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Global Judicial Opinions Regarding Government-Issued COVID-19 Mitigation Measures

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Abstract

Laws play an important role in emergency response capacity. During the COVID-19 outbreak, experts have noted both a lack of law where it is needed and a problematic use of laws that exist. To address those challenges, policymakers revising public health emergency laws can examine how existing laws were used during the COVID-19 response to address problems that arose during their application. Judicial opinions can provide a source of data for this review. This study used legal epidemiology methods to perform an environmental scan of global judicial opinions, published from March 1 through August 31, 2020, from 23 countries, related to government-issued COVID-19 mitigation measures. The opinions were coded, and findings categorize the measures based on: (1) the World Health Organization's May 2020 publication, *Overview of Public Health and Social Measures in the Context of COVID-19*, and (2) related legal challenges brought in courts, including disputes about authority; conflicts of law; rationality, proportionality, or necessity; implementation; and enforcement. The findings demonstrate how judicial review of emergency measures has played a role in the COVID-19 response. In some

cases, court rulings required mitigation measures to be amended or stopped. In others, court rulings required the government to issue a measure not yet in place. These findings provide examples for understanding issues related to the application of law during an emergency response.

Keywords

COVID-19; Legal aspects; Public health preparedness/response; Judicial opinion; Legal preparedness

Background

UPON THE SIGNING OF International Health Regulations (IHR) 2005,¹ participating countries agreed to strengthen the capacity to respond to public health emergencies worldwide. Laws play an important role in emergency response capacity and in IHR compliance. During the COVID-19 outbreak, experts have noted both a lack of law where it is needed and a problematic use of laws that exist.^{2,3} The World Health Organization (WHO) recommended a review of legal frameworks for the tools necessary to respond to future outbreaks.²

Judicial opinions provide important context and guidance for discussions during a review of existing laws. Policymakers reviewing legal frameworks and revising public health emergency laws can examine how existing laws were used during the COVID-19 response to address problems that arose during their application. Judicial opinions can provide a source of data for this review.^{4,5} Policymakers can use this research to better prepare for the legal disputes that might arise when issuing particular types of mitigation measures for future responses such as those identified by WHO for responding to COVID-19.⁶

Judicial opinions can also serve as a source of data for gaining a more complete picture of how mitigation measures impact the course of an outbreak. During disease outbreaks, public health practitioners study how executive and legislative bodies issued mitigation measures in order to understand how the mitigation measure impacted the course of the outbreaks. In addition to understanding the laws put in place by executive or legislative bodies, public health law practitioners can also gain insight from an understanding of how laws change after judicial review of a legal challenge to those measures. For example, judicial opinions may include orders to stop mitigation measures that have been put in place by other government actors.⁷

The operation of the judiciary has been impacted significantly by the pandemic.⁸ However, in this study we were able to collect and review judicial opinions issued from March 1 through August 31, 2020, in response to COVID-19 by constitutional courts and courts with jurisdiction over emergency law review. Through this and similar studies, researchers studying the impact of mitigation measure may then understand the role of the judiciary in legal preparedness. That understanding is important to making sure data are complete when determining how the mitigation measures impacted the disease outbreak.

Methods

In this study, we used a legal epidemiology approach^{9,10} to collect and describe judicial opinions concerning government actions to mitigate COVID-19. This is a legal mapping study, which is a type of legal epidemiology study that strengthens understanding of the legal landscape before studying the impact of that landscape on public health outcomes.

No public databases contain all global judicial opinions. To collect publicly available global judicial opinions, we searched global and regional databases, including ACAPS,¹¹ African Legal Information Institute,¹² Americas Society/Council of the Americas,¹³ JurisPedia,¹⁴ Library of Congress,¹⁵ The Tahrir Institute for Middle East Policy,¹⁶ and World Legal Information Institute.¹⁷ We then searched country-level judicial websites (listed here with each judicial opinion reference). One public health law secondary source was consulted to confirm a question that arose during translation.¹⁸ Collection took place from August 27, 2020, through October 25, 2020.* One case from the Democratic Republic of the Congo, published during the relevant period, was collected and added in February 2021. In total, we analyzed 64 judicial opinions on mitigation measures from 23 different countries. Of these, 39 judicial opinions in 17 countries had at least 1 ruling that required a change (amending, stopping, invalidating, or imposing a new measure).

Cases were included in our review if: (1) the judicial opinion discussed a legal challenge to one of the government actions, (2) the stated purpose of the measure was mitigating the spread of COVID-19, and (3) the judicial opinion discussed the substance of the legal challenge. Judicial opinions were excluded if they described challenges to actions of nongovernmental actors, concerned elections and voting, solely involved criminal charges against private citizens, or otherwise did not fall into the inclusion categories. Cases were categorized solely based on what was written in the judicial opinion; in this study, we did not consider factors that may have contributed to judicial opinions. To analyze each judicial opinion, we created an electronic data collection form using the Public Health Law Information Portal 2.0. Table 1 presents the types of entities disputing the measures and Table 2 presents the types of disputes present in the judicial opinions.

Five mitigation measure categories were identified, based on WHO's *Overview of Public Health and Social Measures in the Context of COVID-19*,⁶ and categorization was iteratively revised as cases were reviewed. We followed descriptions of the categories as set out in the WHO publication. The mitigation measure categories include:

- Emergency declarations
- Movement restrictions – subdivided into border closure, stay at home, isolation or quarantine, and lockdown or all movement restriction
- Physical and social distancing – subdivided into opening or closure of schools, physical closure of business, and restriction or ban on gathering

*The methods described in this paper have been edited for length. Please contact the authors for questions about the methods. Study protocols including detailed explanations of coding categories, definitions, and scope notes are available upon request.

- Protection for specific populations – subdivided into prison populations; migrants, refugees, asylum seekers; health workers; and indigenous populations
- Economic aid or prohibition – subdivided into aid to businesses, aid to individuals, prohibition on type of businesses, employee protections, maintaining health services, and other

These categories were based on international laws and guidance documents and observations gained during initial review and coding. The categories are broad in order to apply across different legal systems. Importantly, however, the presence or absence of these types of laws depends on country context. Not all laws are relevant or necessary in every jurisdiction.

We created the following coding categories for the legal challenges: (1) disputes about authority; (2) conflicts of law; (3) rationality, proportionality, or necessity; (4) disputes concerning rights; (5) implementation; and (6) enforcement. The first category describes disputes where a government entity or official did not have legal authority to act when it issued a mitigation measure, for example, where a public official acted outside of the scope of authority or without consulting another required public official. The second category includes arguments that the mitigation measure conflicts with other existing local, national, or international laws, including laws setting forth constitutional or international procedures and requirements. Many judicial opinions contained disputes about the relationship between the mitigation measures and the status of the emergency; thus, the third category attempts to capture those issues using 3 keywords that may be found in international standards and national standards of review: rational, proportional, and necessary. The fourth category addresses questions about whether there is a right at issue in the dispute. Rights may be those set out in international law, national law, or those claimed by the party initiating the dispute. Our coders looked for the words “rights” or “freedom” or “liberty” when determining whether a right was at issue and did not use any secondary sources to verify whether the right had been codified. The fifth category is a broad category that collects information about disputes involving the duty to issue mitigation measures, the accountability for issuing lawful mitigation measures, and how mitigation measures were being carried out. The sixth category addresses enforcement issues that public health practitioners and policymakers faced during the COVID-19 response, as they attempted to find effective means of ensuring public compliance with mitigation measures while making sure those enforcement mechanisms did not exacerbate the emergency or put law enforcement at unnecessary risk.

Results

Sixty-four judicial opinions from 23 countries met the inclusion criteria.¹⁹⁻⁸² Tables 3 and 4 list the judicial opinions by category of mitigation measure(s) and categories of disputes present. The following sections include brief descriptions of the results and examples for each mitigation measure category. For cases retrieved in languages other than English, the quotations are English translations of those cases.

Emergency Declarations

The emergency declarations category includes any declaration of a state of emergency, disaster, exception, calamity, public health emergency, or other type of emergency related to the COVID-19 outbreak. The title of the declaration, its purpose, and the legal powers that result from such a declaration vary by country. Although the WHO Overview does not discuss emergency declarations, we included emergency declarations in this study because of their important impact on authorizing emergency response activities and setting legal limits to accompany the declarations.

Eight judicial opinions from 6 countries described disputes about an emergency declaration (Table 3). Three of those judicial opinions contained a ruling that required at least 1 change to the declaration (Table 2).

In decision 157 of 2020 in Romania, the People's Advocate argued that the state of alert was a "disproportionate restriction on the exercise of citizens' fundamental rights and freedoms," in addition to other violations.^{63,18} The constitutional court (Curtea Consti tutional a României) determined that the state of alert, which carries powers distinct from a state of emergency, was constitutional "in-sofar as the actions and measures ordered during the state of alert are not aims at restricting the exercise of fundamental rights or freedoms."⁶³ In case 5-20-EE of Ecuador, the constitutional court (Corte Constitucional Del Ecuador), having automatic constitutional control of matters of law regarding states of exception, stated that it would not approve "a new declaration on the same facts" that had been used to support the emergency declaration on 2 previous occasions.³² Instead, the government would need to generate public policies to face the situation caused by COVID-19 without an emergency declaration.³²

In decision 69-2020 of El Salvador, the attorney general argued that the president did not have the power to declare the state of emergency because those powers are reserved for the president only when the legislative assembly is unable to meet.³⁴ The attorney general argued that the president had exceeded his powers and the legislative assembly should have been consulted. The court found the president had exceeded his powers to issue a state of emergency.³⁴

Movement Restrictions

WHO's Overview defines movement restrictions as "measures aim[ed] to prevent introduction and limit movement of the virus from one area to another."⁶ Twenty-nine judicial opinions contained at least 1 dispute about a movement restriction (Table 3). In 16 judicial opinions from 11 countries, courts required at least 1 change to the mitigation measure.

For example, in case KO54 of 2020 in Kosovo, the president submitted a referral to the constitutional court arguing that the government had exceeded its powers under the Constitution of Kosovo, Article 35 and Article 43, when imposing movement restrictions.⁶¹ The constitutional court analyzed the authority provided to the government to restrict travel "in the place" where the epidemic was spreading and said it "cannot agree with

the Government's claim that the sentence 'the travel ban in the place where the epidemic has spread' means the whole territory of the Republic of Kosovo."⁶¹

In judgment 424 of 2020 in Portugal, an individual challenged the government's "prophylactic mandatory confinement measure," arguing that it violated "the principle of proportionality among other vices," and violated fundamental rights.⁵⁹ The Criminal Investigation Court of Ponta Delgada decided, and the constitutional court agreed, that "the mandatory confinement of passengers for 14 days" was not constitutional.⁵⁹

Three judicial opinions from 3 countries described disputes about enforcement of measures and required at least 1 change to the policy.^{60,62,70} In case KO61 of 2020 in Kosovo, deputies of the Assembly of the Republic of Kosovo challenged decisions to impose a cordon sanitaire (ie, restricted movement into or out of a specific area) and a stay-at-home measure on the grounds that the penalties for violating these measures included administrative offenses that were not offenses prescribed by the Law for Prevention and Fighting against Infectious Diseases, nor by the Law on the Sanitary Inspectorate.⁶² The constitutional court agreed the offenses listed were not "prescribed by law," and thus the penalties were not in compliance with the constitution.

In the case of *Law Society of Kenya v Hillary Mutyambai, et al* (120, Kenya, 2020), the Law Society of Kenya disputed a curfew order, arguing that it was contrary to constitutional provisions as legal representation was omitted from the list of essential services, "despite the fact that those arrested under the Curfew Order require legal representation."⁶⁰ Further, the "Curfew Order ha(d) been abused," as there were instances of "teargassing, beating, and use of unreasonable force" during enforcement. The High Court of Kenya determined that the "unreasonable use of force [... was] unconstitutional," and ordered the government to amend the curfew order to include additional professions to the list of essential services. In the case of *Khosa and Others v Minister of Defence of South Africa*, hearing similar arguments regarding enforcement, the High Court required additional guidance and guidelines for enforcement personnel and the establishment of freely accessible mechanisms for "civilians to report allegations of torture or cruel, inhuman or degrading treatment or punishment."⁷⁰

Judicial opinions in the movement restrictions category contained discussions about the manner of enforcement generally. The discussions present significant lessons for public health practitioners and policymakers about the need to consider the method of enforcement when formulating a type of mitigation measure. In the case, *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs of South Africa*, the court stated:

The virus may well be contained—but not defeated until a vaccine is found—but what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and, overall, the maintenance of the rule of law?⁶⁵

And in the case, *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*, the court stated:

Enforcement of the regulations would be ineffectual if there was no penal provision. If people are compelled to abide the regulations designed to save lives

under threat of criminal prosecution, then the penalty is proportional to the purpose, namely saving lives. To hold otherwise, is to grant license to act negligently and/or recklessly in infecting people.⁶⁷

Physical and Social Distancing

The WHO Overview describes physical and social distancing measures as those that “prevent transmission between infected individuals and those who are not infected, and shield those at risk of developing serious illness.”⁶

Eighteen judicial opinions from 9 countries described at least 1 dispute within the Physical and Social Distancing category (Table 3). Nine of those judicial opinions resulted in at least 1 change to the mitigation measure. Further, 6 of those judicial opinions from 5 countries discussed whether measures violated or could violate rights (Table 4), most of which included a discussion about the right to freely assemble.

For example, in opinion 1 BvQ 44 of 2020 in Germany, a registered religious association brought a dispute to the constitutional court (Bundesverfassungsgericht) about a gathering ban that restricted religious activity during Ramadan.³⁶ The court found that while performing religious services did pose a risk to public health, an absolute ban on religious services did not account for variations in location or manner of worship. The court required an exception clause in the measure for case-by-case determination on allowance of religious events. In *Calvary Chapel Dayton Valley v Steve Sisolak* and *South Bay United Pentecostal Church et al v Newsom* of the United States, religious organizations challenged state-imposed mitigation orders that limited the number of people who could attend religious services.^{76,77} The churches argued that the state orders discriminated against houses of worship and violated the constitutionally protected freedom of religion. The US Supreme Court denied the churches’ applications for relief, granting the states deference in issuing mitigation policies to prevent COVID-19 transmission and requiring no amendments to the orders.

Protection for Specific Populations

The fourth category of mitigation measures “aim to protect persons at risk and vulnerable groups.”⁶ Ten judicial opinions from 6 countries contained at least 1 dispute about a special protection measure (Table 4). Six of those judicial opinions resulted in at least 1 change to the mitigation measure. In 3 opinions, parties argued that the government had a duty to act but had not.

For example, in case 1768 of 2020 in Guatemala, the ombudsperson, an independent government official responsible for investigating and acting on complaints filed against the government, argued that the government had a responsibility to provide personal protective equipment for healthcare workers to protect the right to health and life guaranteed in national law as well as rights found in the International Covenant on Economic, Social, and Cultural Rights.³⁹ The constitutional court (Corte de Constitucionalidad de Guatemala) ruled the government was required to purchase personal protective equipment and other supplies needed to combat COVID-19 in healthcare centers.³⁹ In opinion 709, Distrito Federal of Brazil, a nonprofit organization argued that the government violated rights

to life and health by not issuing mitigation measures necessary to protect indigenous populations, including establishing quarantine compliance, contagion prevention measures, and creating a plan for mitigating COVID-19 with participation from those communities.²⁰ The Supreme Federal Court (Supremo Tribunal Federal) ruling ordered Brazil's government to establish measures with participation from the indigenous communities. In the case of *In Re: Problems and Miseries of Migrant Labourers, Suo Motu Writ Petition (Civil)* (6 of 2020) in India, the Supreme Court on its own initiative (ie, *suo motu*), reviewed the action of state governments providing for migrant populations after a nationwide lockdown closed businesses and shut down transportation systems.⁴⁶ The court determined that no proper arrangements were in place to provide migrant workers with food nor had a decentralized process been established for registering the population to determine what aid would be needed. The Indian Supreme Court directed state governments to work toward providing aid to migrant workers.

In *Valentine et al v Collier* and *Barnes et al v Ahlman et al* of the United States, incarcerated individuals alleged that the jail or prison failed to protect detainees from COVID-19 transmission.^{78,79} In *Barnes*, the Supreme Court declined to overturn a lower court's decision that the jail was not required to implement additional safety measures, despite the "excessive risk to inmate health or safety." In *Valentine*, the incarcerated individual argued, among other things, a violation of their constitutional right to be free from cruel and unusual punishment, alleging the prison demonstrated "deliberate indifference for its elderly inmates."⁷⁸ The Supreme Court declined to reinstate a lower court's requirement that the prison implement additional COVID-19 protocols, including extensive cleaning and education.

Economic Aid or Prohibition

The economic aid or prohibition category includes those activities in the WHO Overview that help with the implementation of other mitigation measures. We included a subcategory related to business prohibitions because some judicial opinions discussed measures aimed at mitigating COVID-19 by prohibiting certain business types from operating, distinct from physically closing businesses.⁶

Eleven judicial opinions from 6 countries contained at least 1 dispute concerning economic aid or prohibitions (Table 4). Of those, 6 judicial opinions contained at least 1 ruling that would require a change to or imposition of a measure.

In the case, *Namibian Employers' Federation v President of the Republic of Namibia and Others*, a regulation prohibited employers, during a government-ordered lockdown, from dismissing an employee, requiring unpaid or annual leave, or reducing remuneration.⁵⁵ A group of applicants, including employers' federations and businesses, argued the government had no authority to issue the regulations. The court found that the regulations were not "reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency" because they did not "deal with" the coronavirus. The court pointed out that, regardless of how laudable they were, the legality "is measured by enquiring whether they are authorised by the Article of the Constitution."⁵

In *The Queen (on application of Ahmed Adiatu and Another) v Her Majesty's Treasury of the United Kingdom*, a private hire driver and the Independent Workers' Union of Great Britain challenged decisions to provide aid only to select workers, arguing that the decisions were in conflict with other laws, "discriminatory contrary to the European Convention on Human Rights [...] EU law, and/or were taken in breach of the public sector equality duty."⁷⁵ The High Court of Justice found "the Defendant had sufficient regard to equalities issues" when making its economic aid decisions and dismissed the applicants' complaint.⁷⁵

Discussion

In 31 judicial opinions reviewed, the court rulings stopped, amended, or invalidated a mitigation measure already in place, even if only temporarily, during the emergency response. The public health impact of those changes could vary significantly; a determination of that impact is outside the scope of this study and should be explored through further analysis. However, a comparison of 3 judicial opinions in different countries about disputes to stay-at-home measures illustrates the differences in how judicial opinions could impact emergency management planning and response work. For example, on August 19, 2020, New Zealand's High Court ruled in *Borrowdale v Director-General of Health* that a stay-at-home measure had been invalid for a 9-day period.⁵⁶ In contrast, Kosovo's Supreme Court ruled in case KO54 of 2020 on March 31 that a stay-at-home measure, issued on March 23, 2020, was invalid effective as of April 13.⁶¹ In further contrast, Malawi's Supreme Court issued *Kathumba and Others v The President of Malawi and Others* and stopped a national lockdown the day before it was to be put in place.⁵³

The findings presented here also demonstrate the role of the judiciary in amending mitigation measures and putting measures in place where none existed. Of the 39 judicial opinions that contained at least 1 ruling requiring a change to a mitigation measure, 8 required an amendment to a measure or required a measure to be put in place. In some cases, a court's review required amendments to public health mitigation measures or additional mitigation measures be put in place to aid public health, prevent violations of law, or comply with public health guidance. For example, Guatemala's Expediente 1768-2020 required provision of personal protective equipment to healthcare workers,³⁹ while *Shashank Deo Sudhi v Union of India and Others* required COVID-19 testing to be provided free of charge.⁴⁷ *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others* required amendments to mitigation measures to incorporate vulnerable populations such as asylum seekers,⁷³ and *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service and Others* (120/2020) expanded essential services and personnel lists during a lockdown to include professionals instrumental in protecting individual health and rights.⁶⁰ These findings illustrate the ways in which judicial review of mitigation measures may have strengthened a country's COVID-19 emergency response. National and local courts, acting to provide judicial review of the actions of other governmental entities within their jurisdictions, can provide an independent review of those actions and strengthen global accountability for public health laws and adherence to global public health guidelines (both nationally and internationally).

Our findings demonstrate how courts *can* review government actions during an emergency, which does not mean that courts have reviewed government actions equally in and across all jurisdictions and for all people. The COVID-19 pandemic and the measures issued to address it also physically closed courts, delayed trials and hearings, and created impediments to justice.⁸ The public health impact of court closures or inaccessibility of judicial intervention may present an opportunity for future research to further understand varying impacts of the pandemic on populations, including how these closures might have exacerbated inequitable health outcomes that existed prior to the pandemic.

Public Health Implications

Countries reviewing public health legislation can use the categories of mitigation measures and disputes presented in this article to review judicial opinions and gain a better understanding of existing legal authorities and how they were used.

Judicial opinions provide important context and guidance for discussions during a review of existing laws. For example, the Malawi High Court stopped a national lockdown the day before it was to become effective, and a court reviewing that decision noted an “urgent need for Parliament to pass a new law on public health to be enacted that will comprehensively deal with the issues of pandemics,” observing that “the current Public Health Act is very old and ill-equipped to deal with a pandemic of the COVID-19 magnitude.”⁷ In *State v The President of Malawi and Others ex parte Mponda, Soko, and Others*, which concerned school closures, the High Court in Malawi also addressed the issue of reviewing public health emergency laws, comparing the legal framework under the Disaster Preparedness and Relief Act (DRPA) to how the constitution provides for states of emergencies, stating:

The Court noted that the measures made under the March, 2020 (Order) considering section 45 of the Constitution which states that rights can only be derogated from in the event of a state of emergency. In other words, what limits does section 32 of the DPRA circumscribe. This Court is therefore realizing there will be need for Malawi to have a comprehensive discussion on the important matter and distinctions of the law on state of disasters vis-a-vis states of emergency.⁵⁴

Modernization of public health laws requires an examination of additional protections and limitations on any expanded public health legal authority. Even where courts found that governments did have authority to issue mitigation measures, the mitigation measures issued may have conflicted with limitations on the authorities set out in other laws, including constitutions and international laws, or may have been used in manners that were not rational, proportional, or necessary to address the emergency. For example, in enacting a curfew order, the High Court of Kenya discussed that while the government had the authority to apply a curfew to a public health response, it was required to ensure the curfew was not in conflict with other laws, specifically, that it followed constitutional limitations on those kinds of authorities.⁶⁰

Thus, from these judicial opinions, we can learn a public health legal preparedness lesson that the law can have an impact on mitigation measures and that guidance for policymakers and public health practitioners should include training sessions and simulations to strengthen

preparedness actions to include the use of public health authorities. Training and educational materials may also be used to prepare the judiciary for cases during public health emergencies.⁴ Judicial opinions provide details on the types of measures where existing authority was not implemented, did not take rights into account, or was not used in a rational, proportional, or necessary manner. In those instances, exercises or simulations during nonemergency periods can help policymakers and public health leadership practice use of legal authorities and identify potential gaps or barriers, particularly where public health measures may conflict with the limitations set out in law. Yet, even where public health legal authorities exist, they may be used during an emergency in a manner that is not deemed rational, proportional, or necessary by legal standards, or they may conflict with other laws. Training and simulations can help policymakers and public health leaders practice in-corporating public health guidance into mitigation measures while considering other requirements set out in law.

Limitations

Findings from this study represent results of the judicial opinions that were retrieved during our review. The opinions collected and within the study's scope represent a small sample, and therefore the findings for mitigation measures should not be generalized to other cases not included in this study. The number of cases collected was limited by collection methods, including review of only the highest-level court websites, exclusion of criminal courts, and the limited time frame for collection.

Collectors analyzed cases that were in English or were translatable by machine translation services. Those translation services may not capture nuances of legal significance. Similarly, this study did not include native speakers or legal experts from each country from which judicial opinions were analyzed, which may have impacted researchers' interpretations of judicial opinions and legal arguments. For example, attorney researchers trained in US law recognized from the US Supreme Court opinions that an argument about cruel and unusual punishment invokes the "inalienable right" guaranteed by the Eighth Amendment to the US Constitution, without this being explicitly included in the text of the judicial opinion. This limitation highlights the importance of including legal experts native to the jurisdiction of interest in a legal assessment to expand researchers' understanding of legal, social, and cultural factors that may impact findings.

The presence and number of disputes in each country is not, by itself, significant because those parties bringing disputes to court might need to raise all possible disputes against a law at once to avoid waiving their right to bring that dispute to court later. The results provided for 1 country are not indicative of the situation in other countries, although they may provide helpful examples. Finally, because our primary legal experience and training have been in common law legal systems, the coding system may reflect common law systems more than others.

Conclusion

From March 1 through August 31, 2020, courts played a role in the review of COVID-19 mitigation measures for determining compliance with national and international legal

standards. The judicial opinions collected and coded in this study provide global examples of the legal challenges that arose when using existing laws to address COVID-19, a novel outbreak, including lack of authority to issue mitigation measures, conflict between mitigation measures and other national and international laws, and implementation or enforcement of mitigation measures. The judicial opinions describe the need for increased public health law capacity to ensure mitigation measures can be drafted, implemented, and enforced in accordance with national and international legal requirements. Policymakers revising public health emergency laws can perform additional review of judicial opinions from a jurisdiction of interest using the mitigation measure and dispute categories identified in this study to determine how existing laws were applied during the COVID-19 response. Identifying how existing laws were used can guide discussions about assessing gaps or conflicts in law to strengthen competencies for health practitioners and policymakers using those laws during an emergency and to address future outbreaks.

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Understanding Who Is Challenging Mitigation Measures

Type of Entity Disputing the Measure	Type of Mitigation Measure Disputed				Economic Aid or Prohibition
	Emergency Declarations	Movement Restrictions	Physical and Social Distancing	Protection of Specific Populations	
Government entity, branch, or body	4	5	1	2	1
Government official	1	5	2	1	1
Private person	2	17	10	2	3
For-profit business entity	1	7	10	5	8
Other (or could not be determined)	1	2	0	1	2

Table 2.Types of Disputes Present in Judicial Opinions by Type of Mitigation Measure^a

Type of Disputes Present by Judicial Opinion	Type of Mitigation Measure							
	Emergency Declarations		Movement Restrictions		Physical and Social Distancing		Protection for Specific Populations	
	Total	Judicial Opinion Requiring a Change	Total	Judicial Opinion Requiring a Change	Total	Judicial Opinion Requiring a Change	Total	Judicial Opinion Requiring a Change
Authority	5	2	15	9	5	2	2	4
Conflict	5	1	14	9	6	3	3	5
Rational, proportional, or necessary	4	2	11	6	4	2	1	4
Rights	6	2	27	14	13	6	4	8
Implementation (or lack thereof)	1	1	8	3	5	1	7	5
Enforcement	0	0	4	3	1	0	0	1

^a Judicial opinions counted only once, regardless of the number of times the different types of disputes were raised within each judicial opinion. A finding that a type of dispute was present thus means that at least 1 of that type of dispute was present in the judicial opinion.

Table 3. Types of Disputes by 3 Types of Mitigation Measures—Emergency Declarations, Movement Restrictions, and Physical and Social Distancing

Type of Mitigation Measure								
Movement Restriction				Physical and Social Distancing				
Type of Dispute	Emergency Declaration	Border Closure	Stay at Home	Isolation or Quarantine	Lockdown or All Movement Restrictions	Opening or Closure of Schools	Physical Closure of Business	Restriction or Ban on Gathering
Issuing government had no authority	30, 54	–	56	32, 64	48, 67	54	–	49
Authority was delegated	63	–	–	–	56, 67, 82	–	56	–
Authority exceeded	29, 33	52	60, 61, 62	40, 41, 50	29, 53, 56, 82	72	–	61
Authority not consulted	29, 33	–	61	–	29, 53, 65, 67	–	–	53, 61, 71
Conflict with another law	29, 30, 33, 54, 69	–	25, 28, 60	32, 40, 41, 59, 64	19, 29, 48, 70	–	57, 23, 27, 28	76, 77
Not rational (rationality or irrationality)	69	–	60	40, 41	65, 67, 72	72	57	71
Not proportional (proportionality)	30, 31, 63	–	60, 61, 62	40, 41, 59, 64	48	–	–	53, 61, 71
Not necessary (necessity)	30, 31	–	–	40, 41	72	–	–	61
Violation of right(s)	30, 31, 54, 63, 69	–	24, 25, 28, 56, 60, 61, 62	32, 40, 41, 50, 59, 64	29, 37, 48, 53, 56, 65, 67, 69, 70, 72, 74, 80, 81, 75	54, 72	23, 26	22, 36, 49, 53, 65, 71, 76, 77
Issue in implementation (or lack thereof)	31	–	60	41, 50	72, 74, 80, 81, 82	54, 72	57	36, 49
Illegal method of enforcement	–	–	60, 62	–	67, 70	–	–	49

Note: The numbers refer to references.

Table 4.

Types of Disputes by 2 Types of Mitigation Measures—Protection for Specific Populations and Economic Aid or Prohibition

Type of Dispute	Type of Mitigation Measure									
	Protection for Specific Populations					Economic Aid or Prohibition				
	Prison Populations	Migrants, Refugees, Displaced Persons, Asylum Seekers	Health Workers	Indigenous Populations	Aid to Businesses	Aid to Individual	Prohibition on Type of Business	Employee Protections	Maintaining Health Services	Other
Issuing government had no authority	58	–	–	–	–	–	–	–	–	–
Authority was delegated	–	–	–	–	–	–	–	55	–	–
Authority exceeded	78	–	–	–	–	–	67, 68	43, 55	–	–
Authority not consulted	–	–	–	–	–	–	68	–	–	–
Conflict with another law	78, 79	–	39	–	–	73, 75	–	43, 55	–	30
Not rational (rationality or irrationality)	–	–	–	–	–	73	68	50	–	–
Not proportional (proportionality)	44, 45, 51, 79	–	–	–	–	–	68	–	–	30
Not necessary (necessity)	–	–	–	–	–	–	–	–	–	30
Violation of right(s)	78, 79	–	39	20	–	73, 75	65, 67	43, 55	38	30
Issue in implementation (or lack thereof)	44, 45, 51	46	21, 39	20	66	42, 75	–	–	38, 47	–
Illegal method of enforcement	–	–	–	–	–	–	–	55	–	–

Note: The numbers refer to references.