

Concluding Remarks on Covid-19 and Civil Justice

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The global fight against the coronavirus is not in a fixed status; on the contrary, things change on a daily basis. The short contributions in this document are snapshots and may be outdated rapidly. Nevertheless they provide an interesting overview. The respective contributions raise several interesting issues, some of which are omnipresent, others arise in a specific context. Since we opted for an open, exploratory approach, we were more interested in gaining a broad insight in the challenges (and unexpected possibilities) civil justice systems across the world encounter, rather than quantifying the prevalence of certain measures. The civil justice systems in the countries studied converge around some issues. Simultaneously, there are several differences, some of which can probably be attributed to variation in how severely each country and area within the country is hit by the virus, and in the intensity of the lockdown in general. Other aspects might depend on certain traits of the legal system.

We have identified a few general topics concerning legislative changes, the full (or partial) closing of courts, the transition to online or remote proceedings, the use of written proceedings, and the impact on legal costs and the quality of justice.

It is likely that the Covid-19 pandemic will enhance digitisation of civil proceedings and courts, despite lack of high-speed internet, appropriate hardware (cameras, microphones) and proper software (case management programs, video conferencing programs etc.). Nonetheless, the 'technical' issues are as such not very interesting, at least for this contribution. The Covid-19 related transition to online or remote proceedings on short notice engenders more complex or other problems, at least from a procedural perspective.

Legislative Changes

The first topic that arises from the respective contributions is legislative changes. There are significant variations in the extent to which new rules have been enacted. Some countries, such as Germany, Lithuania, the Nordic countries and Slovenia, have made very limited changes to their civil procedure rules, because the rules foresee the use of electronic communication and video conferencing. The main issue in at least Germany and Norway is how to induce judges to make use of the opportunities that existing rules encompass. This may be related to procedural culture.

In other countries, temporary rules have been put in place, either once or repeatedly. Australia and England change their rules in these Covid-19 days frequently. One reason for frequent amendments in these countries could be the use of Practice Directions to regulate civil proceedings. In Australia, the legal basis for the emergency rules has been questioned. In federal states, the division of powers between the federal, state and local governments could be an issue. The quality of the temporary, emergency rules also raises issues, in e.g.

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Poland. Brazil is one of the countries with tangible litigation that challenges the validity of the measures put in place.

Limiting the Access to and Functioning of Courts

The second is the problem of how to handle the consequences of more or less closed courts. Most courts have been either formally or *de facto* closed to the public at least for a few weeks. Courts in *inter alia* parts of Australia, Canada and Finland have continued holding hearings in courtrooms, at least to some extent, naturally with social distancing put in place. In many other countries, practically all hearings have been postponed, except for *urgent cases*, even in countries with highly digitised courts such as Denmark. If the courts continue to conduct hearings in urgent cases, the question arises how the criteria for 'urgent' are determined.

Clearly, electronic communication is paramount to solving this problem. Some countries have extended time limits: procedural, substantive, or both. While the extension of time limits is problematic if the implications are not carefully considered, since extending one time limit might require extensions of other time limits to enable the courts to deliver justice as has been the case in Poland.

In order to enable courts to function efficiently, France and Poland have enacted rules enabling the transfer of cases among courts and France has introduced rules to transfer hearings from a panel of judges to a single judge.

Adapting to Online and Remote Proceedings

Online or remote proceedings is an obvious solution to the current challenges. Some countries, such as England, the Netherlands and parts of Brazil have already taken steps in this direction before the Covid-19 crisis and can build on existing legislation, drafts or prior experience. In some countries, the civil procedure rules foresee digital proceedings, but the technology is not in place (e.g., part of Brazil, Lithuania, Norway and Poland). Having existing or draft legislation may be advantageous, since the emergency legislation put in place is likely to contain solutions that are problematic and not a sustainable solution as permanent rules. Furthermore, Italian courts have accepted digital communication although the current legislation does not foresee it: exceptional times require pragmatism, not formalism.

As far as online or remote proceedings is concerned, technical and regulatory issues are important. But there is also another aspect, perhaps even more important. Bringing about changes in practice may be a serious challenge: an online hearing requires adaptation of the hearing. Some judges, at least in certain countries, might find using new technology an insurmountable hindrance. Perhaps more importantly, many judges discover that the hearing must be adapted too, when the parties and the witnesses (and experts) are not present in the courtroom. Judges must learn to manage and organise the hearing in novel ways to ensure that the factual and legal argumentation and the examination of evidence is adequate, and that the judge and the parties (their counsel) interact in a meaningful and conductive way. This can be a much more complex process than installing the necessary infrastructure as examples from *inter alia* Germany, Italy and Norway demonstrate, despite the fact that Finnish judges appear to embrace technology more readily. The fact that some courts and judges have already started using remote hearings while others still continue to postpone the hearings results in variation in access to justice within many countries. If you file the case in one court and/or your case is assigned to a specific judge, a remote

hearing will be scheduled relatively swiftly. If you file the case in another court or it is assigned to another judge, you might have to wait for resolution for much longer.

A further question is how to enable the public to access remote hearings. English courts partly broadcast their proceedings, partly record the proceedings and make them available on websites after the hearing. Norwegian courts have found several ways to broadcast hearings. French courts have, in contrast, opted to forgo the requirement of public hearings for the time being.

Written Proceedings and Adaption of Procedural Rules

Introducing more written elements in civil proceedings or even entirely written proceedings enables courts to continue delivering justice, such as in Germany and Spain. Written proceedings could challenge fundamental fair trial rights, nevertheless. In highly oral litigation cultures, such as Australia and Norway, the increased use of written elements could amount to a cultural shift and could be beneficial. Variation in practice among judges and courts could be problematic in this regard as well. Other adaptations of the rules governing civil proceedings might be necessary as well. Ontario (Canada) has enacted a rule enabling courts to ‘relieve compliance with procedural rules ... when it is just or equitable to do so, reasonable and ... required to render justice between litigants ... or necessary to secure convenience, expeditiousness and efficiency in the administration of justice.’ Striking the balance between procedural rights and the need for keeping the civil justice system operational is challenging. Countries with more flexible procedural rules enabling the judge to exercise discretion have an advantage, since a more rigid approach might hinder judges from adapting the proceedings to the current situation.

Impact on Legal Costs and the Quality of Justice

Covid-19 has also had an impact on the legal profession and legal costs. Covid-19 related legal clinics are established in Quebec, Canada. More dismal news come from Germany and Slovenia. Germany might increase court fees and compensation to lawyers, while Slovenia is likely to reduce the salary of judges. Both measures are likely to reduce the access and quality of justice. Some of these and other measures might diminish trust in the judiciary and weaken the position of the judiciary as the third state power.

There is one element that has not surfaced in the contributions: globalisation of civil procedure law. We consider the silence on this topic far from surprising. It may be a global crisis, but the systems of the judiciary around the world are different, the impact of the virus is different per country and the reactions to it as well. Although it may give rise to additional complexity in international cases, in our view it makes sense to find solutions ‘at home’. We must tackle the problems where they are. Moreover, judicial cooperation is contingent on national courts being able to function properly.

Long Term Effects on Civil Justice

At the moment, assessing the long term effects of the coronavirus on the civil justice system is impossible. Dealing with numerous postponed hearings and the surge of coronavirus related cases, will pose a challenge at least in the months to come.

One question is whether the emergency legislation enacted during the state of exception will be permanent. Many of the enacted solutions have been drafted hastily and may challenge the basic tenets of fair trials. The state of exception and austerity caused by the

lockdown could result in reduced funding of courts and increased court fees, as well as higher or lower compensation for lawyers.

Does the influx of online hearings propel a landslide cultural shift, or will those judges who are nowadays resisting to change their practices adapt and implement new practices –be it profound or more superficial changes - , or perhaps return to their old habits once the situation is over?

Could the current situation demonstrate the need for procedural reforms and produce greater acceptance of certain changes? Will the current situation spark procedural innovations, or result in proliferation of mediation and other forms of alternative dispute resolution, as could be the situation in for instance France and Norway?

It is too soon to indicate the long term effects of the current situation. The final answer to Covid-19 related questions on substantive law (force majeure, unforeseen circumstances, class actions, etc.) may take a while as well. Perhaps it is even too soon to hope that it will bring at least some positive elements for the procedural world. But one can hope that as long as the pandemic is around, legal systems across the globe will keep finding a more or less acceptable way to adapt and adjust.