

Summary of conference call - 9 April 2020: "The Functioning of Courts in the Covid-19 pandemic"¹

1. MAIN OUTCOMES

Conclusions:

- A rule of law crises preceded the Covid-19 pandemic, but has been aggravated in some countries by excessive emergency measures and the lack of or inappropriate use of sunset clauses. All emergency measures must be necessary, proportionate, non-discriminatory and subject to periodic review. They must not interfere with the separation of powers, or with judicial independence.
- Courts need to remain functional to discharge key functions while preserving the right to life and health of judges and judicial staff, as well as for lawyers, parties, witnesses etc. Judges have special obligations and may justifiably be asked to accept a higher degree of risk given the essential role of the judiciary in securing human rights protection and the rule of law.
- There is a risk of 'hyper-production' of laws, decrees, regulations and instructions on emergency measures for the judiciary from different levels of power (legislative, executive, judicial), which may at times be contradictory, vaguely formulated or unclear in terms of beginning and end of the respective measures.
- The judiciary needs to remain the guardian of the rule of law and fundamental rights. Key functions of courts include the review of legality of emergency measures, judicial review of emergency legislation with regard to constitutionality and compatibility with international law, and urgent legal matters where delay would cause irreparable harm. The prioritisation of cases should ensure gender equality and the protection of the most vulnerable: children, elderly, persons with disabilities.
- There is some consensus regarding the definition of "urgent" cases, which cannot be suspended. These include cases with defendants in (pre-trial) detention; cases where immediate protection is required by women or other vulnerable groups from (domestic) violence (in particular during confinement in quarantine); other urgent family disputes; and cases relating to violation of measures concerning COVID-19 that imply irreparable harm. However, decisions on which cases to suspend and which ones to continue also need to take into account the changing nature and intensity of the pandemic.
- The reduction of the prison population, by scrutinizing the necessity of pre-trial detention and considering early release, constitute a measure to reduce the risk of COVID-19 spreading in places of detention and at the same time reduces the burden on the penitentiary and the judiciary in the supervision of such cases.
- During quarantine and lock-down individuals may not be able to seek justice, and lawyers may be unable to defend the rights of their clients adequately.
- Various problems arise in the context of videoconference hearings, including lack of meaningful participation during online hearings and shortcomings in terms of observing non-verbal cues, problems with the identification of parties and the examination of evidence, and the lack of means for confidential client-lawyer communication during online hearings. Access of the public may be compensated partially by broadcasting hearings, however shortcomings remain, including with regard to trial monitoring. Many judicial functions and the delivery of fair trial rights mean that face-to-face interaction cannot be entirely replaced by the use of IT-solutions. Parties may not own a computer, not have access to internet, or not be tech-savvy enough to ensure full participation in online hearings.
- A rise in bankruptcy and labour-related cases is expected, as well as domestic violence cases and

¹ This document has been summarized by Andrea Huber, Deputy Chief, ODIHR Rule of Law Unit, based on a conference call on 9 April 2020 and various sources submitted to ODIHR. Please double check country-specific references prior to use in other documents.

family disputes, including disputes over the custody of children.

- The ensuing economic crisis may result in reduction of investments in judicial systems at a time of increased backlog of cases.

Recommendations:

- The over-production and overlapping of scope of laws, decrees and regulations on special measures for judicial procedures should be avoided. The periods of suspension of deadlines, any exceptions and the fate of deadlines during the suspension period should be regulated as clearly as possible.
- Online tools and technology should be used as much as possible to deliver the key functions of courts, however weighing the interest in continuing the procedure despite shortcomings of videoconference hearings and paper-based procedures as compared to an actual trial. The use of online tools and technology requires a basis in law, and measures should be taken in order to ensure consistency in use across the jurisdiction.
- Emergency measures relating to courts and judicial procedures should be consulted with judicial stakeholders, such as judges associations and judicial self-governing bodies.
- Emergency measures should include an end date and not interfere with the separation of powers or judicial independence. Their necessity and proportionality should be reviewed periodically.
- Clear criteria should be established, with a margin of appreciation for judges, for the determination of an "urgent case" which should not be suspended, but requires at least interim relief. The availability of certain remedies is required by international human rights obligations and cannot be suspended.
- Judicial self-governing bodies and judges associations should engage, as a matter of urgency, in discussions on preparing for the restoration of court activities at the end of lock-down/ emergency measures (prioritization of cases from the back-log, necessary adaptations of case allocation etc).
- Protocols should be discussed timely before the end of lock-down to determine an organized return to court for judges and other court staff, while ensuring continued protection against new infections, for example a phased return or alternating court days for judges.
- Prioritization of cases following the end of emergency measures should be non-discriminatory and not over-emphasize economic interest over the protection of rights of individuals, and should follow fair and objective criteria.

3. SPECIAL MEASURES ADOPTED BY STATES

--- See more detailed country-specific practices under 7.

While **procedures are suspended** in a range of countries (except for urgent cases), in others courts remain open (e. g. Bosnia and Herzegovina, Croatia, Austria, Sweden). Yet, access to court buildings has been restricted in a broad range of countries, such as Germany, Italy, Spain, Canada etc.

States use **different sources of law** in order to regulate changes to the judicial system in times of the crises, from tailor-made laws, ordinances by the Ministry of Justice, government decisions to decisions by Judicial Councils and instructions issued by court administrations. As a consequence, judges are facing a variety of **instructions from a host of different sources**, which are sometimes even contradictory.

Oftentimes, these **sources of law regulate a mix of issues**, including the type of procedures that are suspended, but also practical issues such as measures taken to protect judges and court staff and whether access to court is prohibited. In some countries, regulations order the suspension of hearings, but without regulation on how they will be resumed after the end of the crises.

Nearly all regulations in CoE member states include an **end date** (the longest in Slovenia, until 30 April), with the exception of Denmark, Turkey and Lithuania where there is no indication of how long the

special rules will apply. All CoE member states do maintain minimum judicial services, in particular recognise the need to continue cases relating to children, hearings on detention etc.

Statutes of limitation and **procedural deadlines** have been suspended, interrupted or expanded in many jurisdictions.

Jury trials have mostly been suspended.

Problems have arisen with regard to **electronic/ digital signatures** of judges (and other court officials) in order to authenticate themselves and validate decisions taken while they are working remotely.

3. INTERNATIONAL LAW

--- See *Guidance Note of International Commission of Jurists (ICJ), The Courts and COVID-19*, 6 April 2020, <https://www.icj.org/icj-guidance-on-the-courts-and-covid-19/>

Human rights and rule of law obligations continue to apply to all institutions and organs of a state, including in a state of emergency. **Restrictions** may be permissible in the interest of public order (ordre public) or public health (e. g. freedom of movement, freedom of association, right of peaceful assembly). However, any such measure needs to adhere to the principles of legality, non-discrimination, necessity and proportionality. Restrictions need to have a time limit and be kept under ongoing review so that they can be adapted or removed if and when they turn out to have become unnecessary or disproportionate. Measures must not interfere with judicial independence, and preferably should be taken in consultation with the judiciary.

However, other restrictions **may require derogation**, for example a general denial or postponement of procedures or a closure of procedures from public access (see safeguards such as "all trials in criminal matters ... must be conducted orally and publicly", courts must provide "adequate facilities for the attendance of interested members of the public, within reasonable limits", "trial within reasonable time" for persons accused of an offence).

Judges, lawyers, prosecutors and court staff, as all human beings, have the **right to life and right to health**, which requires states to set measures of protection. It is worth noting that the mortality rate of the Covid-19 virus seems to increase with age, and that in many judiciaries a relatively high proportion of judges is of higher age, compared to other professions. At the same time, judges may justifiably be asked to accept a higher degree of risk than other individuals who do not hold public office (see also medical staff, police, fire-fighters etc).

Key functions of courts reflected in international law relate to a) the right to a fair trial by an independent and impartial court (Art 14 ICCPR), b) the right to judicial control of deprivation of liberty (Art 9(3) and (4) ICCPR); and the right to an effective remedy (Art 2(3) ICCPR). All three functions are essential in times of emergency or crises. The judiciary plays a crucial role in keeping checks on the other state powers, in particular the executive, which tends to increase its power during states of emergency.

Other safeguards cannot be restricted due their **non-derogability**. Non-derogable rights include the prohibition of torture, prohibition of slavery, right to life, the presumption of innocence in criminal proceedings, the prohibition of retrospective criminal law and the availability of a remedy². Also, guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.

² Human Rights Committee, General Comment 29, para. 14.

4. DETERMINATION OF "URGENT CASE" AND INTERIM RELIEF

--- See *Guidance Note of International Commission of Jurists (ICJ), The Courts and COVID-19*, 6 April 2020, <https://www.icj.org/icj-guidance-on-the-courts-and-covid-19/>

--- *World Health Organization (WHO): Addressing ethical issues in pandemic influenza planning: Discussion Papers, 2008*, https://www.who.int/csr/resources/publications/cds_flu_ethics_5web.pdf

A **new type of case** has emerged in which individuals are brought to court because of breach of quarantine rules. However, oftentimes the definition of such offences as well as the sanctions for those who do not comply with confinement orders lack clarity and raise concerns with regard to the principle of legality.

The quarantine measures have shown to result in **increasing family disputes**, in terms of domestic violence but also other family-related conflicts. **Labour disputes and insolvencies** are also expected to increase considerably.

While state and court practices differ with regard to the selection of 'urgent cases' that are continued despite closure of courts, a certain consensus is forming regarding the definition of "urgent cases", which cannot be suspended. These include the following types of cases:

- Violations of human rights and constitutional rights, especially those with risk of irreparable harm and cases relating to non-derogable rights.
- Cases relating to rights of vulnerable individuals, such as children, older persons, women, persons with disability, especially in context of their need of injunctive relief against violence, but also arrest and detention since the vulnerability of these groups tends to increase when deprived of liberty.
- Persons deprived of their liberty: The right to challenge the lawfulness of detention cannot be suspended, but also the protection of the right to life and against torture while detained cannot be dispensed of, even in situations of emergency. (Note that video-conference hearings create problems if judge cannot observe the individual concerned, including whether the individual has signs of torture or ill-treatment.)
- Sanctions for breach of emergency measures: The UN Special Rapporteur on the Independence of Judges and Lawyers has emphasized that national courts must remain competent and capable to evaluate and if necessary nullify any unlawful imposition or unjustified extension of emergency measures.³
- The reduction of the prison population should also be considered as urgent measure in protection of persons deprived of their liberty, and at the same time reducing the burden on the penitentiary and the judiciary during the pandemic. The necessity of pre-trial detention should be scrutinized and early release of prisoners held for non-violent offences be considered.

On the other hand, it was highlighted that in the context of criminal procedures Article 14(3) (d) ICCPR⁴

³ UN Special Rapporteur on the Independence of Judges and Lawyers, Report to the UN General Assembly, 12 August 2008, UN-Doc. A/63/271, paras. 16-19, 66.

⁴ Article 14(3) ICCPR: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"

enshrines the right 'to be tried in his presence'; and Article 9(3) ICCPR⁵ the right to 'be brought promptly before a judge', both **explicitly requiring a face-to-face hearing**.

Outside of cases in which decision without delay is required by international law, there seems to be consensus that **judges need to decide, on a case-to-case basis**, which cases to suspend and which ones to continue despite lock-downs and court closures. Factors to take into consideration may include:⁶

- the nature of the hearing, including complexity of the case and matter being dealt with
- the availability and quality of technical equipment and systems of remote communication of the parties and all relevant actors (e. g. witnesses, interpreters)
- the existence of impairments or other factors that could negatively affect the parties' ability to participate in the proceeding (e. g. visual and other relevant disabilities and impairments, age/ familiarity with IT-systems)
- whether the parties/ the defendant have legal representation
- the ability of party/ defendant and lawyer to interact with each other confidentially during the remote/ videoconference hearing
- the need to call witnesses
- the need to (physically) examine evidence
- the length of delays and their likely impact on the rights of the party/ defendant.

5. FAIR TRIAL AND OTHER HUMAN RIGHTS CONCERNS

--- See *Publication of Fair Trials International, Safeguarding the right to a fair trial during the coronavirus pandemic*:

<https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>

On videoconference hearings specifically see below.

A recent report of the Fundamental Rights Agency (FRA) notes that "the consequences of the COVID-19 outbreak demonstrate the limitations of the judicial system's ability to work remotely using electronic devices for communication, to **access files held in databases** and to conduct proceedings via video conference. This is particularly the case where courts are not fully adapted to using such technology."⁷

According to the FRA's assessment "Video conferencing could be used where deemed appropriate following a case-by-case assessment. However, if used "by default" there could be a negative impact on the minimum standards as developed under Articles 47 or 48 of the Charter and Article 6 of the ECHR, in particular in relation to effective participation in proceedings, including one's right to be present." The Agency noted that the suspension of 'non-urgent' requests to access to files will affect the equality of arms, where there is no secure means for accessing it online.⁸

Other concerns relate to **data protection and privacy issues** when files are accessed remotely. It was

⁵ Article 9(3) ICCPR: Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

⁶ Based in part on Briefing of Fair Trials International, Safeguarding the right to a fair trial during the coronavirus pandemic.

⁷ European Union Agency for Fundamental Rights, Coronavirus Pandemic in the EU - Fundamental Rights Implications, Bulletin 1 (1 February - 20 March 2020), p. 28 (https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf).

⁸ European Union Agency for Fundamental Rights, Coronavirus Pandemic in the EU - Fundamental Rights Implications, Bulletin 1 (1 February - 20 March 2020), p. 28 (https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf).

flagged that when using specific software and/ or Cloud solutions, the data may ultimately be owned by the provider rather than by the court.

Concerns have arisen over ambiguously formulated **times of suspension of deadlines** ("until the end of the epidemic"), with regard to the fate of deadlines starting during the suspension period, and with regard to procedural acts or deadlines exempted from the suspension.

6. VIDEOCONFERENCE HEARINGS

--- See *Remote Courts Worldwide website*, reporting on various state practices on remote and virtual hearings: <https://remotecourts.org/>

--- See Daniel Devoe and Sarita Frattaroli, *Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward*, <http://socialaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system/04devoe-sarita-paper.pdf>

It should be emphasized also that remote hearings (via videoconference or other technical equipment), even in times of emergency, do require a **basis in law**. **Concerns regarding the legality** of judges using videoconference hearings on the basis of a governmental recommendation or decree have been raised, alongside problems due to lack of **consistency** in the use of teleconferenced hearings (some judges use it, others do not, judges use it very differently).

Videoconferencing has been introduced or expanded in many jurisdictions, although sometimes without much preparation.

Countries where videoconferencing is used in civil/ criminal procedures as per notes taken during meeting include: Austria, Croatia, Hungary, Serbia, Portugal, Sweden (where also regular hearings are held), North Macedonia, France (videoconference hearings but also hearings by phone), Kazakhstan⁹ (where the app *TrueConf* is being used for court hearings), UK, Ukraine (where judges reportedly are allowed to use any video-conference application and where some are broadcasting hearings via *youtube* to ensure public access), and Slovenia.

Substitution of hearings by video-conference or other IT-solutions firstly requires that the respective **technical solutions are in place for all parties** involved, i. e. judge(s), lawyers, prosecutor (where applicable), parties, witnesses, interpreter (where applicable) with sufficiently reliable and continuous audio and video. Technical support should be made available for the parties in order to ensure their effective participation, and hearings need to be halted if the connection is interrupted. It can only continue once the problem is resolved. It should be noted that persons who are not tech-savvy or have sensory disabilities may not be able to use and/ or to participate effectively using such technology.

A range of fair trial issues arise in the context of videoconference hearings, including (but not limited to):

- How to check the identity of the parties
- How to prevent witnesses or parties from being influenced or directed by third parties during testimony
- How to enable parties to observe the courtroom in its entirety
- Attorney-client privilege: no confidential communication possible between client and lawyer in a videoconference hearing
- Public access (as required by Article 6 ECHR, 14(1) ICCPR)
- How to file and inspect evidence

The **effectiveness of legal representation** in such hearings has been questioned, noting that a hearing is more than merely conveying information. For example, videoconferencing deprives the parties and

⁹ Description in Russian language: <http://sud.gov.kz/rus/news/o-rezhime-raboty-sudov-respubliki-v-ramkah-chp>.

judge from observing non-verbal clues and from observing the courtroom in its entirety. It was also highlighted that while testifying via video-link parties and witnesses cannot be prevented from looking at 'cheat sheets' or receiving signals or cues from third parties.

Lack of **publicity of hearings** infringes on a key human rights safeguard and impedes the public from participating and observing justice being done. Some countries/ courts have attempted to compensate for the publicity of trials by broadcasting or web-streaming online hearings. However, there are concerns about wholesale broadcasting of entire criminal proceedings, especially on third party platforms.

The observation of trials and **trial monitoring is severely restricted** in videoconference hearings.

Concerns have been raised with regard to the potential **deliberate misuse** of remote/ videoconference hearings as a means of persecution. First experiences have arisen where defendants and their lawyers were not able to question witnesses, or where in fact even the identity of witnesses remained unclear in a videoconference hearing.

7. JUDICIAL ADMINISTRATION/ COURT MANAGEMENT

The current systematisations of judicial positions are made on the basis of the normal/expected inflow of cases and the resources required to solve them in a reasonable time. The COVID-19 crisis has interfered with these assumptions, and resources are being "reshuffled". Less judges are physically working in courts, only 'urgent' trials are held or are held using IT-solutions in an attempt to manage the incoming cases. Using the COVID-19 terminology, the judiciary also needs to "flatten the curve" of caseload to manage the decreased capacity (judges, courtrooms, physical access, support staff), and the change in demand (urgent cases, expected increase in labour and insolvency cases).

Disciplinary procedures against judges may be continued despite lock-down, but be removed from public scrutiny by way of video-conference rather than public hearings.

After the health-related crises, an **economic crises** has to be expected, with a risk of judicial budgets being further reduced, and/ or investment in the judiciary having to compete with other urgent causes.

Challenges which are likely going to arise **after the end of lock-down** were discussed briefly, but should be elaborated on in more detail. It was feared that specific types of cases are likely going to be prioritized over others, but that criteria for prioritization may be arbitrary and be subject to political or mainly economic agendas.

There may be a **temptation for quick appointments of judges** in order to deal with case backlogs, risking to fall short of international standards.

Judicial self-governing bodies and judges associations should engage, as a matter of urgency, in discussions on preparations for resuming court activities at the end of lock-down (prioritization of cases from the back-log, necessary adaptations of case allocation etc).

Protocols should be discussed in time before the end of lock-down to determine an organized return to court for judges and other court staff, while ensuring continued protection against new infections, for example a phased return or alternating court days for judges.

There is a danger that decisions relating to judicial administration, including selection and promotion of judges, continue to be subject to remote decision-making, e.g. circular decisions via email. While such measures may provide a temporary emergency solution to prevent paralyzation during the height of the pandemic, they do not compensate for conscientious deliberations of judicial bodies, such as judicial

councils and general assemblies of courts, and bear a risk of undue influence of court presidents.

8. OVERVIEW OF STATE PRACTICES (AT THE TIME OF CONFERENCE CALL)

--- See CEPEJ blog "*Sharing solutions and measures implemented in the member States to ensure the functioning of European judicial systems in the context of the COVID pandemic-19*" -

<https://www.coe.int/en/web/cepej/compilation-comments>

--- See also Council of Bars and Law Societies of Europe (CCBE) Survey: *Exchange of experiences and best practices between bars*,

https://www.ccbbe.eu/fileadmin/speciality_distribution/public/documents/CCBE-Survey-Exchange-of-experiences-and-best-practices-between-bars-AM-3.pdf

--- See Fair Trials International, *COVID-19 Justice Project*, <https://www.fairtrials.org/newsmap>

Please note the below country examples are a sample and have been included based on available information. Please double-check before use in other documents.

According to a recent report of the Fundamental Rights Agency (FRA) the new laws in **Italy, Portugal and Slovenia** stipulate that urgent acts in which fundamental rights are at stake - such as proceedings concerning minors at risk or urgent guardianship and domestic violence proceedings – be carried out.¹⁰

Albania was mentioned as a country where the establishment of special measures for the judiciary was introduced in a transparent manner. Measures have been put in place by the Normative Act on Special Measures in the Area of Court Activity During the Epidemic Caused by COVID-19 by the Council of Ministers, upon a proposal by the Minister of Justice and reportedly in consultation with the High Judicial Council. Court hearings on administrative, civil and criminal cases, which are not urgent, and deadlines for filing lawsuits and other procedural actions were suspended "until the end of the epidemic caused by the COVID-19 outbreak", with a few explicit exceptions such as family cases, validity of arrest and deadlines of maximum detention duration. The Normative Act authorizes the judicial administration councils and bodies of every court to approve special organizational matters on the conduct of court proceedings necessary to avoid gatherings in court premises and courtrooms.

In **Austria**, the Second COVID-19 Act (Official Journal 2020 I 16) has interrupted deadlines in civil proceedings until 30 April, which means that the full period re-starts when the interruption ends, for example a deadline of four weeks for an appeal will expire four weeks into May (unless the interruption were to be extended). Video-conferencing is available as an option for hearings in civil, administrative and criminal matters, and can include hearing witnesses, examination of other evidence and reviewing pre-trial detention. Furthermore, the modalities for deliberation of court chambers and senates have been changed and the option of 'circular deliberation' was expanded.¹¹ Issues have arisen with regard to the role of general assemblies of courts in judicial appointments, and the law has been changed to enable voting in writing by the members of the General Assembly in a circular way.¹² One-third of judges can veto such a proceeding. The lack of verbal deliberations on such matters has been flagged as a shortcoming. While individuals can address the Constitutional Court challenging the constitutionality of laws, no urgent procedure or interim measure is available in case laws or by-laws are in breach of fundamental rights. This has prompted criticism as to the lack of an effective remedy.

¹⁰ European Union Agency for Fundamental Rights, *Coronavirus Pandemic in the EU - Fundamental Rights Implications*, Bulletin 1 (1 February - 20 March 2020), p. 28 (https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf).

¹¹ Regular procedural legislation envisages a circular decision only for a senate of three judges who consent on such decision-making in simple cases (Article 15 of the Procedural law of the Supreme Administrative Court). The temporary exception enables a circular decision also for a panel of five judges in case none of the judges vetoes such decision-making.

¹² The case file and the draft decision (proposal of the reporting judge) are handed from one judge to another in a certain pre-arranged way (system of *anciennité*, last one to receive is the chairing judge of the chamber/senate). Every judge can make comments to the draft and in case necessary another draft is circulated.

In **Czech Republic**, the Ministry of Justice has introduced the so-called "Lex COVID Justice", which reportedly enshrines the suspension of executions of debtors (enforcement proceedings) and remits missed legal deadlines.

In **Denmark**, a task force has been established to capture lessons learned. Courts reportedly operate on an emergency basis and focus on 'critical cases', while court and legal deadlines have been interrupted.¹³

France has adopted four ordonnances (decrees with the force of law) on the basis of the Law on Health Emergency in the context of the COVID-19 pandemic: adapting rules of criminal procedure, rules applicable to ordinary courts dealing with non-criminal matters as well as to contracts of co-ownership, rules of administrative procedure and on prolongation of deadlines expiring during the period of the health emergency. As in many other jurisdictions, statutes of limitation and deadlines for the exercise of remedies were extended; the possibility to hold hearings by videoconference, already provided for in the Code of Criminal Procedure, was extended - without the need of the consent of parties - to all criminal courts other than jury trials. Should a first instance criminal court be unable to function, the first president of the court of appeal can designate another court of the same kind. Other adjustments reported include: hearings can be presided by a single judge instead of a panel; juvenile courts can sit without lay assessors; presidents of courts can exercise the function of investigating judge; pre-trial detentions were allegedly automatically extended for two months, three months or six months depending on the gravity of the criminal offence alleged; time limits were increased to allow investigating chambers to rule on a request for release; pre-trial detention can be extended without adversarial debate; time limits for the Court of Cassation were extended to adjudicate on appeals concerning detained persons.¹⁴

In **Hungary**, after an initial judicial recess, at the time of the conference call courts were back to work, although with changes such as digital hearings and restrictions on physical access to buildings and judicial premises. Reportedly, according to Decree no. 74 of 31 March 2020 on certain procedural measures to be implemented during the state of emergency in Hungary, normal deadlines remain applicable to courts and parties of proceedings, in principle, unless there is a "procedural step which imperatively requires the presence of any of the parties to proceedings and there is no other means by way of which the court could proceed with the case (in particular impossibility of correspondence in writing, of communication by electronic means or of remote interviewing by info-communication tools)".¹⁵

In **Slovenia**, the Courts Act has been amended after the SARS pandemic by Article 83a, which allows for the introduction of special rules in case of natural and other disasters such as epidemics (referred to as extraordinary events). The President of the Supreme Court decides by decree, upon proposal by the Minister of Justice. Article 83a refers to Article 83, which states that during court holidays (from 15 July to 15 August) courts shall hold hearings and make decisions only in "urgent matters".¹⁶ Furthermore, procedural deadlines are suspended during the period of the extraordinary event and court writs cannot be served. Other measures can be introduced by the President of the Supreme Court. The measures may last as long as the extraordinary event, but no more than two months. In Slovenia, videoconferencing has been introduced seven years ago with strict data security policies and protocols, enabling judges to use an established, rather than a spontaneously make-shift system available at all district courts. Yet, videoconferencing was stated to be used only to a limited extent in hearings in criminal and civil matters.

¹³ According to informal notification in judicial network within the EU.

¹⁴ This information is based on an unofficial translation made available to ODIHR of the ordonnances in France.

¹⁵ According to informal notification in judicial network within the EU.

¹⁶ Matters listed as urgent during court holidays include defendants deprived of liberty, aliens not resident in Slovenia, interim decisions, matters regarding upbringing and childcare protection, relating to detention of persons in mental health institutions, disputes about publication of correction of published information, compulsory settlement and bankruptcy).

monitoring of places of detention during COVID-19". This resource, developed in cooperation with the Association to Prevent Torture (APT) will hopefully be available at the beginning of May.

Please note that various materials have been made available with regard to monitoring places of detention during the pandemic, including by the UN Subcommittee for the Prevention of Torture (SPT), the CPT, the Council of Europe and Penal Reform International (PRI).

See also White Paper on Access to Justice for Pre-trial Detainees, "Bringing Justice Into Prison: For a Common European Approach", June 2019 (A Report based on Comparative Analysis and Empirical Studies in nine EU countries by the Research Project EUPretrialrights)

Resources

Guidance and recommendations:

International Commission of Jurists (ICJ), Briefing note "The Courts and COVID-19", 6 April 2020: <https://www.icj.org/wp-content/uploads/2020/04/Universal-ICJ-courts-covid-Advocacy-Analysis-brief-2020-ENG.pdf>

Fair Trials International, Safeguarding the right to a fair trial during the coronavirus pandemic: <https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>

Daniel Devoe and Sarita Frattaroli, Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward, <http://socialaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system/04devoe-sarita-paper.pdf>

Hague Conference on Private International Law, Guide to Good Practice on the Use of Video-Link under the Evidence Convention, 2020, <https://assets.hcch.net/docs/569cfb46-9bb2-45e0-b240-ec02645ac20d.pdf>

Florida Court Education Council's Publications Committee, Pandemic Influenza Benchguide: Legal Issues Concerning Quarantine and Isolation, 2019, https://www.flcourts.org/content/download/218173/1974984/pandemic_benchguide.pdf

World Health Organization, Addressing ethical issues in pandemic influenza planning: Discussion Papers, 2008, https://www.who.int/csr/resources/publications/cds_flu_ethics_5web.pdf

Country-specific regulations and practices:

Council of Europe, Management of the judiciary - compilation of comments and comments by country: <https://www.coe.int/en/web/cepej/compilation-comments>

Recap of legal and judicial practices in the context of the pandemic, compiled by the Council of Bars and Law Societies of Europe: https://www.cbbe.eu/fileadmin/speciality_distribution/public/documents/CCBE-Survey-Exchange-of-experiences-and-best-practices-between-bars-AM-3.pdf

Fair Trials International, Covid-19 Justice Project (tracking how justice systems and fair trial rights are being affected by the Covid-19 pandemic): <https://www.fairtrials.org/covid19justice>

International Association of Judges, Judicial Activity during the Coronavirus Pandemic²¹

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²¹ Available as attachment on request.

²² Available as attachment on request.

²³ Available as attachment on request.

²⁴ Available as attachment on request.

²⁵ Available as attachment on request.

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Check-list of issues

1) Overall challenges for courts in times of the Covid-19 crises

- What are the core functions of courts that need to be delivered despite pandemic?
- Accordingly, suspension of procedures versus continuation and how to decide (eg urgent and core functions like decisions on pre-trial detention, domestic violence/ temporary injunctions, judicial scrutiny of emergency legislation and measures etc)
- Article 14 ICCPR and other international standards
- Fair trial implications in case of suspension (right to a trial within reasonable time)
- Problem of a multitude of laws, decrees and instructions on court management and proceedings, including contradictory regulation
- Lack of consultation and coordination of special measures with judicial self-governing bodies and judges associations

2) Changes in modalities of procedures that are continued in lock-down

- Video-conferencing and other remote ways to conduct hearings and their implications for fair trials, including public hearing, access to case files for lawyers and parties, recording of videoconference hearings
- Challenges with videoconferencing such as verification of identity of parties and witnesses, examination of evidence, reading of 'non-verbal cues', problems of inconsistent use by different courts/ judges
- Avenues of appeal against new procedural decisions?
- Modalities for deliberation of court chambers and senates
- Statutes of limitation and deadlines for motions and decisions
- Accessibility of the required technology (parties and defendants with special needs, but also older less tech-savvy individuals, individuals without computer and/ or wifi)
- Issues relating to judges working remotely, including data security
- Access to case files etc for all parties (judges, prosecutors, lawyers, victims)
- Access of defendants to their legal representatives, in particular when in detention due to ban of visits (availability of telephone and videoconferencing in prisons, quality of legal representation with remote preparation, confidentiality of defendant-lawyer communication, filing and examination of evidence)
- Fair trial rights and quality of legal representation during remote hearing (presentation of evidence, lack of ability to consult with lawyer, lack of ability to assess non-verbal clues, reliable sound and video)
- Means of correspondence with courts, availability of postal services?

3) Judicial administration during Covid crises

- Safety of judges and court staff, as well a lawyers, witnesses etc / Protection of right to life and health
- Means of consultation of special measures with judicial self-governing bodies and judges associations
- Protection of the right to life and health of judges vs delivery of core judicial functions
- Who takes decisions/ who is entitled to take decisions on changes of modalities of courts (government? parliament? judicial self-governing bodies? court presidents?)
- Challenges in judicial administration during the pandemic, including appointment of judges, secondment/ transfer of judges to other courts, selection procedures of vacant judgeships, changes in allocation of cases?

- Suspension of disciplinary proceedings? - Risk of non-public, non-transparent procedures in case of continuation

4) After the crises:

- What to expect at the end of the health crises? How can courts plan ahead?
- Expected increase in labour law cases and insolvencies
- How to deal with the backlog of cases/ what to prioritize (how to prevent politicized prioritization or prioritization merely based on economic agenda)
- Issues around (changes of) allocation of cases
- How to fill vacant judgeships (no selection procedures during the crises).
- Risk of expansion of use of video-conferencing technology despite negative impact on fair trial rights
- Which systems could be set up on how to responsibly deal with court administration in emergency situations for the future?

End./