



Action Report

What's Next: Bar Associations and the Pandemic Response, *Revisited*

On March 16, 2022, LawAsia and the American Bar Association (ABA) coordinated a dialogue on the challenges legal communities face because of the pandemic and how bar associations are responding six months after these dialogues began. The discussion in this session, the last in a series, centered around challenges in three main topical areas: access to justice, transparency for the public, and innovations resulting from the pandemic. Panelists were asked to respond to four questions (1) How can bar associations best promote transparency of legislative processes and law enforcement during future crises?; (2) What approaches can Bar Association take to combat the degradation of fundamental rights in the age of doxing and “fake news”?; (3) In what ways has the pandemic forced positive innovations in your jurisdiction, such as alternatives to incarceration to address prison overcrowding, remote hearings providing access to justice to remote populations?; and (4) Vaccine and mask mandates and vaccine passports and contact tracing, how can these comply with rule of law principles?

Below is a summary of the present situation on these issues in a variety of countries in Asia shared during the session, followed by more specific recommendations from each panelist.

1 How can bar associations best promote transparency of legislative processes and law enforcement during future crises?

Lessons from the US: With the science around the pandemic evolving it created a sense of uncertainty among the public about what people were supposed to do to comply with and avoid public health threats. Bar associations can help rebuild public trust by providing developing instructions to the public and explaining that the instructions are evolving. While Emergency Orders can be used to implement public health measures in the short term, to respond to urgent health threats, Bar associations should help ensure that government agencies enacting Emergency Orders consider public comments at some point in the process



and means to challenge those orders where unintended negative outcomes arise. The Administrative Procedure Act in the U.S. specifies the mechanism for government agencies to use in proposing regulatory measures. See 5 U.S.C. §§551–559. It also requires public notice to be given and an opportunity for the public to comment. Agencies may waive notice and the comment process, however, if good cause can be shown. For example, agencies can waive notice when they need to institute public health measures that arise very quickly and when it is important to enact the measures immediately – when necessity demands immediacy. A good practice is for agencies to offer the opportunity for public comment after the measures have been adopted and may modify the measures in response to the comments.

Lessons from the Philippines: The Integrated Bar of the Philippines (“IBP”) promotes transparency by meeting with the legislature and during the pandemic met with Speaker of the House of Representatives, Lord Allan Velasco, to discuss proposed legislation and matters concerning the legal profession during the pandemic. The IBP is painfully aware of the disproportionate Covid-19 response in certain communities, such as targeting vulnerable groups and the risk of heavy-handed security responses which undermine the health response in such communities. In response, the IBP conducted several webinars and released statements discussing and explaining the legal and political developments to incapacitated different groups and sectors. Also, the IBP and Legal Network for Truthful Elections (LENTE) entered into a Memorandum of Agreement to help enlighten the public on different issues and processes, i.e., to educate and capacitate the public on the different electoral laws, issues, and processes. Regional chapters and legal aid will assist in filing cases against election law violators to serve as examples and deter future violators. Also, the IBP will pursue genuine electoral reform by gathering information before and during elections and submitting its recommendations to the legislative branch of the government.

2 What approaches can Bar Association take to combat the degradation of fundamental rights in the age of doxing and “fake news”?

Lessons from the US: Doxing and “Fake News” have become pervasive problems during the pandemic. As a result, many defamation suits were brought and are pending in the U.S. court systems. Currently, actions are pending against Project Veritas, Fox News, One American News, the Gateway Pundit alleging that the news organizations intentionally promoted and profited from false claims of voter fraud during the 2020 American election. Such false claims sowed the seeds of distrust about the U.S. Government’s response to the pandemic. By perpetuating false allegations, civil servants, who run elections and businesses that provide the machines, have come into the middle of the crossfire and have been unfairly harmed. Legal scholars believe it is likely that the plaintiffs, in the defamation suits, might be able to prove news organizations acted and published inaccurate reports with reckless disregard for the truth and facts, and they did so with the intent to undermine trust in the democratic process and government’s ability to address future health crisis.

Lessons from the Philippines: With the power of technology and social media being harnessed to chart the new normal, the internet serves as a breeding ground for different sources of fake news and other means for degrading fundamental rights. The IBP can work across borders to promote policy solutions to balance freedom of expression and countering misinformation and adopt the following approaches to combat the degradation of fundamental

rights: (1) launch information dissemination campaigns; (2) conduct webinars for chapter officers and lawyers in general; (3) build linkages with media house and outlets to fact-check news articles, especially when legal issues and implications are involved e.g. the IBPs engagement with Rappler, a local news outlet, and Facts First PH project which fact checks information regarding legal issues; (4) extend legal assistance to those whose rights have been impinged; and (5) engage in dialogues with the government to convey concerns and impart suggestions to address the infringement of rights.

3 In what ways has the pandemic forced positive innovations in your jurisdiction, such as alternatives to incarceration to address prison overcrowding, remote hearings providing access to justice to remote populations?

Lessons from the US: Some innovations implemented by the U.S. justice system are: (1) allowing electronic home monitoring in lieu of jail time; and (2) conducting remote hearings to reduce spreading COVID-19. The legal professional, however, can still do more to provide access to justice. First, it can advocate to eliminate privately contracted telephone services/fees for prisoners – services which charge exorbitant fees for prisoners. Second, lawyers can advocate for continuation use of remote hearings, especially for status dates and other routine matters. The risk of virtual court does carry with it detrimental consequences that are felt by litigants and criminal defendants. Virtual court has left a backlog of cases that result in great distrust amongst the public. Cases not moving at an efficient pace undermine the confidence in the justice system. In these situations, Bar Associations should help courts mount emergency actions to clear dockets.

Lessons from the Philippines: One positive innovation has been the Supreme Court of the Philippines (“SCOTP”) – in partnership with Microsoft 365 – institutionalizing videoconferencing hearings for all its courts nationwide. SCOTP approved the Guidelines on the Conduct of Videoconferencing, which allows remote appearances in court proceedings from individuals across and outside of the Philippines. The Judiciary has emphasized and works to promote access to justice through technology. The Secure Justice Project, launched on December 20th, 2021, saw the pandemic as an opportunity to use technology to provide better services to the Filipino justice system by extending legal services to indigent litigants through legal aid hubs in chosen areas in the Philippines. In 2022 the goal is to adopt and implement mediation proceedings for Muslim and Indigenous Peoples (Ips/ICCs) communities. The Project will be implemented in partnership with law schools and their corresponding legal clinics through the mandatory Clinical Legal Education Program (CLEP) acting as hubs. Five million Pesos have been granted to the Project to provide laptops and internet to all the province hubs. Another positive innovation was moving the bar exam online and reducing the number of days to two instead of the usual four Sundays in one month.

Lessons from Mongolia: An essential innovation that the pandemic forced onto the Mongolian justice system is the need for an effective e-court system—a system that is not plagued by an insufficient infrastructure. The Judiciary needs better internet speeds and networks, technology that helps reliably ascertain the identity of witnesses, and it needs more flexible procedural provisions.

Lessons from Hong Kong: The pandemic forced a wider use of technology in the judicial system. Promoting the use technology will inevitably result in more access to justice for participants in the legal system. The HKIAC can assist Hong Kong in developing the use of technology in the system because it has both the capacity and experience to assist.

4 Vaccine and mask mandates and vaccine passports and contact tracing, how can these comply with rule of law principles?

Lessons from the US: Vaccine and mask mandates, and vaccine passports raise concerns regarding individual rights versus a government's right to constrain certain behavior if people are posing a threat to others. In the United States, federal courts have wholly focused on individual liberties, i.e., the right of people to avoid some constraints on their activities. Some courts, however, have failed to acknowledge the countervailing liberty interest: the right to not be exposed to a communicable disease. In some instances, courts have upheld mandates for public employees. An example is where federal courts upheld vaccine mandates for agencies that regulates healthcare providers, such as hospitals and physicians. The legal community's responsibility is to make sure that the public health perspective is well represented in court and other legal proceedings.

Lessons from the Philippines: Vaccine requirements were intended to protect the public and prevent the spread of the virus. However, the current laws also restrict individual rights, specifically the right to travel or movement. Some examples of mandates and requirements, which are being challenged are: (1) The Department of Transportations "No Vaccine No Rides" policy; (2) Local government ordinances; and (3) "No Vaccine Stay Home" policy/stay home orders. However, vaccines mandates are in fact addressed in the Constitutional of the Philippines. It states:

The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. The right to travel shall not [be] impaired except in the interest of national security, public safety, or public health, as may be provided by law. The Constitution of the Philippines Article III §6.

The IBP uses its influence to provide its position on vaccine mandates and remind the government of this constitutional provision. The IBP also works to educate the public on these constitutional issues. However, even considering Article III §6, the right to movement may be legally restricted. Before such movement is restricted, there must be an explicit provision of statutory law that grants the exercise of such restrictions. The courts of the Philippines have held that laws that limit the enjoyment of liberty should be construed against the government in favor of the individual. After all, this result is keeping with the democratic principles that "governments are of laws not of individual men."

Mandatory vaccination remains a polarizing issue. Because of this, the IBP has been actively providing its position on the legal issues surrounding vaccination, especially on policies that appear to promote mandatory vaccination. Also, the IBP has partnered with the medical and scientific communities to educate members and the public on the science behind vaccines and the virus. Conversely, the IBP supported the government's mask mandate and other protocols, such as social distancing, because of the limited impact on individuals' bodily integrity In the

Philippines, Probable Cause must be shown that enforcing vaccines and mask mandates, and vaccine passports are in the public interest. The first step to check the legality of mandates and passports is for a law to exist or be passed that obligates people to comply with these regulations – then it can be challenged to see if it is compliant with the rule of law. When mandates and passports are challenged courts must conduct a balancing test to determine whose right prevails, i.e., the interest of the private individual v. the interest of the government to protect the general public.

Lessons from Hong Kong: Hong Kong has not had any issues with masks mandates because Hong Kong has a culture of wearing them as one consequence of the SARS outbreak in 2003. SARS helped prepare Hong Kong by drastically shifting people’s mentality to focus on protecting oneself and the community through wearing masks. On the other hand, vaccines are not compulsory; they are encouraged because of the Vaccine Passports and the high mortality rate amongst the elderly. Hong Kong recently rolled out a vaccine passport which is required for shopping malls, government buildings, etc. Currently, the passports are being challenged in court, but no decisions have been issued yet because they are working through the court system. Such vaccine bubbles, especially those for court buildings – raising access to justice concerns – are being challenged. But Hong Kong doesn’t have any decided cases yet. Instead, Hong Kong courts look to European Jurisprudence to see what the trends and relevant principles are. Hong Kong courts are considering the *Vavříčka and others v. The Czech Republic* decision issued by the European Court of Human Rights when deciding the legality of vaccine and mask mandates, and vaccine passports. *Vavříčka and others v. The Czech Republic* (App. Nos. 47621/13 and 5 others) [2021] ECHR 47621/13 at [293].

Presenters:

- Professor Renee M. Landers, Professor of Law, Suffolk University
- Mr. Burt M. Estrada, National President and Chairman of the Board of Directors, the Integrated Bar of the Philippines
- Hon. Oyuntungalag Jargalsaikhan, Chief Judge of Civil Appellate Court of Ulaanbaatar, Mongolia
- Mr. Victor Dawes, SC, Chairman of Hong Kong Bar Association, Hong Kong SAR
- Facilitator: Ms. Sara Sandford, Chair of the ABA Rule of Law Institute Board of Directors and former Chair of the ABA International Law Section

Opening Remarks:

- Ms. Melissa Pang, President of LawAsia
- Ms. Deborah Enix-Ross, President Elect of the ABA

Rapporteurs

- Mustafa Aijazuddin
- James Zhang

Summary of Specific Action Tips for Bar Associations

Offered by Professor Renee M. Landers, Professor of Law, Suffolk University

Bar associations are in a good position to work with legislators and the executive branch to review some of the statutory authorities relating to emergency powers, to update them, and clarify the roles of each branch of the government, e.g., specify standards and circumstances under which it is justifiable to impose restraints on individual liberties. Statutes exist in the U.S. that address issues such as emergency powers held by governors and public health authorities to respond to health crises circumstances and what the authority of the federal regulatory agencies might enact for the general welfare. Many of the laws are outdated, however, and do not really anticipate public health or other emergencies that might have an extended duration.

Ultimately, revisions, when made, to statutes should consider: (1) whether they are sufficiently specific about what authorities state or federal governments must do to protect the community from harm; and (2) what authorities the executive branch may invoke if the legislature fails to act. Organized bar associations could then step in to ensure the constitutionality of these statutes and any revisions that may be made. Furthermore, science should be considered by government agencies and courts in developing responses to public health threats. As the effects of the pandemic recede somewhat, governments will be tempted to focus on other issues. Now is the time, however, to make necessary changes to prepare for future public health emergencies while the lessons of the pandemic are still fresh.

Offered by Burt M. Estrada, National President and Chairman of the Board of Directors, the Integrated Bar of the Philippines

The IBP hopes that, through its many partnerships, it can contribute to the shaping of needed legislation to be better prepared for future emergencies and ensure access to justice. Policies and legislations will not be left to the whims of administrative officers, whom can be prone to abuse when there is no law that provides for clear limits of their powers during emergencies. Alternatively, the judiciary has been aggressive in pursuing effective reform initiatives and advancements considering the pandemic. However, lawyers must remain responsible judicial partners in continuing to improve the administration of justice and to uplift the rule of law when they can. As the Philippines tries to find and negotiate its way out of this global pandemic, which has radically changed the way of life, lawyers need to remember that they are officers of the Court and sentinels of democracy and the rule of law.

Offered by Hon. Judge Oyuntungalag Jargalsaikhan, Chief Judge of Civil Appellate Court of Ulaanbaatar, Mongolia

There are many lessons that were learned from the COVID-19 pandemic. However, there are processes that can still be adopted to prepare for future crises and ensure access to justice. First, Mongolia must implement programs that raise public awareness and limit the spread of fake information. Second, more efforts need to be made to introduce an effective e-court system – a system on a good platform. E-court systems will allow people to access justice

while adhering to pandemic restrictions. Furthermore, the system needs more internal coordination with flexible procedural laws that would allow judges and attorneys to administer justice efficiently.

Offered by Victor Dawes, SC, Chairman of Hong Kong Bar Association, Hong Kong SAR

The COVID-19 pandemic left the practice of law in Hong Kong wholly unprepared. However, there are steps that can be taken to prepare for the next crises. The main step that should be taken is to promote the use of technology in all parts of the justice system – e.g. remote hearings, virtual visitation with prisoners and detainees, etc. Remote hearings should be the rule rather than the exception. No reason why remote hearing facilities cannot be installed in detention facilities. They can be used for both prison visits and remote hearings, even in criminal cases. Furthermore, HK already implemented remote hearings in 2021; the HKIAC hosted 138 hearings, of which 101 were fully or partially virtual, and 37 were in-person at HKIAC's premises in Hong Kong.