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**New Perspectives on Comparative Constitutional Law:  
Methodological Bases and Challenges – Establishing a Global  
Database from the Practice of Constitutional Review During  
the Pandemic**

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**New Perspectives on Comparative Constitutional Law: Methodological  
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During the Pandemic<sup>3</sup>**

**Introduction**

The present paper describes the methodological background of our ongoing research project establishing a global database on constitutional review practice during the Covid-19 pandemic (hereinafter, 'Covid-19'). The outcome of this project will be a user-friendly, multilayered platform in English, aided by legal research and information technology instruments, facilitating the further creation of substantial scientific works. Its overall added value lies in the database's unprecedented focus on constitutional review, with a broad coverage of countries, jurisdictions, and constitutional topics. In addition, by ensuring access to the original sources as much as possible, and owing to careful verification, all information provided in the database will be of guaranteed authenticity. Apart from simply providing information, our research project will offer access in a systematized way, specific to Covid-19-related national constitutional case law, according to the parameters detailed in section III.3.

The act of building global databases that focus on specific constitutional topics has been widespread in recent years because of the emerging importance of comparative constitutional law and the proliferating use of digital infrastructures for research purposes. Indeed, scholars have acknowledged the existing difficulties of accessing relevant materials from different countries.<sup>4</sup> Peruginelli and his co-authors<sup>5</sup> demonstrated that accessing credible sources is almost as difficult as conducting effective analyses of the sources at our disposal.

The pandemic has invigorated interest in these databases, as several countries have concurrently faced similar constitutional challenges during the international health emergency. Shortly after the onset of the pandemic, global databases were developed that have collected Covid-19-related laws and regulations,<sup>6</sup> relevant case law,<sup>7</sup> and parliamentary responses;<sup>8</sup> information on applied limitations on freedom of expression;<sup>9</sup> impacts on access to justice;<sup>10</sup> and finally, information from the still-evolving Covid-19-related legal databases.<sup>11</sup> Our project will complement this group with a well-structured set of sources aimed at examining the role of constitutional review during the pandemic. As demonstrated in section III.3, our database will rely on several established constitutional law databases;

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<sup>4</sup> Devins, C., – Felin, T., – Kauffman, S., – Kopp, R., 'The Law and Big Data' (2018) 27 Cornell Journal of Law and Public Policy 357–413.

<sup>5</sup> Peruginelli, G., - Conti, S., - Fioravanti, C., 'COVID-19 and digital library services: an overview on legal information' (2021) 37 Digital Library Perspectives 65–76.

<sup>6</sup> <https://covidlawlab.org/> accessed 25 July 2022.

<sup>7</sup> <https://www.covid19litigation.org/> accessed 25 July 2022.

<sup>8</sup> <https://www.ipu.org/parliaments-in-time-pandemic> accessed 25 July 2022.

<sup>9</sup> <https://features.hrw.org/features/features/covid/index.html?#censorship> accessed 25 July 2022.

<sup>10</sup> <https://globalaccessjustice.com/global-access-to-justice/> accessed 25 July 2022.

<sup>11</sup> <https://lukaslehner.github.io/covid19policytrackers/#11-civic-freedom-human-rights-media> accessed 25 July 2022.

nevertheless, some significant differences between our project and these resources should be noted.

First, using the Covid-19 litigation case collection financed by the World Health Organization as an important point of reference, we narrowed the coverage of our project to constitutional review case law, which will be defined more precisely in section I.1. Second, due to the specific scope of our database, we can access a larger portion of relevant materials in the field of constitutional review than other initiatives with a broader focus. Third, a more specific collection with a narrower scope may yield more comparable data than collections with broader targets but with less information available to access and share. Therefore, with these considerations in mind, and with a great openness to collaborating with the administrators of existing Covid-19-related databases, we are now working on the implementation of the website, which will disseminate Covid-19-related constitutional case law around the globe.

Two key factors should be highlighted here as the underlying reasons for launching this research project. On the one hand, this scientific approach is necessary due to the constitutional implications of Covid-19, which have significantly influenced constitutional review on a global scale. Second, although most constitutional courts have ruled on at least some of these issues,<sup>12</sup> the accessibility of this case law is highly fragmented, and extraordinary efforts are now required for a more in-depth understanding (of their practice?). Notwithstanding that our research project has primarily been created to expedite information sharing, its significance reaches beyond its own boundaries for a greater complexity. It may contribute to clarifying the uncertainties related to the definition of constitutional review and its confines under states of emergency. By outlining the scope of constitutional review during emergencies, the database might also contribute to the establishment of more resilient constitutional frameworks that can serve as bridges during these demanding periods.

These challenges instantly piqued the interest of constitutional scholars, as many well-elaborated constitutional principles seem to have been outweighed by the consideration of public health protection.<sup>13</sup> Furthermore, a comparable view of different approaches to Covid-19-related constitutional issues will also serve State or international actors seeking coordinated or adjusted responses where the challenge requires supranational cooperation (e.g., travel restrictions, mandatory health measures). This, in turn, could lead to a basic improvement in constitutional practices under exceptional crisis situations, which will likely be more frequent in the following decades.<sup>14</sup>

To comply with these established aims, a meticulous methodology was carefully crafted beforehand. The same level of detail will also apply to the regular monitoring and updating necessary after the research project ends. In this paper, we will address three fundamental methodological considerations: (i) the geographical scope of the database; (ii) the definition and delimitation of Covid-19-related case law; and (iii) the development and inauguration of the database. We will undoubtedly face a number of unexpected challenges during and after the launch of the database itself; however, the following considerations provide strong points of reference for tackling these issues during the later stages of the database's implementation.

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<sup>12</sup> For the purpose of this paper, the term 'constitutional court' encompasses all judicial bodies that have jurisdiction to hear cases from the entire country; that deliver final decisions at least at the national level; and that have the competence to review the constitutionality of the applicable laws during the assessment of the cases. In reality, as will be demonstrated later, in several countries this means the 'supreme court' or the 'constitutional council,' but for terminological cohesion and transparency, we will use the term 'constitutional court.'

<sup>13</sup> Spadaro, A., 'COVID-19: Testing the Limits of Human Rights' (2020) 11 *European Journal of Risk Regulation* 317–325.

<sup>14</sup> G., Joelle., 'Power, Law and the COVID-19 Pandemic – Part II: Preparing for Future Emergencies', *VerfBlog*, (2021/5/15) <https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-ii> accessed 25 July 2022

## I. The geographical scope of the database

### I.1. The concept of constitutional review in the literature and our definition for the purpose of this project

Courts are the “ultimate guardians of constitutions.”<sup>15</sup> Constitutional courts have various means at their disposal to enforce the supremacy of the constitution above all laws and administrative acts, as well as the compliance of judicial interpretations of the constitution. The organizational arrangements for constitutional adjudication and the instruments used can also vary considerably from one country to another. However, the primary function remains the same: “to enforce the constitution in the face of threats by the different branches of government or even individuals.”<sup>16</sup> As the first step, we needed to define constitutional review for the purpose of this project since this definition would determine the circle of countries from which the relevant case law would be chosen. The basis of comparative constitutional law is comparability, which is grounded in similar methodological backgrounds used for the collection of the compared information.<sup>17</sup>

Different expressions are used in the literature—judicial review, constitutional adjudication, and constitutional review—which seem to have similar meanings, but which, depending on the context, may differ from one other.<sup>18</sup> This clarification is important not only because the purpose of the research project should be clear but also because domestic experts will be using the research methodology to collect constitutional court decisions. It is therefore important to articulate the concept in the clearest possible way for the benefit of the project’s international collaborators.

‘Constitutional jurisdiction’ is a broad concept, which encompasses other roles of courts besides the pure review of legislation and administrative acts.<sup>19</sup> Barroso offers the following examples<sup>20</sup>: (i) direct application of the constitution; (ii) interpretation in accordance with the constitution<sup>21</sup>; and (iii) “unconstitutionality by omission,” which means that unconstitutionality occurs because of an omission in the legislation, resulting in a violation of the constitution. According to de Visser, the expression ‘constitutional jurisdiction’ can be used to describe many of a court’s functions, such as examining the legality of elections, conducting impeachment proceedings, and deciding on referenda.<sup>22</sup> Narrowly defined, a court has constitutional jurisdiction when it “can ensure the supremacy of the constitution by reviewing the constitutionality of acts of parliament and courts, and invalidating or disregarding them if they offend against the constitution.”<sup>23</sup>

While it is undeniable that thought-provoking Covid-19-related constitutional interpretation issues have arisen, and that courts have applied the constitution directly to resolve Covid-19-related legal issues, our research project essentially focuses on constitutional court opinions involving the constitutionality of a specific regulation, law, or norm. Therefore, our research project is not based on the concept of constitutional jurisdiction. Nevertheless, there is one

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<sup>15</sup> Maartje, d. V., *Constitutional Review in Europe: A Comparative Analysis* (Bloomsbury Publishing Plc 2015)

<sup>16</sup> Luís, R. B., 'Counter-majoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 *American Journal of Comparative Law* 109.

<sup>17</sup> Jakab, A., – Dyevre, A., – Itzcovich, G. ‘Comparative constitutional reasoning’ in Jakab, A., – Dyevre, A., – Itzcovich, G. (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017)

<sup>18</sup> Arne, M. M., (eds) *Constitutional review systems around the world*. (Vandeplass Publishing 2018) 5-32.

<sup>19</sup> Roberto B., (n 9) 19.

<sup>20</sup> *ibid.*

<sup>21</sup> In this case the court is not examining the constitutionality of a norm but determining the meaning and content of a constitutional provision without reference to a specific case.

<sup>22</sup> Visser (n 8) 95.

<sup>23</sup> *ibid.* 94.

exception: Covid-19 has presented legislators around the world with unexpected situations, and in many instances, a legislator's inaction or incomplete legislation has resulted in unconstitutional situations. For this reason, our analysis also covers constitutional court decisions where the court has found that the unconstitutionality was caused not by a norm but by a norm's absence. Thus, our analysis extends to those decisions in which the court stated that a regulation lacked such essential content which would be derived from the constitution.

Another concept evident in the literature is 'constitutional review' itself, which has greater relevance for outlining the bases of our methodology. Constitutional review is technically a subcategory of judicial review, which also encompasses the review of an administrative action's conformity with a statute or the constitution, while the terms are often used interchangeably in the literature. According to Ginsburg and Versteeg, constitutional review is "the formal power of a local court or court-like body to set aside or strike legislation for incompatibility with the national constitution."<sup>24</sup>

We have relied only partially on a still-existing definition of constitutional review<sup>25</sup> and elaborated a slightly different concept for the purpose of the present study. Our definition of constitutional review is the following: Constitutional review is "*the formal power of the highest court or court-like body in a particular country to assess a piece of legislation or a judicial ruling regarding its compliance with the national constitution.*"

## **I.2. Methodological remarks regarding this definition**

As our definition differs in certain respects from Ginsburg and Versteeg's approach, some additional explanations are necessary to justify our choices. In some cases, courts lack the power to strike down legislation but are still able to decide whether a law, or a certain application of a law, is constitutional. Australia, Canada, New Zealand, the United Kingdom, and several other Commonwealth countries (hence, their deep belief in traditional legislative supremacy) have enacted a new model of judicial review where the legislature has the final word on constitutional issues.<sup>26</sup> This "weak-form"<sup>27</sup> of judicial review creates an institutional balance between courts and legislatures, but it does not necessarily mean there is a narrower scope of constitutional review. A fully-fledged control of norms is possible; the difference is whether a parliamentary majority has the power to overrule the court's decision within a relatively short timeframe. Regarding our research project's aim, it makes no difference if a court cannot strike down a piece of legislation; hence, the interpretational methods and the argumentation can be examined irrespective of the court's competence to strike them down.<sup>28</sup> Furthermore, in cases of constitutional complaints or similar motions (the exact terminology in the different countries is irrelevant), the applicable law may not be struck down, but the constitutionality of its exact application is clearly reviewed. Obviously, owing to the inclusion of constitutional complaints in countries where the constitutional court is more accessible, these initiatives will be overrepresented in the database, such as in the cases of Brazil, Costa Rica, and India.

Apart from the previously defined meaning of constitutional review, those rulings should also be considered that reject the hearings of certain constitutional matters—that is, when constitutional courts rely on the narrow contours of their jurisdiction/competence. These

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<sup>24</sup> Tom G., - Mila V., 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *Journal of Law, Economics, and Organization* 587, 14.

<sup>25</sup> <https://worldjusticeproject.org/> accessed 25 July 2022

<sup>26</sup> Stephen G., 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 709.

<sup>27</sup> Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008).

<sup>28</sup> For example, how the court used non-legal arguments to decide the constitutionality of a Covid-19-related regulation, what the court suggested to the legislator on how s/he should resolve the unconstitutionality.

decisions also help to outline the scope of constitutional review during a public health emergency.

In addition to this, similar to Ginsburg and Versteeg's approach, our concept is a formal one: it only considers countries where the power of review is articulated in the constitution, or at least in a constitutional norm. The problem is that judicial review can only function effectively in a system with a real separation of powers and with an independent judiciary. It would stretch the scope of the research project if, before collecting the data, we had also conducted research on countries around the world to determine which have independent judiciaries. Further, due to the important differences among various forms of government (parliamentary, semi-presidential, and presidential, without mentioning the diversity within these categories), the intensity of constitutional review may vary considerably, regardless of the level of judicial independence. The assessment of these factors, as well as the conceptualization of more potentially impactful contextual elements, is expected from the concrete investigations; the database's contribution is to simplify the accessibility of case law for comparative purposes.

Additionally, in several constitutional systems where populist political groups exercise power, the independence of the judiciary is often undermined or at least threatened. Notwithstanding this circumstance, delving into such issues at the edge of constitutional law and political theory would require us to evaluate each of the world's constitutional systems, which could result in an unreasonable narrowing of the database's geographical scope. Our task is to establish a database for ongoing and further research and to address what might also be a legitimate research question—that is, whether countries with populist political leadership, illiberal constitutionalism, or facade constitutions have reacted to the health crisis differently than nations with better records on the rule of law. However, we cannot select among countries on these grounds, as we can only verify the legal possibility of effective constitutional review. For similar reasons, we have not relied on the existing rule of law indexes for the selection of countries; nevertheless, the questionnaires used for the national contributors to these indexes provided valuable methodological samples to develop our own survey.

Finally, it should be emphasized that only the highest judicial body entitled to conduct constitutional review in each country has been considered for our database. Consequently, from countries where constitutional review is decentralized, and lower courts are also authorized to conduct constitutional review, such as in Finland, Greece, Norway, and Sweden, only those cases will appear in the database that have been heard by the highest competent court—that is, the country's supreme court. Similarly, in most of the Commonwealth countries, at least during the first stages of our case collection process, only a small number of cases were expected since most of the Covid-19-related legal controversies went before those countries' highest courts, but their supreme courts have only issued a few relevant rulings. This was the case in Botswana, Lesotho, Malawi, Namibia, Uganda, Zambia, and Zimbabwe, among others.

Furthermore (and for the same reasons), the decisions of the federal state judicial bodies from federal or confederate countries, such as the state constitutional courts of Germany and Austria, as well as the judgments of US state supreme courts, are excluded from the database. Our last point here is also related to the status of the Judicial Committee of the Privy Council in London, where appeals may be heard from several Commonwealth countries in the highest instance. In the database, only the highest court operating in a particular country will be considered; the inclusion of the Privy Council as a hybrid court (somewhere between the domestic and the international level), which hears just a very small number of cases from each concerned country, would unjustifiably narrow the examined case law from those countries. By contrast, the constitutional rulings of the Eastern Caribbean Supreme Court will be

included with regard to its six sovereign member States (Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines) since this judicial body functions primarily as a joint supreme court for these countries rather than a supranational judicial entity. Moreover, although the Eastern Caribbean Supreme Court has a permanent seat in Castries, Saint Lucia, it has delegated judges in each member State, so remedy requests are heard locally.

The Venice Commission's list of constitutional courts was of great assistance in selecting the highest competent judicial body from each country.<sup>29</sup> However, we did not automatically follow this compilation because the list contains two supreme judicial bodies for certain countries like from Finland; we always insisted on following the project rule that only one court be selected from each country to preserve the project's feasibility. In the contested cases, further explanations about the selections will be provided in the database's country-specific web pages.

### **I.3. The exact list of examined countries**

Our data on constitutional review—similar to Ginsburg and Versteeg's research<sup>30</sup>—stems from the Comparative Constitutions Project (hereinafter, CCP).<sup>31</sup> The CCP, after acquiring the English-language texts for every country's constitution, developed a survey to encode the constitutional documents. In this survey, there were specific questions about judicial review. Relating to our research, the CCP survey's most important question was the following: "To whom does the constitution assign the responsibility for the interpretation of the constitution?"<sup>32</sup> The possible answers were "any Ordinary Court; Constitutional Court/Council; Supreme Court only; special chamber of the Supreme Court; first (or only) Chamber of the Legislature; Second Chamber of the Legislature; both Chambers of the Legislature are required; left explicitly to non-constitutional law; other, please specify in the comments section; unable to determine."<sup>33</sup>

Using the CCP's database, and the concept of constitutional review defined earlier, 175 countries were identified whose constitutions allow for examining whether a piece of legislation accords with the constitution.<sup>34</sup> Therefore, these countries will be included in our database.

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<sup>29</sup> <https://www.venice.coe.int/webforms/courts/> accessed 25 July 2022.

<sup>30</sup> Tom G., - Mila V., 'Why Do Countries Adopt Constitutional Review?' (2020) 21 University of Virginia 24.

<sup>31</sup> Zachary Elkins, Tom Ginsburg and James Melton., 'Constitute: The World's Constitutions to Read, Search, and Compare' Online at [www.constituteproject.org](http://www.constituteproject.org) accessed 25 July 2022.

<sup>32</sup> Zachary Elkins, Tom Ginsburg and James Melton, 'The Comparative Constitutions Project : A Cross-National Historical Dataset of Written Constitutions' (*Researchgate*, January 2008)

<[https://www.researchgate.net/publication/265478356\\_The\\_Comparative\\_Constitutions\\_Project\\_A\\_Cross-National\\_Historical\\_Dataset\\_of\\_Written\\_Constitutions](https://www.researchgate.net/publication/265478356_The_Comparative_Constitutions_Project_A_Cross-National_Historical_Dataset_of_Written_Constitutions)> accessed 25 July 2022 106.

<sup>33</sup> *ibid.*

<sup>34</sup>The complete list is as follows: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia (Plurinational State of), Bosnia and Herzegovina, Brazil, Brunei, Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Chile, Colombia, Comoros, Congo (Democratic Republic of the), Congo (Republic of the), Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia (Republic of the), Georgia, Germany, Ghana, Greece, Guatemala, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Jamaica, Jordan, Kazakhstan, Kenya, Kiribati, Korea (Republic of), Kosovo, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malaysia, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Moldova (Republic of), Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, New Zealand, Nicaragua, Niger, Nigeria, North Macedonia (Republic of), Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian

Moreover, in some countries, the possibility of constitutional review has not been mentioned explicitly, but robust discussions have evolved from the existence of constitutional review, and high judicial bodies have declared the unconstitutionality of particular laws. On this basis, the highest courts of Denmark,<sup>35</sup> Norway,<sup>36</sup> and San Marino<sup>37</sup> will also be included. The only European countries excluded are Switzerland,<sup>38</sup> where due to its strong traditions of direct democracy, courts have traditionally exhibited a deferential attitude towards constitutional review; and the Netherlands, where, despite some academic discussion on the subject, its constitution explicitly bans constitutional review.<sup>39</sup>

From outside Europe, notwithstanding the absence of clear constitutional backgrounds, Argentina<sup>40</sup> and Botswana will be included. In Argentina, the Supreme Court has delivered several judgments on the constitutionality of laws and lower judicial rulings, while constitutional challenges may also be lodged in the Supreme Court of Botswana.<sup>41</sup> By contrast, the judicial bodies of Eswatini, Qatar, and Saudi Arabia will be excluded because they are absolute monarchies; Eritrea and Trinidad and Tobago will also be excluded since no references have been found to constitutional review. Finally, still-existing communist dictatorships, where the dominant party plays a strong formal and informal role, also fall outside the scope of the database, although, in Vietnam, after the last constitutional amendment in 2013, the implementation of an initial form of constitutional review has been reported.<sup>42</sup>

We excluded only the most obvious cases—that is, only those countries where comparable data was not expected. All in all, the total number of countries included in our database is 179, and the countries excluded from the further (survey-based) stages of our research project are the following: Cambodia, China (People’s Republic of), Cuba, Eritrea, Eswatini, the Democratic People’s Republic of Korea, Laos, the Netherlands, Palau, Qatar, Saudi Arabia, Switzerland, Trinidad and Tobago, and Vietnam.

There are several important issues yet to be deeply examined in the constitutional literature: the scope of constitutional review during emergencies; the attitudes of constitutional courts during these periods; the factors that influence their activity during emergencies; the involvement of each fundamental right in constitutional controversies; the most-contested rights and freedoms during pandemics; the constitutionally permissible scopes of State interventions; the identification of geographical (continental or regional) specialties; and the migration of constitutional ideas during emergencies. Due to the database’s broad geographic

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Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Sweden, Syrian Arab Republic, Taiwan (Republic of China), Tajikistan, Tanzania (United Republic of), Thailand, Timor-Leste, Togo, Tonga, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Vanuatu, Venezuela (Bolivarian Republic of), Yemen, Zambia, and Zimbabwe.

<sup>35</sup> <https://www.dr.dk/nyheder/indland/historisk-tvind-dom> accessed 25 July 2022.

<sup>36</sup> For instance: Anine K., *Judicial Review in Norway—A Bicentennial Debate* (Cambridge University Press 2019) 298.

<sup>37</sup> Bertolini, E., ‘Constitutional Justice in the Republic of San Marino’ *Comparative Law Journal of the Pacific* (2018) [https://www.wgtn.ac.nz/\\_data/assets/pdf\\_file/0006/1738806/Bertolini.pdf](https://www.wgtn.ac.nz/_data/assets/pdf_file/0006/1738806/Bertolini.pdf) accessed 25 July 2022

<sup>38</sup> Rosalind D., - Felix U., ‘The Swiss Constitution and a weak-formunconstitutional amendment doctrine?’ (2018) 16 *International Journal of Constitutional Law* 54-74.

<sup>39</sup> Van der Schyff, G., ‘The Prohibition on Constitutional Review by the Judiciary in the Netherlands in Critical Perspective: The Case and Roadmap for Reform’ (2020) 21 *German Law Journal* 884-903.

<sup>40</sup> Alejandro M. G., ‘Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions’ (2007) 45 *Duquesne Law Review* 409.

<sup>41</sup> <https://www.voanews.com/a/botswana-court-reserves-judgement-after-state-appeals-gay-sex-ruling-/6269154.html> accessed 25 July 2022.

<sup>42</sup> Art. 70. (10), 74. (4) and (7), art. 98. (4) of the Constitution of Vietnam (adopted in 1992, last amended in 28 November 2013)



spectrum, it has the potential to contribute considerably to substantial comparative assessments and a deeper understanding of these and similar issues to conceptualize the resilience of constitutional systems under the extraordinary pressures inflicted during emergency periods.

## **II. The material scope of the database: Covid-19-related case law**

### **II.1. Preliminary considerations**

Turning to the material covered in the database, we are yet unable to provide an exhaustive list of the covered topics that might be relevant (at least from our perspective). Consequently, a particular margin of discretion will be left to the collaborators in terms of case selection—specifically, which cases have a sufficiently strong association with the pandemic and with the public health emergency. Nonetheless, some basic orientation should offer meaningful assistance for the national contacts; therefore, during the elaboration of the database, we collected the available cases in a non-systematized way to identify issues that have arisen during the pandemic. As a result, around 450 constitutional rulings were already at our disposal from about 60 countries, while the number will obviously increase, perhaps on a daily basis. This set of cases is not sufficient to conduct well-founded comparative research, but it nonetheless constitutes a proper point of reference for the survey collaborators of the most frequent subjects of Covid-19-related cases. Furthermore, the enumeration of these crucial matters may uncover those keywords that will assist with a taxonomy and will also assist interested stakeholders searching for case law that focuses on a similar issue in different countries.

We identified two main topics in the case law and, among these two categories, several subgroups that further define the survey's scope and the database's structure. Numerous decisions have concerned the constitutional framework of the public health emergency itself—for instance, the contours of the separation of powers during the extraordinary period; how sharing competencies among the constitutional actors is influenced; and how the different government branches bridge these challenging periods in terms of their daily operations (for instance, with online parliamentary sittings or court trials). In the meantime, other judgments review the constitutionality of certain fundamental rights restrictions imposed due to the extraordinary circumstances. The following two sections describe these categories while providing concrete examples, and the most frequently addressed issues within the two main categories are highlighted.

### **II.2. The constitutional framework of the public health emergency: the separation of powers during the pandemic**

The public health emergency period saw the appearance of numerous constitutional controversies that were unknown (or perhaps unrecognized) in the previous decades. These controversies are enumerated below.

A) The legality of declaring a public health emergency is dubious. However, the French Constitutional Council,<sup>43</sup> the Constitutional Courts of Bulgaria,<sup>44</sup> Romania,<sup>45</sup> and Serbia,<sup>46</sup> and the Supreme Court of Israel<sup>47</sup> delivered rulings that confirmed the constitutionality of the public health emergency.

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<sup>43</sup> Constitutional Council of France, 11 May 2020, 2020-800 DC.

<sup>44</sup> Constitutional Court of Bulgaria, Decision 10. of 2020, 23 July 2020.

<sup>45</sup> Constitutional Court of Romania, 157/2020.

<sup>46</sup> Constitutional Court of Serbia, 21 May 2020, IUo-42/2020.

<sup>47</sup> Supreme Court of Israel, 3 December 2020, HCJ 5314/20.

B) One key question surfaced regarding the extent of the extraordinary authorization required for lawmakers to secure unquestionable legitimacy for restrictions that severely curtailed the activities of ordinary life, and which led to the unprecedented combination of fundamental rights restrictions. For example, the Constitutional Courts of Romania<sup>48</sup> and Kosovo annulled their respective public health ministry's decrees on the grounds that the government alone should introduce far-reaching restrictions on fundamental rights during emergency periods, based on exceptional parliamentary authorization, indicating that a ministerial decree is not a proper legal form in this instance.<sup>49</sup> Further, the Constitutional Courts of Austria<sup>50</sup> and Romania<sup>51</sup> found that the government overstepped its legislative authorization by implementing public health measures that were overly strict.

C) The distribution of law-making competencies is also relevant in the vertical sense. In federated countries, such as Italy<sup>52</sup> and Brazil,<sup>53</sup> challenges were raised as to whether particular measures could be rendered by state/regional authorities, or whether federal legislation was required in light of the known circumstances.<sup>54</sup>

D) Furthermore, adherence to formal legislative rules also raised certain legal doubts, when due to the alleged pressing need for urgency, some steps were neglected or conducted improperly. The best example of this is a ruling of the Slovenian Constitutional Court that struck down various ministerial decrees on educational matters because, in breach of constitutional requirements, these were not published as usual in Slovenia's official gazette.<sup>55</sup>

E) Parliaments have been forced to suspend their activities or implement digital solutions to ensure the possibility of remote sittings. Constitutional courts have reviewed the constitutionality of these measures, including the French Constitutional Council, which found it acceptable to hold online parliamentary debates in light of the public health concerns,<sup>56</sup> while in December 2021, the Supreme Court of Estonia ruled that a general ban on in-person parliamentary sittings was an unjustifiable restriction.<sup>57</sup>

F) Similarly, online hearings replaced traditional in-person trials in a number of countries, raising constitutional concerns. Before the pandemic, constitutional courts, such as Belgium's, were reluctant to acknowledge the constitutionality of these types of solutions.<sup>58</sup> However, in light of the demanding circumstances, the Spanish Constitutional Tribunal,<sup>59</sup> the French Constitutional Council,<sup>60</sup> the Constitutional Tribunal of Chile,<sup>61</sup> and the Supreme Courts of Norway<sup>62</sup> and Costa Rica<sup>63</sup> gave the green light to trials held via electronic platforms, including criminal trials.

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<sup>48</sup> Constitutional Court of Romania, 458/2020, 25 June 2020.

<sup>49</sup> Constitutional Court of Kosovo, 5 May 2020, 214/IV/2020; Constitutional Court of Kosovo, 6 April 2020, 01/15

<sup>50</sup> Constitutional Court of Austria, 14 July 2020, v363/2020.

<sup>51</sup> Constitutional Court of Romania, 20 October 2021, No. 672

<sup>52</sup> Constitutional Court of Italy, 37/2021, 17 March 2021.

<sup>53</sup> Supreme Court of Brazil: 22 April 2020, 3.385 (ACO 3385 TP); 13 May 2020, 672 (ADPF 672; 06. May 2020, 6343 (ADI 6343/MC-Ref.

<sup>54</sup> Knauer analyses deeply the difficulties with which federal systems faced during the pandemic. Knauer, N. J., 'The COVID-19 Pandemic and Federalism: Who Decides?' (2020) 23 *New York University Journal of Legislation and Public Policy* 1–33.

<sup>55</sup> Constitutional Court of Slovenia, 3 December 2020, U-I-445/20.

<sup>56</sup> Constitutional Council of France, 01.04.2021, 2021-814 DC

<sup>57</sup> Supreme Court of Estonia, 23 December 2021, No. 5-21--32.

<sup>58</sup> Constitutional Court of Belgium, 21 June 2018, Arrêt n° 76/2018.

<sup>59</sup> Constitutional Tribunal of Spain, 2 June 2021, BOE-A-2021-11304.

<sup>60</sup> Constitutional Council of France, 19 November 2021, 2020-866 QPC.

<sup>61</sup> Constitutional Tribunal of Chile, 12 January 2022, Rol. 11.647-2021.

<sup>62</sup> Supreme Court of Norway, 08 May 2020, HR-2020-972-A.

<sup>63</sup> Supreme Court of Justice of Costa Rica, 30 October 2020, 20872/2020.

G) Courts otherwise should not neglect the safeguards for criminal proceedings during quarantines, and the Constitutional Council of France,<sup>64</sup> the Federal Constitutional Court (FCC) of Germany,<sup>65</sup> and the Constitutional Court of Serbia, for instance, confirmed this standard.<sup>66</sup>

H) The pandemic may also influence the legal status of municipalities, and the central government may have constitutional duties to safeguard the proper functioning of these bodies during this challenging period. For example, the Hungarian Constitutional Court heard a controversy that focused on the level of financial resources allocated to municipalities during the public health emergency.<sup>67</sup>

I) Also at issue has been whether scheduled elections should be held despite the public health emergency or whether a delay is acceptable.<sup>68</sup> Moreover, questions have been raised about how the temporary period should be treated:<sup>69</sup> in most countries, the existing mandates have been extended until after the delayed elections.<sup>70</sup>

### **II.3. Restrictions of fundamental rights during the pandemic**

The other main type of Covid-19-related constitutional rulings that we noted is associated with the most onerous restrictions placed on fundamental rights during the public health emergency, along with the constitutional implications of these measures.<sup>71</sup> The most vulnerable fundamental rights, also protected under the Universal Declaration of Human Rights, will be enumerated below. However, it should be kept in mind that this list is far from exhaustive, as endless forms of State intervention have been imaginable under the special legal orders.

A) Especially during the vaccination campaigns, constitutional courts considered whether mandatory vaccination requirements for the entire population or for specific occupations complied with an individual's right to human dignity.<sup>72</sup> The Supreme Court of the United States (SCOTUS) blocked mandatory vaccinations,<sup>73</sup> while a constitutional complaint before the German FCC, challenging the requirement for staff in the health and care sectors to provide proof of vaccination against Covid-19, was unsuccessful.<sup>74</sup> It has also been questioned whether a challenge to additional restrictions imposed on non-vaccinated individuals would have a similar outcome.

B) The different treatment of vaccinated and non-vaccinated individuals has raised red flags about the discriminatory character of such measures,<sup>75</sup> as well as other pandemic-related

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<sup>64</sup> Constitutional Council of France, 29 January 2021, 2020-878/879 QPC.

<sup>65</sup> Federal Constitutional Court of Germany, 11 November 2020, 2 BvQ 87/20.

<sup>66</sup> Constitutional Court of Serbia, 17 September 2020, IUo-45/2020.

<sup>67</sup> Constitutional Court of Hungary, 8/2021, 2 February 2021, IV/3261/2021.

<sup>68</sup> Supreme Court of Brazil, 14 May 2020, 6359 (ADI 6359 Ref-MC); Constitutional Court of Croatia, 14 September 2020, U-I-1925/2020.

<sup>69</sup> Landman, T. – Di Gennaro Splendore, L., 'Pandemic democracy: elections and COVID-19' (2020) 23 *Journal of Risk Research* 1060–1066.

<sup>70</sup> Constitutional Council of France, 17 June 2020, 2020-849 QPC.

<sup>71</sup> Lebreton, A., 'COVID-19 pandemic and derogation to human rights' (2020) 7 *Journal of Law and the Biosciences* 1–15.

<sup>72</sup> For instance: Constitutional Court of Hungary, 3088/2022. 10 March 2022, IV/4110/2021; Supreme Court of Costa Rica, 5 January 2022, No. 000374 – 2022.

<sup>73</sup> Supreme Court of the United States: *Biden v. Missouri*, 13 January 2022, 21A240; *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 13 January 2022, 21A244.

<sup>74</sup> Federal Constitutional Court of Germany, 27 April 2022, 1 BvR 2649/21.

<sup>75</sup> Constitutional Council of France, 1 April 2021, 2021-814 DC du 1er avril 2021; Constitutional Court of North Macedonia, 16 February 2022, Decision No. Y.6p.101/2021; Supreme Court of Israel, 14 September 2021, HCJ 5322/21 M.C. v. Government of Israel.

State interventions.<sup>76</sup> The issues have been whether the definitions of “protected” and “non-protected” are arbitrary and whether the restrictions imposed on non-vaccinated individuals overstep the reasonable level of differential treatment.

C) In a freedom of expression case, the Hungarian Constitutional Court upheld the constitutionality of an amendment to the criminal code, sanctioning those who spread false information and undermined the efficacy of the collective protection against the epidemic.<sup>77</sup> Similar controversies have arisen in other countries where freedom of expression was also challenged in other contexts.<sup>78</sup>

D) Several countries banned, or heavily restricted, political assemblies during the pandemic, and numerous stakeholders contested the constitutionality of these orders. The German FCC examined the prohibition of particular assemblies against curfew measures,<sup>79</sup> while the Hungarian<sup>80</sup> and Albanian Constitutional Courts<sup>81</sup> confirmed the constitutionality of a general ban on assemblies.

E) SCOTUS assessed restrictions on religious ceremonies in the freedom of assembly context and the scope of religiously justified exemptions under public health measures.<sup>82</sup> These issues have also appeared in the case law of the German<sup>83</sup> and Croatian Constitutional Courts.<sup>84</sup>

F) In the case of elections, infected or quarantined persons faced significant difficulties exercising their right to vote.<sup>85</sup> Apart from this, due to measures limiting mobility, citizens living abroad may also have been partially or totally excluded from the electoral process. For instance, SCOTUS<sup>86</sup> and the Croatian Constitutional Court outlined the State’s duties to adopt special voting mechanisms in light of the public health emergency.<sup>87</sup>

G) An example of crafting constitutional standards for the compensation of private entrepreneurs due to restrictions on their economic activities is found in the Supreme Court of the United Kingdom, which reviewed the constitutional consequences of the economic hardships and outlined the required level of affordable compensation for affected stakeholders.<sup>88</sup> In addition, the Constitutional Court of Austria examined the violation of

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<sup>76</sup> Constitutional Court of the Czech Republic, 9 February 2021, Pl. ÚS 106/20; Constitutional Court of Hungary, 3537/2021, 22 December 2021, IV/03010/2021.

<sup>77</sup> Constitutional Court of Hungary, 15/2020, 8 July 2020, IV/00699/2020.

<sup>78</sup> Constitutional Court of Ecuador, 28 April 2020.

<sup>79</sup> Federal Constitutional Court of Germany, 15 April 2020, 1 BvQ 828/20; Federal Constitutional Court of Germany, 17 April 2020, 1 BvQ 37/20; Federal Constitutional Court of Germany, 5 December 2020, 1 BvQ 145/20.

<sup>80</sup> Constitutional Court of Hungary, 23/2021, 13 July 2021, IV/00839/2020.

<sup>81</sup> Albanian Constitutional Court Decision 11/2021.

<sup>82</sup> Supreme Court of the United States: *South Bay United Pentecostal Church v. Newsom* 02, 5 February 2021, 20A136; *Roman Catholic Diocese of Brooklyn v. Cuomo*, (25 November 2021, 20a87; *Tandon v. Newsom*, 4 September 2021., 20A151; *Denver Bible Church v. Polis*, 1 June 2021; 20A163; *Calvary Chapel Dayton Valley v. Sisolak*, 24 July 2020, No. 19A1070.

<sup>83</sup> Federal Constitutional Court of Germany, 29 April 2020, 1 BvQ 44/20.

<sup>84</sup> The Constitutional Court of Croatia, 23 February 2021, U-II-5709/2020.

<sup>85</sup> For a more detailed analysis of the relevant issues please see: Hasen, R. L. ‘Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them’ (2020) 19 *Election Law Journal: Rules, Politics, and Policy* 263–288.

<sup>86</sup> Supreme Court of the United States, *Republican National Committee v. Democratic National Committee*, 4 June 2020), 19A1016.

<sup>87</sup> Constitutional Court of Croatia, 3 July 2020, U-VII-2980/2020.

<sup>88</sup> Supreme Court of the United Kingdom, *Free Speech Union and Young v. Office of Communications*: 9 December 2020.

property rights caused by the pressing need for extraordinary measures,<sup>89</sup> as did the Croatian Constitutional Court.<sup>90</sup>

H) Bans on leaving home, the closing of country borders, and strict quarantine regulations extremely limited people's mobility, which amounted to virulent interference with individual rights. The Constitutional Court of Portugal<sup>91</sup> struck down a policy of the Azores regional authorities that prevented even Portuguese citizens from exercising their right to move freely about the country. Similarly, the Supreme Court of El Salvador condemned an overly strict quarantine rule.<sup>92</sup> The Constitutional Courts of Lithuania,<sup>93</sup> Russia,<sup>94</sup> Slovenia,<sup>95</sup> and Bosnia and Herzegovina also heard cases concerning heavy restrictions placed on the freedom of movement.<sup>96</sup>

I) Government authorities in many countries strictly controlled their citizen's movements, which required the storage and treatment of a huge quantity of personal data.<sup>97</sup> The Slovak Constitutional Court said that laws pertaining to the treatment of personal data should meet the general constitutional requirements for data protection, even during the public health emergency.<sup>98</sup> Constitutional concerns related to data protection have also been raised before the Supreme Courts of Brazil<sup>99</sup> and Costa Rica.<sup>100</sup>

J) Finally, privacy has been an area subject to extraordinary interference, and constitutional courts have also formulated standards for the protection of this right.<sup>101</sup>

We are obviously aware of the fact, that this taxonomy does not cover all relevant areas, and some cases may fall within the scope of more thematic subcategories. Nevertheless, this simple categorization can assist in structuring the collected case law, acquainting the collaborators with what we are seeking, and also identifying the most important keywords to facilitate searching when the database goes public. We now turn to the queries addressed to the collaborators, indicating (i) who we intend to approach; (ii) how the queries will be formulated; and (iii) how the collected information will be used for the purpose of establishing the database.

### **III. Questionnaires, inquiries**

#### **III.1. The circulated survey**

Having determined what we meant by constitutional review, the geographical scope of our research, and the kind of information sought, we now address how this data will be collected from around the world. Although this may seem to be a purely technical aspect, it constitutes

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<sup>89</sup> Constitutional Court of Austria, 14. July 2020 / G 202/2020

<sup>90</sup> Constitutional Court of Croatia, 23 February 2021, 6087/2020.

<sup>91</sup> <https://www.jurist.org/news/2020/08/portugal-constitutional-court-declares-azores-quarantine-for-visitors-unconstitutional> accessed 25 July 2022

<sup>92</sup> Rulings of the Supreme Court of El Salvador (26 March 2020. and 8 April 2020.)

<sup>93</sup> Constitutional Court of Lithuania, 2 July 2020, KT116-A-S108/2020.

<sup>94</sup> Constitutional Court of Russia, 25. December 2020, 49-II.

<sup>95</sup> Constitutional Court of Slovenia, 27 August 2020, U-I-83/20.

<sup>96</sup> Constitutional Court of Bosnia and Herzegovina, 20 April 2020. 1217/20; Constitutional Court of Bosnia and Herzegovina, 22 December 2020, 3683/20.

<sup>97</sup> For further assessment of data protection issues during the pandemic please see: Zwitter, A. - Gstrein O. J. 'Big data, privacy and COVID-19 – learning from humanitarian expertise in data protection' (2020) 5 Journal of International Humanitarian Action 1–7.

<sup>98</sup> Constitutional Court of Slovakia, 13 May 2020, PL. ÚS 13/2020.

<sup>99</sup> Supreme Court of Brazil, Federal Council of the Brazilian Bar Association v. President Bolsonaro, May 7. 2020.

<sup>100</sup> Supreme Court of Costa Rica, 26 November 2021, No. 2021026578

<sup>101</sup> Constitutional Court of Montenegro, 23 July 2020, U-III no. 22/20

the most crucial element of the database. We thus paid special attention to existing relevant databases, exploring viable solutions from which we could garner inspiration.<sup>102</sup>

The key requirements as they relate to our survey are the following: the collaborators' reliability and credibility, since they are expected to provide necessary information; interoperability, with regard to the form of the inquiries, especially in light of the huge diversity of legal cultures concerned; and the overall accessibility and comprehensibility of the requested data. Given the wide and diverse geographical, political, and legal scope of our project, we developed a flexible strategy to approach the information sources to procure the exact information needed and to accurately assess the processed data.

The first consideration regarding the questionnaire was its form and content. Will distribute online queries requiring "yes-or-no", single-answer multiple choice, or multiple-answer multiple choice responses, along with open-ended questions. We included options for responding "other" or "not specified", followed by open-ended response options. It was of utmost importance to exclude any inquiry that might require the collaborators to qualitatively evaluate the given decisions, which might be expected from those researchers who will rely on the database. The questions' subjects, aims, and exact phrasing were challenging to formulate due to the difficulties presented by the diversity of the examined countries. To meet these challenges, we relied on the terminology of international human rights instruments.<sup>103</sup> Apart from the legal terminology, we gathered insights from the World Justice Project's population polls when we crafted the introductory part and the questions seeking the respondent's personal information.<sup>104</sup> We did duly consider, while phrasing our inquiries, that our questionnaires would address a narrow circle of official public representatives.

In the longest part of the questionnaire, the following questions appear:

- A) Has the constitution of your country been modified during the pandemic (since 11 March 2020, when the World Health Organization declared Covid-19 to be a pandemic)? If yes, has the constitutionality of these modifications been reviewed?
- B) Has any special legal order (e.g., a state of emergency) been declared in your country during the Covid-19 pandemic since 11 March 2020? If yes, please provide links to the full texts of the main governing laws or a cursory summary of the relevant legal framework.
- C) What is the highest judicial body in your country authorized to exercise constitutional review (hereinafter, 'constitutional court' regardless of the exact name and form of that body) in your country?
- D) Did the constitutional court have the full competence to conduct constitutional reviews during the special legal order? If not, please briefly describe how the constitutional court's jurisdiction was narrowed.
- E) What kinds of issues concerning the status, functioning, and competences of the main constitutional actors have been reviewed by the constitutional court in relation to the Covid-19 pandemic since 11 March 2020? For example,
  - 1. the legality of declaring the public health emergency;
  - 2. the target of the extraordinary authorization;
  - 3. the vertical separation of powers during the public health emergency;
  - 4. the respect of formal legislative rules;
  - 5. the functioning of parliaments during the pandemic;

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<sup>102</sup> For an extensive tracker of Covid-19 policy trackers, please see: <https://lukaslehner.github.io/covid19policytrackers/#11-civic-freedom-human-rights-media> accessed 25 July 2022.

<sup>103</sup> Mainly on the wording of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as these two documents have the most influence on international human rights practice.

<sup>104</sup> [https://worldjusticeproject.org/sites/default/files/documents/GPP%20Questionnaire%202021\\_Full.pdf](https://worldjusticeproject.org/sites/default/files/documents/GPP%20Questionnaire%202021_Full.pdf) accessed 25 July 2022.

6. the functioning of courts during the pandemic;
  7. the prevalence of constitutional safeguards in criminal proceedings;
  8. the constitutional status of autonomous regions, counties, or municipalities;
  9. the realization or postponement of scheduled elections;
  10. other constitutional matters not specified.
- F) What kinds of fundamental rights violations were examined by the constitutional court in relation to the public health emergency since 11 March 2020? For instance,
1. human dignity;
  2. equality;
  3. freedom of expression;
  4. freedom of religion;
  5. freedom of assembly;
  6. the right to vote;
  7. the right to free enterprise;
  8. the right to free movement;
  9. the protection of personal data;
  10. the right to privacy;
  11. or further fundamental rights restrictions not enumerated.

Under questions 5 and 6, please provide the exact references of the cases if available and links to their full texts or at least a brief summary (English, or other world languages, are preferred, but materials in other languages can also be of great assistance in completing our compilation of data). Apart from the links, Word or PDF formats are also interoperable with our database. We are looking for the issuing court; the commonly used name of the case (and, if applicable, the date when it was decided and its reference or docket number). For example, Supreme Court of the United States; *Biden v. Missouri*; 13 January 2022; 21A240.

Besides this basic information, please include in your response the following details about each case, if relevant:

1. What are the merits of the rulings?
2. Has it applied legal consequences?
3. How long did the decision take to conclude?
4. What is the distribution of the votes among constitutional court members?

Any additional details indispensable for properly contextualizing the case in the comparative database are welcome.

Please do not evaluate the case law in your response; only objective factual information will be transferred to the database.

Having established and launched the website, we will dedicate a separate subpage to the questionnaire, which will be available to anyone, making a public call to contribute new cases to facilitate the continuous monitoring and maintenance of the database.<sup>105</sup> Reasonably, we will not rely solely on voluntary contributions when updating the database; our strategy is to distribute a short inquiry to all collaborators on an annual basis.

### **III.2. The order of information providers**

To receive credible and informative responses to the survey, we need collaborators familiar with the constitutional review practices of their countries, who can locate easy access points to this data, and who can serve as verified information sources, providing summaries using international legal-English terminology. Answering the questions should not require

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<sup>105</sup> For similar solutions, see:

<https://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/Covid19freedomAssembly.aspx?fbclid=IwAR3AfuUqZSr4I03Lx4oAq-rsXgdX3u8vxbWcdGwvaM7xgrKKa57b9LCKRiw;>  
<https://www.surveygizmo.eu/s3/90224295/remote-working-in-parliaments> accessed 25 July 2022.

subjective value judgments. Among the most essential factors are proximity and the experts' sufficient insights about, and familiarity with, the latest case law in their countries. Consequently, the primary and most practical solution was to approach the supreme judicial or, in some exceptional cases, parliamentary bodies that have the competence to conduct such constitutional reviews. With this in mind, we finalized a collaboration agreement with the Hungarian Constitutional Court, as it has extensive international connections, including memberships in the Superior Courts Network,<sup>106</sup> the Conference of European Constitutional Courts,<sup>107</sup> and the World Conference on Constitutional Justice.<sup>108</sup> All supreme judicial bodies in official communication with the Hungarian Constitutional Court will be contacted, referencing the Court, or they will be contacted directly through the Constitutional Court of Hungary. The remaining courts will be contacted through their presidential staffs or other main representatives.

In case of a lack of definitive or sufficiently informative answers, or there is no response at all utilizing this method, we established a secondary list of official information sources. Using this list, we would contact (i) ministers with competence on constitutional issues; (ii) fundamental rights commissioners; or (iii) parliamentary commissions and offices, or other organizational units qualified to handle constitutional and legal matters. However, there will likely be representatives who do not reply substantially or at all to our requests; with these countries, we would attempt to recruit other collaborators. If we fail to receive substantive information from official sources, then we would proceed to contact non-State actors: (iv) primarily, university professors of constitutional law or other constitutional scholars in that country; or (v) secondarily, international, regional, or national NGOs.

To supplement our work, we will contact collaborators of similar databases mentioned in section III.3. In a complementary manner, we will collect multiple comparative reports from international and national research centres tracking constitutional courts' activities in various countries during the same period.

### III.3. The database

In general, the lack of national comparable data in the context of constitutional law presents a significant barrier; therefore, even the most inclusive projects focus on the constitutional systems of a narrow geographical region or a few arbitrarily selected countries, which correlates with the usual weaknesses of comparative legal analyses.<sup>109</sup> Our project will serve to systematize the outcome of comparative endeavours with the establishment of a transparent and open-access database, which will be a subsection of the Hungarian Centre for Social Sciences, Institute for Legal Studies' website.<sup>110</sup> Before launching the database, we concluded a comparative analysis of already functioning databases covering Covid-19 and/or constitutional law-related issues.<sup>111</sup> In this section, we highlight those operating databases that most shaped our approach.

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<sup>106</sup> <https://echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c=> accessed 25 July 2022.

<sup>107</sup> <https://www.confueconstco.org> accessed 25 July 2022.

<sup>108</sup> [https://www.venice.coe.int/WebForms/pages/?p=02\\_WCCJ&lang=EN](https://www.venice.coe.int/WebForms/pages/?p=02_WCCJ&lang=EN) accessed 25 July 2022.

<sup>109</sup> Jakab, A., – Dyevre, A., – Itzcovich, G. 'Comparative constitutional reasoning' in Jakab, A., – Dyevre, A., – Itzcovich, G. (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017)

<sup>110</sup> For the current structure of the website, please see: <https://jog.tk.hu> accessed 25 July 2022

<sup>111</sup> For cursory glances to the digital scientific databases existed in the legal field already before the pandemic please see: Devins, C. – Felin, T. – Kauffman, S. – Kopp, R. 'The Law and Big Data' (2018) 27 *Cornell Journal of Law and Public Policy* 357–413.; Hübner, D. C. 'The 'National Decisions' database (Dec.Nat): Introducing a database on national courts' interactions with European Law' (2015) 17 *European Union Politics* 324–339.; Šadl, U. – Olsen, H. 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30 *Leiden Journal of International Law* 327–349.



Several databases have already been developed that partially intersect with our research project's scope. The International Center for Not-for-Profit Law established a fully-fledged tracker of enacted laws and regulations related to Covid-19 and constitutional issues, which is also a plausible representation of our research project, but substituting laws with court decisions.<sup>112</sup> The Council of Europe launched a website that includes the constitutional review decisions of its member States, which could provide insights on how to categorize various constitutional issues, although our geographical scope is different.<sup>113</sup> The "Covid-19 Litigation Project" provides a practical example of the scope of covered countries, but we are only collecting constitutional review decisions from the highest courts conducting constitutional reviews.<sup>114</sup>

Numerous valuable combinations of thematic laws, regulations, and press releases concerning Covid-19 and free speech can be found on the websites of the International Press Institute<sup>115</sup> and Human Rights Watch,<sup>116</sup> while the topic of Covid-19 and privacy are covered in Privacy International's database.<sup>117</sup> All of these provide viable models on how thematization could be designed for our project—for example, how we might delimit constitutional issues concerning a particular fundamental right (e.g., freedom of expression, freedom of movement).

A more detailed, separate subsection will be created in our database for each continent, region, and relevant country. The Inter-Parliamentary Union's website provides a helpful reference for listing national parliaments' adaptive measures promulgated after the declaration of the pandemic.<sup>118</sup> The site includes country profiles in alphabetical order with the working schedules of each nation's legislative power. We found it valuable that each country's description is thoroughly detailed in paragraphs. Our database's country pages will include brief descriptions of the constitutional review mechanisms operative during emergencies in that country. We will also provide a summary of the central constitutional issues that have been raised.

For user-friendly summaries, the International Institute for Democracy and Electoral Assistance's study entitled "Global Overview of Covid-19: Impact on Elections" should be highlighted.<sup>119</sup> The associated database is available in an easily understandable format for all interested researchers, and summary statistical statements have been prepared from the data. Although the one-sentence highlights can be practical, we intend to provide longer English-language summaries. After the country sections, we will include compilations with broader scopes to facilitate the exploration of possible correlations. For insights on taxonomy, the Global Access to Justice Project's database<sup>120</sup> serves as a reference for regional overviews, but we will add continent-level summaries as well. Apart from providing summaries, national collaborators will be welcome to blog on any specific issue about their country, similar to the website of the Lex-Atlas database, which compiles responses to legal queries related to Covid-19.<sup>121</sup>

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<sup>112</sup> <https://www.icnl.org/covid19tracker/> accessed 25 July 2022

<sup>113</sup> <https://venice.coe.int/files/Bulletin/COVID-19-e.htm> accessed 25 July 2022

<sup>114</sup> <https://www.covid19litigation.org/about> accessed 25 July 2022

<sup>115</sup> [https://ipi.media/covid19/?alert\\_type=0&language=0&years=0&country=0](https://ipi.media/covid19/?alert_type=0&language=0&years=0&country=0) accessed 25 July 2022

<sup>116</sup> <https://features.hrw.org/features/features/covid/index.html?#censorship> accessed 25 July 2022

<sup>117</sup> <https://privacyinternational.org/examples/tracking-global-response-covid-19> accessed 25 July 2022

<sup>118</sup> <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic#K> accessed 25 July 2022

<sup>119</sup> <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections?fbclid=IwAR3ivPPgaAAWL4l-tBnbIKm757tIKK0Fb0ft6rrr4jfxn01HjlkN443MGFU> accessed 25 July 2022

<sup>120</sup> <https://globalaccesstojustice.com/global-access-to-justice/> accessed 25 July 2022

<sup>121</sup> For a specific example of this type of blogging on Lex-Atlas, see: <https://lexatlas-c19.org/brazil/> accessed 25 July 2022.

Another core feature of our database will be the provision of an intersectional search engine, designed to search a separate dataset populated by constitutional topics, invoked fundamental rights, regions, countries, years, and other relevant tags. Machine-readable documents will facilitate random text searches as well, and further precision will be required to collectively comb through all the relevant information. In this regard, the databases of the Constitute Project,<sup>122</sup> Equinet,<sup>123</sup> and the “Covid-19 Law Lab” have provided inspiration.<sup>124</sup>

If feasible, the full texts of the rulings will be accessible in English or other world languages (Arabic, Chinese, French, Portuguese, Russian, or Spanish). Metadata will be stored in an Excel file, which will preserve the links of each document. For this feature, the dataset of V-Dem (Varieties of Democracy) on democracy ratings should be mentioned, as it can be downloaded in different temporal versions, sizes, and formats, and it is possible to select several countries to compare simultaneously.<sup>125</sup>

In addition, a bibliography section will enumerate a list of English-language publications concerning the pandemic's constitutional dimensions.<sup>126</sup> The full texts of the academic contributions will be linked, and the complete bibliographic information will be included on our website.<sup>127</sup>

## Conclusion

Our research project is dedicated to obtaining a more in-depth understanding of four issues of paramount importance in terms of Covid-19's constitutional implications. First, the pandemic represents a memorable moment from a constitutional perspective: numerous constitutional courts (or supreme courts with constitutional review competencies) have addressed similar issues. It may be argued that this situation has called for more significant and nuanced perspectives on comparative constitutional analysis than previously required. Our database aims to assess the comparability of this extensive case law.

Second, according to our hypothesis, global, continental, and regional comparisons of current constitutional developments should enhance the constitutional dimensions of, and reactions to, pandemics and other emergencies. Such comparisons will be facilitated remarkably by our database.

Third, the database will allow general conclusions to be drawn from the constitutional behaviours of the different legal cultures. Where was constitutional review most actively utilized during the pandemic emergency and for what reasons? Which fundamental rights or institutional constitutional challenges were lodged most frequently during this period—globally and regionally? What different standards were established for absolute rights protection and separation of powers during the time of emergency?

Fourth, as the onset of Covid-19 is now more than two years behind us, perhaps hindsight allows constitutional scholars to now focus on more specific analyses of the pandemic's effect on each fundamental right and the separate elements of the rule of law. Our easily searchable database has the potential to greatly contribute to such endeavours.

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<sup>122</sup> <https://www.constituteproject.org/?lang=en> accessed 25 July 2022.

<sup>123</sup> <https://equineteurope.org/covid-19-response/#data> accessed 25 July 2022.

<sup>124</sup> [https://covidlawlab.org/?s=&topic=isolation-quarantine-measures&region=&country=South+Africa&type=&search\\_tag=&sorting=date\\_issued](https://covidlawlab.org/?s=&topic=isolation-quarantine-measures&region=&country=South+Africa&type=&search_tag=&sorting=date_issued) accessed 25 July 2022.

<sup>125</sup> <https://www.v-dem.net/vdemds.html> accessed 25 July 2022.

<sup>126</sup> For a similar solution, see: Chen, Q – Allot, A – Lu, Z. ‘LitCovid: an open database of COVID-19 literature’ (2021) 49 *Nucleic Acids Research* D1534–D1540.

<sup>127</sup> For an example of how bibliographic information and hyperlinking can be integrated with a Covid-19-related academic contribution database, see: <https://www.sandiego.edu/law/centers/chlpb/database.php> accessed 25 July 2022.

Apart from the expected invigoration of the relevant academic discussion, the database will be an essential and core reference for constitutional practice, even in Hungary. Suppose a constitutional court, for instance Hungary's, faces a Covid-19-related or similar challenge. In such a case, it will be much easier for the Court to obtain an overview of related foreign constitutional case law and the different existing models. This insight will definitively place the Court's constitutional rulings in a broader context and introduce the Court to new background resources for its assessments. Thus, our database itself will be the concrete result, contributing to the global discussion (in both practitioners' and academics' circles) about the pandemic's constitutional ramifications.

The research project will deliver a concrete product: an open-access, complete, and transparent database, providing Covid-19-related constitutional case law from all relevant countries of the world. This is an unprecedented moment in the twenty-first century in that many countries have declared national emergencies for the same reason. Indeed, our database will considerably amplify researchers' perspectives, which may lead to a deeper understanding of constitutional review during emergencies. This article has only outlined the main features of the database, and we will likely face numerous unforeseen, but minor, methodological challenges during the latter stages of the work. Nevertheless, we can always rely on the fundamental purposes, principles, and methodological assumptions set forth in this contribution.

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