government on Guidelines for the Law on Prevention and Control of Infectious

diseases in terms of implementation of isolation measures, enforced isolation measures and specific anti-epidemic measures during the epidemic period) quarantine epidemic areas, (Art. 49, Law on Prevention and Control of Infectious diseases in 2007; Art. 1, Decree 101/2010/ND-CP) restrict or banning traveling, all or some business activities. (Art. 52, 53, Law on Prevention and Control of Infectious diseases in 2007) This regulation is contrary to Clause 2, Article 14 of the Constitution of Vietnam on limiting fundamental rights as it stated that only laws could restrict fundamental rights. Meanwhile, the current restrictions on fundamental rights appear pretty frequently in Decrees of the Government of Vietnam – which are sub-law documents.

Several new regulations, developed in the Decrees issued from 2020, meet the disease prevention requirements. Some are the regulations related to not wearing masks in public places (Paragraph 1, Article 12, Decree 117/2020/ND-CP) or sharing fake news on social networks (Article 99 and 101 Decree 15/2020/ND-CP). The other is based on the old regulations related to preventing infectious diseases, but the fines have been increased many times. For example, the fine is from 2 to 3 times higher than the old one for acts of failing to inform, educate, disseminate information for employees about the epidemic; for concealing or failing to declare the medical status of oneself and others; for violating regulations on medical isolation; the fine is increased from 5 to 10 times for violating regulations on the application of epidemic prevention and control measures; the fine is six times higher than before for the act of disposing of used face masks in public places. Such increase in fines is justified because the previous fines were from 10 to 15 years ago, so there was also price slippage, partly due to epidemic prevention and control requirements. Raising the fine is considered a measure to make people aware of epidemic prevention.

In addition to the administrative penalties mentioned above, the authorities in some localities have taken several coercive measures against those who refuse medical isolation or testing. For example, there was a case of a woman in Bac Giang, who was an F1 and forcibly taken by the local epidemic prevention force to a concentrated isolation area (Van Truong, 2021). An F1 woman in Nghe An was also forced to go into medical isolation by the authority (Doan, 2021). Ward officials also broke an apartment lock, forcing a woman in Binh Duong to take a COVID-19 test (Ba Son, 2021). Afterward, she was fined 2 million VND (about 90 USD) for "failing to perform tests at the request of competent health agencies during the infectious disease surveillance" according to Point a, Clause 2, Article 7 Decree 117/2020/ND-CP. A man in Ca Mau was forced to concentrate on medical isolation when refusing to take a COVID-19 test (Van Dum, 2021). In a commune in Thanh Hoa province, the local authority locked the gates of 278 F2 households to isolate them at home for two weeks (Le Hoang, 2021). The above actions of the Local Government have met with mixed public opinion and are considered stringent measures, violating human rights and even affecting the people's dignity.

There is a legal basis for forced isolation as prescribed in Clause 3, Article 3 of Decree 117/2020. Accordingly, in addition to the primary and additional penalties, the authorized bodies may apply remedial measures, including coercive medical isolation, medical examination, and treatment. At the same time, public opinion on social networks also seems to agree with the authorities' approach in forcing people to go to isolation and considers it a necessary measure to protect the public order and health. However, the practice of forced

testing is a controversial issue in Vietnam. Some say that the provisions of Clause 3, Article 3 of Decree 117/2020 on "coercive medical isolation, medical examination, and treatment" also included the legal basis for coercive testing. Those who do not support this action claim that there is no clear legal basis for forced testing, and the authorities can only impose a fine of between 1 million and 3 million VND for the act of failing to get tested. So far, there is no official interpretation for this regulation. However, under the pressure of public opinion, the leader of Thuan An city, Binh Duong province, publicly apologized to the woman forced to get tested (VN News, 2021).

Recently, one of the controversial issues in Vietnam has been resolving conflicts on fundamental rights. Is it possible to infringe on one's rights for the health and safety of the community? Even if there is a legal basis for forced isolation, can the local authorities break locks, break doors, and escort people to isolation areas? Can these acts be considered a home infringement or illegal arrest, detention, or imprisonment of a person according to the Penal Code? The right to housing and bodily integrity are rights recognized and protected by the Constitution. In addition, the enforcement of regulations on forced isolation is a provision in the sub-law documents, while the right to housing and bodily integrity are constitutional rights, protected by the Constitution; therefore, the use of "strong" coercive measures such as breaking doors, breaking locks... seems to have crossed the line of "proportionality" and "justifiable purpose" in limiting human rights, which is a topic still being debated in many parts of the world.

For locking the door of 278 households in Thanh Hoa, although it has been justified that all these households have agreed and the public opinion concurs that it is for disease prevention, this is still an act without an appropriate legal basis.

2.2 Criminal Violations and Penalties

Currently, in Vietnam, the provisions on crime and punishment are regulated only in the Penal Code, which was newly approved in 2015. According to the principle of Nulla poena sine lege; Nullum crimen, nulla poena sine praevia lege poenali, "Principle of legality", the COVID-19 pandemic in Vietnam can be viewed from the following perspectives: political, economic, social, ethical, and legal. From a legal perspective, it can be seen that the COVID-19 pandemic has increased law violations in society (Report of the Minister of Public Security 2021), which include the status of crime. The following acts are considered as crimes related to the COVID-19 pandemic:

Table 11-2: Criminal Penalties for Violations of Epidemic Prevention Measures

	Related Violations	Saction	Legal Grounds
1	Intentionally spreading dangerous infectious disease to other people	Fine from 50 million to 200 million VND (USD 2,272 – USD 9,088), imprisonment for 1 year up to 12 years	Article 240 of the Penal Code
2	Escaping from isolation facilities; Failing to comply with isolation regulations; Refusing or evading the application of isolation, coercive isolation measures thereby spreading infectious disease to other people	Fine from 50 million to 200 million VND (USD 2,272 – USD 9,088), Imprisonment up to 12 years	Article 240 of the Penal Code

	Related Violations	Saction	Legal Grounds
3	Failing to make medical declarations, making incomplete or false declarations thereby spreading infectious disease to other people	Fine from 50 million to 200 million VND (USD 2,272 – USD 9,088), Imprisonment up to 12 years	Article 240 of the Penal Code
4	Offences against regulations of law on immigration; illegal stay in Vietnam; brokering illegal entry	Fine from 5 million to 50 million (USD 227 – USD 2,272), Imprisonment for 6 month up to 15 years	Article 347, 348 of the Penal Code
5	Violations against regulations of law on occupational safety, occupational hygiene and safety in crowded areas: Owner of a business establishment, manager of a service business establishment (such as a bar, dance club, karaoke, massage service, beauty salon...) continue to conduct business or service after a temporarily suspension decision to prevent the COVID-19 pandemic has been enacted, that cause damage of 100 million VND or more due to the incurring costs for disease prevention and control	Fine from 20 million to 100 million VND (USD 909 – USD 4,545), imprisonment for 3 months up to 12 years	Article 295 of the Penal Code
6	Illegal provision or use of information on computer networks or telecommunications networks causing confusion in public opinion and affecting the State's epidemic prevention policy	Fine from 30 million to 1 billion VND (USD 1,363 – USD 45,450), imprisonment for 6 months up to 7 years	Article 288 of the Penal Code
7	Insulting another person, such as illegally sharing personal information and secrets, seriously offending the reputation and dignity of medical staff, people who participate in the prevention and control of the COVID-19 pandemic, those infected or suspected to have been infected with COVID-19	Fine from 10 million to 30 million VND (USD 454 – USD 1,363), imprisonment for 3 months up to 5 years	Article 155 of the Penal Code
8	Abuse of trust to appropriate property: Anyone who takes advantage of the COVID-19 pandemic to give false information about the use of drugs and medical supplies on disease prevention and control in order to appropriate other's property	Imprisonment for 6 months to 20 years or for life. All or part of the property gained from the act may be confiscated	Article 175 of the Penal Code
9	Hoarding: Anyone who takes advantage of the scarcity or fakes scarcity during the COVID-19 pandemic to buy in large quantities and stockpile goods from a price stabilization program or well-priced by the State in order to gain illegal profit	Fine from 30 million to 5 billion VND (USD 1,363 – USD 227,250) or imprisonment up to 15 years	Article 196 of the Penal Code
10	Resisting law enforcement officers in the performance of their official duties: Anyone who uses violence or threat of violence or other methods to obstruct law enforcement officers from performing their official duties in the prevention and control of the COVID-19 pandemic	Imprisonment up to 7 years	Article 330 of the Penal Code
11	Negligence that results in serious consequences: anyone who negligently fails to perform or correctly perform their duties in implementing measures to prevent and control the epidemic	imprisonment for 6 months up to 12 years	Article 360 of the Penal Code

(Source: Compiled by this authors.)

The Vietnamese Penal Code stipulates that certain exceptional circumstances will increase the nature and danger of the crime compared to the normal situation, such as: Taking advantage of war, State of emergency, natural disaster, epidemic, or other tragic circumstances of society to commit crimes (Article 52 of the Penal Code). Therefore, aggravating factors must be stipulated in order to match these circumstances. The COVID-19 epidemic is considered a unique circumstance to apply these aggravating factors. Thus, the crimes mentioned above are punished more severely than ordinary circumstances.

It can be seen that, on a national scale, because there is no unified understanding and uniform application of the law, even though the same situation may occur, the authorities in each locality will act differently. Due to the complicated development of the pandemic, fears about the spread of the disease, and loopholes in the law, these factors have created extreme acts, arbitrary law enforcement, and abuse of power. Unusual occurrences such as natural disasters or epidemics can lead to restrictions on human rights. The Constitution of Vietnam also recognizes that fundamental rights may also be restricted for "public health" reasons. This principle is a common standard that most Constitutions and laws of countries worldwide recognize.

Nevertheless, how to limit these rights? What is the degree of the limitation? When can public authorities decide to limit human rights? These are still gaps in current Vietnamese law.

3. Operation of the Courts during COVID-19 Pandemic

The court system of Vietnam is organized under the combination of two principles: by handling level and by territory. The Vietnamese court system has the Supreme People's Court, the People's High courts, the Provincial People's courts, the Districts People's courts, and the Military courts' system.

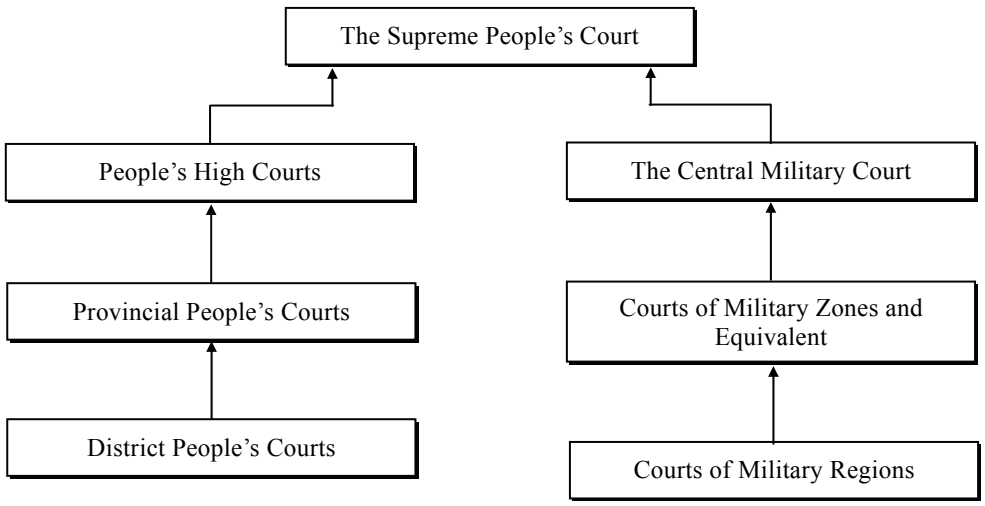

Figure 11-1: The Judiciary System of Vietnam

(Source: Compiled by this authors.)

The highest judicial body is the Supreme People's Court. The High People's Courts are located in three regions of the territory: Hanoi, Da Nang, and Ho Chi Minh City. Every province has its own Provincial People Court and every district has its own District People's Court.

The Constitution of Vietnam stipulates the judgment principles: ensuring judicial independence and adversarial principle, publicity, ensuring the right to defend, ensuring the impartiality of those who conduct procedure... The handling of the cases is based on the procedure laws, including three procedure laws: civil procedure, criminal procedure, and administrative procedure.

The trial of cases related to COVID-19, according to the Chief Justice of the Supreme Court of Vietnam, is contributing to the prevention of the epidemic by issuing judgments and applying punishments with the obstructing and opposing acts (Ta, 2021).

3.1 The Role of the Supreme Court in the Period of COVID-19

According to the Law on the Organization of People's Courts in 2014, the Supreme Court has the role in guiding the lower courts to apply the law consistently in the trial process (Article 20). During COVID-19, the Supreme Court has exercised this right by issuing Official Letters guiding the trial of COVID-19 prevention and control cases (Official Letter No. 45/TANDTC-PC on March 30, 2020 to guide the lower courts to apply the Penal Code on cases related to COVID-19; Official Letter No. 109/TANDTC-PC on August 6, 2020 to guide the lower courts on organizing trial related to COVID-19 prevention). For example, to apply the crime of illegal provision or use of information on computer networks or telecommunications networks as prescribed in Article 288 of the Penal Code, the Official Letter 45/TANDTC-PC guides: Anyone who have posted fake information or misinformation about the situation of the COVID-19 epidemic which causes wrong public opinion on the computer, internet or telecommunication networks.

In the context that Vietnamese judges thoroughly apply the principle of only compliance with the law, especially the Penal Code (Article 9 of Law on the Organization of People's Courts). At the same time, jurisprudence has not yet developed, and these guidelines are considered necessary and meaningful for judges in the trial of criminal cases related to COVID-19.

However, not all of the Supreme Court's guidelines have been approved by experts. For example, some opinions suggested that the Supreme Court's guidance on the crime of spreading epidemics was ambiguous, leading to difficulties in applying this crime in practice. According to this guidance, people who are suspected of having COVID-19 or returned from an epidemic area have been quarantined but have escaped from the quarantine place, failed to comply with the regulations on quarantine, evaded to quarantine, did not declare medical records, or made false declarations, and leading the spread of COVID-19 epidemic to others will be prosecuted for the crime of "spreading the disease to others." Nevertheless, what is "suspected disease caused by COVID-19"? Who doubts? Patient or government agency? What is the epidemic area? How was the notice notified? (Ngo, 2021). Such equivocal guidance leads to inconsistent application of the law across courts.

One activity of the Supreme Court in adjudicating cases related to COVID-19 that is

considered positive from the point of view of the rule of law is to ensure the right to a speedy trial through the Supreme Court's direction to the lower courts in applying summary procedures for these cases. On that basis, many cases were quickly tried and ensured criminal procedure principles, including the principle of publicity, ensuring the right to an attorney, and litigation.

3.2 Adjudicating Cases Related to Epidemic Prevention

From the beginning of the epidemic in Vietnam to October 28, 2021, the Vietnamese courts have handled 144 criminal cases with 187 defendants related to the prevention and control of the COVID-19 epidemic; judged 136 cases with 177 defendants (Report of the President of the People's Supreme Court 2021). Both statistics and the judiciary agencies' opinion show an increase in COVID-19 related crimes while Vietnam took epidemic prevention and control measures.

Because the criminal procedure of Vietnam follows the inquisitorial model, the Court is only the last stage of the procedure. This model devises the procedure into stages, each of which is in charge by a system of agencies: charge under the investigation agency, prosecution by the People's Procuracy, and the court judge. The feature of this model is that the judgment outcome is much dependent on previous investigation processes conducted by investigating agency. The situation where the Court is not upholding the prosecution given by the Procuracy is not shared. According to our research on the COVID-19 related crimes, there is no case in which the Court disproves prosecution.

3.2.1 The Criminal Cases of Spreading Epidemic

The Ho Chi Minh City Police handled the first criminal case of a spreading epidemic being prosecuted in Vietnam on December 3, 2020 (Tuyet, 2021). The accused is an employee of Vietnam Airlines. He flew with the crew from Japan to Vietnam on flight VN 5301 of Vietnam Airlines. When arriving at the airport, he was tested for COVID-19 and was isolated in a concentrated isolation area of Vietnam Airlines. After two negative tests, he was released from the concentrated isolation area and required local isolation until the end of November 28, 2020. During this time, he did not comply with the home isolation requirement but deliberately went out for breakfast, went to school, and contacted several people. However, in this period, his third test was positive. The authorities immediately traced and isolated those in close contact with him. According to the indictment, he was accused of adversely affecting the lives of more than 2,000 people in Ho Chi Minh City, including 861 people in concentrated isolation areas and 1,400 people in home isolation. According to the Ho Chi Minh City Department of Health, the damage caused by this spreading of COVID-19 to the community was nearly VND 2.8 billion, including the cost of testing F1, F2 cases. Besides, there are also costs for conducting medical isolation for the cases in contact with positive patients related to this criminal case... Total material damage was more than VND 4.475 billion. The Court's judgment held that this was a severe behavior, dangerous to society, has infringed the safety of life and health of community and society, so it was required to be stringently handled for the educational purpose to the accused and as a general deterrent and prevention. The Court pronounced 2-year in prison sentence on the accused but granted a suspended sentence.

Following this case, many other cases were prosecuted and judged for spreading the

epidemic. The latest case was prosecuted on November 7, 2021 (Ha, 2021) related to a karaoke bar in Bac Giang (a Northern province of Vietnam) where the COVID-19 epidemic broke out in industrial parks with many workers and thousands of positive cases in early 2021. The owner of this karaoke bar violated the Government's ban on mass gatherings during the epidemic, resulting in 20 positive cases.

The case with the most severe sentence for spreading disease was judged by the Court of Ca Mau (a Southernmost province of Vietnam) (Nhat, 2021). The 28-year-old defendant is a worker at a wholesale market. He traveled from the epidemic area to the locality and was infected with COVID-19, but did not comply with the regulations on home isolation, contacted many people, dishonestly declared to the health authorities, causing 19 infected cases, of which one was died. The Court gave a 5-year prison sentence to the defendant. This decision is the most severe sentence in Vietnam among the judgments for spreading the epidemic.

Another case was about a religious organization called the Renaissance Missionary Church. This religious organization was alleged for spreading epidemic when performing religious rituals; there were more than 200 COVID-19 infected cases related to this religious organization and thousands of F1 cases in Ho Chi Minh City. However, this case has not yet been prosecuted.

Given the COVID-19 outbreak, the criminal cases of spreading epidemic under Article 240 of the Vietnamese Criminal Code, which have been prosecuted, have increased dramatically compared with before the pandemic. However, according to our statistics for more than 100 epidemic-related cases that were prosecuted and judged, the number of trial cases related to the crime of spreading epidemic are 21 cases in more than 1 year, accounting for 21% – a rate is not high in comparison with other kinds of crime.

3.2.2 The Criminal Cases of Act Against Officers in Performing Epidemic Prevention

Related to epidemic prevention, resisting law enforcement officers in their duties is another type of crime that accounts for many prosecuted cases. According to our statistics, of 120 COVID-19 related trial cases, up to 40 were tried for such crime. Specifically, it is an act against officers in performing epidemic prevention as prescribed by authorities at all levels.

In their official duties, resisting law enforcement officers are stipulated in Article 330 of the current Vietnam Penal Code. This crime is described as any person who uses violence, the threat of violence, or otherwise obstructs law enforcement officers performing their official duties or forcing them to commit illegal acts. The penalty for this crime can be up to 7 years in prison. Regarding COVID-19 prevention and control, acts against law enforcement officers in the performance of their official duties are demonstrated by acts of obstructing or resisting the inspection, examination, and control of law enforcement officers in implementing regulations on prevention and control against the COVID-19 epidemic. When the epidemic broke out in many places, the authorities carried out many measures to combat the epidemic, such as blockade, medical isolation, and SARS-CoV-2 virus testing in areas with high numbers of confirmed cases. Because of the difficulty of traveling, many people had a conflict with the force in charge of epidemic prevention and control, so they

committed crimes against law enforcement officers performing duties.

The most common acts against law enforcement officers in the performance of their official duties are failing to comply with the Government's blockade regulations by passing traffic checkpoints or controlling epidemics on the road, deliberately running away when facing a stop signal of vehicles (Da Nang Police, 2021) opposing functional forces by force or insult, curse, push to obstruct their performance of duties (Le Sen, 2021).

In addition to the above two crimes during the epidemic prevention and control period, the Court in Vietnam also strictly handles other cases related to the COVID-19 epidemic, such as: taking advantage of the epidemic to obtain property by defrauding, putting on fake internet information to confuse public opinion or smear and distort the Government's anti-epidemic policy (Nguyen, 2021).

3.3 Applying the Simplified Procedures to the Violations of Epidemic Prevention Rules

With the complicated development of the COVID-19 epidemic, many criminal cases related to violations of epidemic prevention and control measures were quickly investigated, prosecuted, and tried. There are many cases in which the accused has been brought to trial within five days (Tran, 2021).

The summary procedure has been regulated since the 2003 Criminal Procedure Code and then re-stipulated in Article 456 of the 2015 Criminal Procedure Code. This regulation is a particular proceeding to investigate quickly, prosecute, and adjudicate cases of less severe and unmistakable evidence. The offender is caught red-handed, or the offender confesses his/her crime. The offender has fixed records and residence.

In the COVID-19 epidemic, social distancing, restrictions on mass gatherings, many cases had to be prolonged, and several legal activities faced obstacles. The summary trial of simple cases has saved time and money for government agencies. Within the crimes related to COVID-19, as mentioned above, cases related to the spread of disease, fighting against law enforcement officers in the performance of their official duties, or fraudulently trading in anti-epidemic goods are simple crimes with precise shreds of evidence, so the application of the summary procedure is appropriate and does not violate the procedural order. In addition, in many lawyers' opinions, applying this summary procedure will help the cases be quickly resolved and ensure the deterrence of the law in the context of a complicated epidemic (Tran, 2021). The summary judgment also supports creating consensus in society, improves people's confidence in the State's legal policies, and brings the law to life as quickly as possible.

It can be seen that, during the current epidemic, the application of summary judgment not only promotes the advantage of ensuring timeliness and urgency but also significantly reduces the workload for the State agencies, saving time and money.

3.4 Pilot Online Trial

During the epidemic period from February 2020 to the present, many cases were backlogged, and the courts could not conduct trials during the period of social distancing due to the epidemic. Meanwhile, the number of new cases regularly rises, leading to a backlog and overload of many courts. The number of investigated, prosecuted, and tried

criminal cases each year in Vietnam reaches hundreds of thousands of cases, causing pressure on ensuring the time for investigation, detention, trial, and guaranteeing the lawful rights and interests of the accused. Due to the prolonged epidemic, significant criminal cases have had to be adjourned 4-5 times and are likely to be delayed for a long time (Hoang, 2021). Faced with that fact, the Supreme People's Court has drafted the regulation on online adjudication and has piloted at the People's Court of Thu Duc, Ho Chi Minh City.

According to this draft, the trial will still be held at the Court with the participants being the trial panel, representatives of the Procuracy and lawyers, and the defendant in temporary detention will not come to the Court but will be able to sit in the detention room to attend the trial. The online Court only judges first instance cases for less severe or grave crimes with clear evidence. The Court also only tries appellate cases where the defendant is found guilty of less serious crimes at the first instance session or severe and grave crimes. The defendant requests a reduction of the penalty, or the involved parties request an increase in compensation. Civil, administrative, marriage, and family cases will only be tried with simple circumstances, clear legal relations, and sufficient evidence. Cases with grave offenses will not be tried online. Appellate cases where the defendant complains or the Procuracy appeals for consideration and returns the case files and requests for clarification of details are also not adjudicated online. Civil, marriage, and family cases in which the litigant or property is located abroad; cases that require the participation of interpreters, crimes related to national security, crimes of sexual abuse of people under 18 years old, crimes of infringing on judicial activities, crimes of infringing position, and the responsibility of military personnel will also not be tried online.

The online adjudication model has been applied in many parts of the world and has proven its advantages in the epidemic, helping to solve the problem and save the national budget. The application of online courts in Vietnam is also a significant step forward in judicial activities. This trial is also part of the plan to organize an electronic court in Vietnam. However, because of the need for appropriate infrastructure and techniques for organizing online court sessions, this model will only be piloted and gradually expanded in Vietnam. According to summary procedures and face-to-face trials, court sessions will be held together during the epidemic period.

The draft on online adjudication regulation is still being discussed at the National Assembly of Vietnam; receive comments and corrections for promulgation and application soon.

4. Challenging the Sanctions Related to Epidemic Control

4.1 Complaints Related to Administrative Fines

Vietnam's administrative court system is located in the people's court system, and thus it is also divided by trial level and territory. The Court has the authority to judge the legality of administrative decisions (including administrative sanctioning decisions) of state agencies.

During this period, decisions on administrative penalties for violators of epidemic prevention and control measures can be said to be the daily work of authorities in all localities. There are no statistics on complaints against administrative decisions on

sanctioning violations to prevent and control COVID-19. However, on the mass media, some information can be seen related to the litigants who have been fined for administrative violations and wish to sue an administrative lawsuit against the decision sanctioned them.

In Ho Chi Minh City, an example of a lawsuit related to an administrative decision sanctioned violation in the post, telecommunications, information technology, and radio frequencies (Judgment 250/2021/HC-PT, 2021). On March 24, 2020, Ms. T posted on her Facebook to warn people who had contact with Mr. H, who was from the US to Vietnam, to be infected with COVID-19. At 10:30 am on March 25, 2020, Ms. T removed the post. On April 7, 2020, the Chief of Police of District B, where Ms. T lives, issued an administrative decision to sanction her with 10 million VND (USD 450) because she posted false, slanderous, and distorted information insulting Mr. H's reputation. Ms. T believes that the information she posted on Facebook is in good faith to raise awareness and vigilance in preventing the COVID-19 epidemic in the community. Disagreeing with this sanctioning decision, Ms. T filed a lawsuit against this administrative sanctioning decision. In the first-instance administrative judgment on September 23, 2020, the People's Court of District B rejected the entire petition of Ms. T. Disagreeing with this decision, Ms. T continued to sue at the appellate level. However, the People's Procuracy representative of Ho Chi Minh city said that the first-instance Court has grounded to reject Ms. T's lawsuit. The Procuracy proposed that the Court reject Ms. T's appeal and uphold the decision of the first-instance judgment.

After that, the appellate judgment dated March 22, 2021, of the People's Court of Ho Chi Minh City rejected Ms. T's appeal and upheld the decision of the first-instance judgment.

Another illustration is that a woman in Binh Duong was forced to take a Covid test and was fined 2 million VND. (Thanh Dong, 2021) After this incident and with many comments about the force of the local authority to take people to a COVID-19 test did not have a legal basis, the Thuan An city authority organized a public apology to this woman. However, on October 4, 2021, the woman live-streamed on her personal Facebook page and announced that she had invited a lawyer and would sue the authority's decision to punish her (Le Anh, 2021).

Another case attracting Vietnamese public opinion is that a male worker in Nha Trang city went out to the street during social distancing to buy bread. However, the functional force in Vinh Hoa ward, Nha Trang city, temporarily seized his motorbike and fined him because people are only allowed to go out to buy "essential goods," meanwhile, bread is considered an "unessential good." The case was posted on social networks and then caused controversy about whether bread is an "essential good" or not? After that, the officer who issued the sanctioning decision had to apologize to the male worker, return his motorbike, and withdraw this decision (Tuoi tre online news, 2021).

4.2 Appeals and Protests Against Criminal Judgments

To handle criminal acts, including those related to COVID-19 prevention and control, judges in Vietnam perform two operations: determine the crime and decide the punishment. The crime is described in its composition. After understanding this composition, the judge will take the details of the case to compare and find the appropriateness. The determination

of this crime has a fixed pattern, and the judge cannot do otherwise because the principle in the judge's work is only to comply with the law. According to our assessment, in the cases related to COVID-19, the judges have correctly determined the crimes based on the law provisions guided by the Supreme Court.

According to Penal Code, the judge's next activity is determining which penalty frame this crime falls under. Does the judge need to determine whether the defendant's crime contains any aggravating circumstances? For example, Article 240 stipulates that the crime of spreading dangerous infectious diseases to humans with aggravating circumstances is an offense leading to the announcement of epidemics under the competence of the Prime Minister and will be imprisoned for up to 12 years (more severe than the case without this circumstance). In that context, judges in Vietnam can actively apply aggravating and mitigating circumstances to determine appropriate sentences.

There has been a question in COVID-19 prevention and control: Is there a more severe case than the standard case? In the Penal Code of Vietnam, there are provisions for aggravating circumstances such as taking advantage of natural disasters and epidemics. The context of the COVID-19 epidemic is explained as being the case to apply this aggravating circumstance. The implication of the Vietnamese legislator in this aggravating circumstance is that the epidemic will increase the nature and level of danger to society compared to the case without the epidemic. Therefore, the punishment will be more severe.

According to our statistics, up to the present, no defendant has been applied to this aggravating circumstance by the Court. However, in the sentences, the judges have considered that the crime committed during the epidemic represents a danger to society and should be severely dealt with. Besides, the subjective consciousness of the judge also believes that applying severe punishment is one of the solutions to prevent crime. For example, a sentence of a person who resisted law enforcement officers in the performance of their official duties when he reviled and snatched officers' phones when they reminded and asked the defendant to wear a mask. This judgment considered: The defendant's committed acts show a sense of disregard for the law, obstructing officers in performing their official duties, posing many potential risks of COVID-19 disease transmission in the community, causing loss of local order and safety. It is necessary to strictly handle the accused, leading to a special educational effect on the accused in particular and for those who have been and are intending to resist officers in the performance of their official duties (Judgment 23/2020/HS-ST, 2020).

Currently, there is no research on public opinion in Vietnam on administrative and criminal handling forms for violations of the State's epidemic prevention and control measures. Press reports often assess public reactions. Accordingly, the press notifies that opinions agree with the sanctions imposed by the State (Thao, 2021). The press often concludes to condemn acts that spread infectious diseases to humans or resist law enforcement officers performing their official duties (Vnews/Vietnam+, 2021). These actions are a contemptible attitude for the law, infringing on social order, causing anger in public. The defendants all sincerely confessed their guilt, repented, and asked for a reduction in the punishment when faced with the Court's sanctions. The Court rejected none of the 144 cases from the prosecution's indictment.

However, several opinions came from the defendants' attorneys on the accuracy of the

judgments. For example, at a trial in District 7, Ho Chi Minh City, the defendant was heard with the crime of resisting law enforcement officers in the performance of their official duties because the defendant attacked an apartment guard when he asked the defendant to wear a mask. His attorney argued with the representative of the Procuracy that the guard was not a public official. He is just a guard for a company and is employed by the apartment Board (Judgment 27/2020/HS-ST, 2021). However, the Trial Panel rejected this point of view of the lawyer, according to which the company guard is also a public official.

It is necessary to punish violations of law in epidemic prevention and control. However, some opinions should find out the reason for this phenomenon. During the epidemic period, some forms of administrative and criminal sanctions have become more severe than before. Nevertheless, in reality, many people are not aware that their violations will be handled to such a degree. At the same time, there are many causes of violations, including intentional violations and cases of going out for a legitimate reason. Determining a legitimate reason and how to deal with these situations is also a matter of controversy. For example, there have been debates regarding whether bread is an "essential goods"? Are women's tampons an "essential commodity"? (Le Kieu Trang, 2021) Or is taking your pet to the veterinary a "good cause" (Phan, 2021)?

However, the critical fact is that people are still not aware of their violations. Therefore, other solutions promote propaganda and education of the law to help people understand which acts should be handled for administrative violations and which ones should be prosecuted for penal liability.

There is an opinion that the cause of resisting officers in the performance of their official duties and violations of the law in the COVID-19 prevention and control also comes from state officers (Opinion of MP Nguyen Van Hien, 2021). Some local officials have violated regulations on epidemic prevention and control, such as the case of the Director of the Tourism department of Binh Dinh province played golf during the social distancing period and he was dismissed after that (Thanh Long, 2021); the case of dismissing a Director of Hanoi Housing Development and Investment Corporation for making false declarations (VTV, 2021); the case of conflicts between an officer in National Assembly Delegation of Da Nang city and a staff taking samples for testing, leading to this officer hit the testing staff and after that, he was demoted (Minh, 2021). The above cases have created a negative image for people. It is necessary to severely handle officers who violate the law because these officials must first be role models to obey the epidemic prevention and control regulations. If there are any violations, the officials must also be strictly handled according to the law.

In addition, there are also some unofficial comments about court judgments on social networks. There is an opinion that patients with COVID-19 should not be punished for spreading the disease because they are victims of the disease and commit crimes with unintentional errors in many cases.

5. Conclusion

The epidemic of the past two years has shown many embarrassments and raised many legal problems that the State of Vietnam has to face in unusual situations. Faced with new situations arising from the epidemic context, the State needs timely measures; however, it

also needs legal grounds. In the context that Vietnam does not have a law on the state of emergency, some regulations issued by the Government to apply in the pandemic context are not understood and applied uniformly throughout the country, the role of court becomes even more important.

During the COVID-19 period, facing the pressure of urgent context, facing the requirements of preventing epidemic, sanctions for violations are necessary. However, how to handle these violations to ensure deterrence, education but not lead to violation of fundamental rights is difficult requirement while executive power often tend to abuse power, especially in emergency situations. In that context, court needs to act as a mediator to check and balance the abuse of powers of the executive and legislative branches. The court must be the one to hold justice scale to protect the rights of people against these abuses of power.

In Vietnam, as mentioned above, the application of coercive measures (forced isolation, forced testing) or the interpretation of new regulation enacted during social distancing is always controversial. However, in this context, the Vietnamese courts are quite passive and seem to influenced by the Government's view of prioritizing everything for anti-epidemic (Manh Hung, 2021). Judge often consider crimes in the context of epidemic as aggravating circumstances. With the mindset that promotes anti-epidemic, the application of the law by courts has sometimes become rigid and unreasonable (for example the case of a company guard is interpreted as a "public officer" as mentioned above). Although, the Supreme Court has promptly issued guidelines for adjudicating new crimes in the context of epidemic, but it seems that the views of court are only illustrative for the policies of the Government. The court can not interfere with the government's exercise of power. This issue is explained by the political system of Vietnam where there is not exist the principle of separation of power, but only division and coordination (Clause 2, Article 3 of Constitution of 2013). However, it must be admitted that the Vietnamese courts have tried very hard to play their role quite well in the pandemic: The Supreme Court promptly issued instructions, the simplified procedure was also applied timely, the pilot online trial is also a considerable effort.

In general, the reality in Vietnam has had the following problems:

Firstly, applying the law-making process in an emergency case is necessary. Law-making will generally require research, drafting, draft submission, and voting, with many parties, which take time. However, this process will not be effective in the context of crisis and emergency. The emergency law-making process will empower the National Assembly to draft, amend and pass laws quickly and promptly to meet new requirements. Although the 2015 Law on Promulgation of Legal Documents, amended in 2020, has a separate chapter stipulating the formulation, promulgation of legislative documents under simplified procedures. However, this procedure has not been applied, even in an emergency like COVID-19. Failure to apply this procedure will result in the administrative documents promulgated by the Government will restrict human rights. However, according to the 2013 Constitution, human rights are only restricted by laws. This principle will lead to many government administrative decisions being at risk of unconstitutional during the pandemic.

Secondly, it is necessary to pass a law on the State of emergency quickly. Although Vietnam already has the Ordinance on the State of emergency issued in 2000 and some

other legal documents with provisions on the State of emergency such as the Law on Prevention and Control of Infectious Diseases in 2007, the National Defense Law in 2018, Cybersecurity Law 2018... However, these documents do not meet the requirements outlined in an emergency, such as a natural disaster, an environmental crisis, or COVID-19. Therefore, it is necessary to have a Law on the State of emergency in general so that when crises arise, state agencies will have a solid legal basis for decisions and to ensure that such decisions are based on respect for human rights and respect for the rule of law.

Thirdly, Vietnamese jurists have often expressed the necessity of a constitutional protection mechanism. The reality of Vietnam in recent years has shown that the lack of a constitutional mechanism affects the rule of law, which Vietnam is pursuing. It is also the need to protect human rights violated by unconstitutional laws. Therefore, the research and establishment of a constitutional protection mechanism is still a goal that Vietnamese jurists pursue.

Fourthly, the Supreme Court in Vietnam needs an additional authority which is the power to interpret the Constitution and laws. If the Court does not have this function, the rights of citizens must wait for explanations from other subjects. Moreover, the interpretation of the law can lead to abuse of power, mutilation, and restriction of citizens' freedoms. Compared to the legislative and executive organs, the Court is least prone to abuse of power (Vo, 2003). The demand for legal interpretation in Vietnam today is significant. However, currently, the Supreme Court is not given this authority, but it belongs to the Standing Committee of the National Assembly. This practice makes it difficult for the courts to apply the law, especially in emergencies like COVID-19.

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