UiT The Arctic University of Norway

Civil Justice and Covid-19

Bart Krans, Anna Nylund, David Bamford, Laura Ervo, Frédérique Ferrand, Aleš Galič, Wolfgang Hau, Jordi Nieva Fenoll, Clement Salung Petersen, Catherine Piché, Piotr Rylski, Elisabetta Silvestri, John Sorabji, Vigita Vėbraitė, and Hermes Zaneti jr.

UiT The Arctic University of Norway – 2020 Septentrio Academic Publishing

http://septentrio.uit.no/

Septentrio Reports, No 5, 2020

ISSN: 2387-4597

DOI: https://doi.org/10.7557/sr.2020.5

How to cite this report:

Bart Krans, Anna Nylund, David Bamford, Laura Ervo, Frédérique Ferrand, Aleš Galič, Wolfgang Hau, Jordi Nieva Fenoll, Clement Salung Petersen, Catherine Piché, Piotr Rylski, Elisabetta Silvestri, John Sorabji, Vigita Vėbraitė, and Hermes Zaneti jr. (2020). Civil Justice and Covid-19. *Septentrio Reports 5*. https://doi.org/10.7557/sr.2020.5

UiT The Arctic University of Norway
N- 9037 Tromsø, Norway

Phone: 77 54 40 00
Fax: 77 64 49 00

postmottak@uit.no
www.uit.no

Table of contents

Keywords

civil litigation; civil justice; civil procedure; courts; court proceedings; judiciary; covid-19; coronavirus

An Introduction to Covid-19 and Civil Justice: Unforeseen, Unexpected and on Short Notice

Bart Krans, Full Professor Civil law and Civil procedure law, Leiden University; email: h.b.krans@law.leidenuniv.nl and

Anna Nylund, Professor, Faculty of Law, UiT The Arctic University of Norway, email: anna.nylund@uit.no

The landscape of civil justice has changed rapidly in very short time. The Coronavirus (Covid-19) pandemic has an impact on civil cases on a global scale that could be characterised as unprecedented. Numerous countries across the globe are facing the question how to enable courts to cope with civil cases in these strange times. Do courts proceed as usual? If not, which cases are dealt with, and how? And perhaps: will the current situation teach us something for the post-pandemic period (which we are all hoping for)?

The impact of the virus is not the same in every country, nor is the way in which governments respond to the situation identical. The consequences for the civil judiciary are varying, not only between countries, but also over time. What seems appropriate today may be considered outdated next week, depending on, what one can call, the societal impact of this virus and current status of the fight against it.

We have asked colleagues from several countries to give a short overview of the consequences of the pandemic for civil cases. We deliberately did not provide our colleagues with a table of questions or a specific list of topics to be covered. We asked our colleagues to write a very short piece about what they have seen or see in their countries on the consequences of Covid-19 for the judiciary. We added that they could go into every possible topic that they deem interesting for people in other countries.

Needless to say, we are truly grateful that so many colleagues almost immediately answered in the affirmative and provided us with a text concerning their country. International collaboration on legal issues on such a short notice is not given, especially when one keeps in mind that the sudden switch to online teaching at many universities, which is relevant for at least some of the authors of this piece, does not mean that the time one has to spend on university teaching has decreased. So: we are thankful.[1]

The constantly changing societal situation these days underlines that the respective contributions hereafter is by definition a snapshot, per country fixed on certain point in time. Most of the contributions are finished in the first half of April 2020.[2] It may very well

[1] To, in alphabetical order by country, David Bamford (Australia), Hermes Zaneti jr. (Brazil), Catherine Piché (Canada), Clement Salung Petersen (Denmark), John Sorabji (England), Laura Ervo (Finland), Frédérique Ferrand (France), Wolfgang Hau (Germany), Elisabetta Silvestri (Italy), Vigita Vėbraitė (Lithuania), Piotr Rylski (Poland), Aleš Galič (Slovenia) and Jordi Nieva Fenoll (Spain). Each of these authors have written the text of their own country. This introduction and the final words are written by Bart Krans and Anna Nylund.

[2] Some of the respective contributions here-after mention a 'closing date'.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5455

be that the situation has changed since submitting the chapters to us, or will do so on short notice.[3]

[3] To prevent loss of time, the use of the English language in this contribution is not been checked by a native speaker.

Australian Courts in the Age of Covid-19

David Bamford, Professor Emeritus, Flinders University, email: david.bamford@flinders.edu.au

Date 20 April 2020

So far Australia has enjoyed the benefit of being an island continent where relatively quick introduction of border controls and physical distancing has meant limited introduction of the Covid-19 virus. In a population of 27 million, there have been less than 7 000 cases and less than 70 deaths. Some 90% of cases have come from those travelling to Australia from overseas. Over 80% of the cases are found in just three states: New South Wales, Queensland, and Victoria.

With 9 different jurisdictions (one federal, 6 states, and 2 territory court systems) exercising civil jurisdiction, it is not surprising that responses to Covid-19 have varied across the jurisdictions. In part, this reflects the different degrees of threat Covid-19 poses across Australia. Responses are continuing evolve even within jurisdictions so that, at the moment, change seems continual. Nevertheless, there are some common themes emerging as experience of the virus and the emergency measures grows. This brief summary outlines four themes.

The first, and most obvious, theme has been to accelerate the move to electronic communications and the decline of 'face to face' hearings. The majority of court work is procedural – the never-ending supervision and management of cases as they proceed to trial. In the past, these were held as face to face hearings before a judicial officer. Where oral hearings are required, increasingly they are to be done by telephone or video conferencing.

Associated with this is the second theme– the decline in orality. More and more applications for procedural orders are being determined on the 'papers' - the written submissions and written evidence provided by the parties. Some appellate courts have decided that they will only hear appeals on the papers unless otherwise ordered.

The third theme is the 'papers' are no longer paper. Australian courts are now discouraging the use of paper documents and requiring parties to file and handle documents electronically.

The fourth theme is that in many courts, most trials have been suspended until the situation becomes clearer. This suspension is expected to continue for some months. However in jurisdictions where Covid-19 has remained relatively contained, like South Australia, civil trials have resumed but with rules about physical distancing, etc.

Many Australian courts were already well down the path to adopting many of these measures anyway – Covid-19 has just speeded up the process. As a result, some courts are well advanced in the use of ICT, but others are less so. As a result, some courts do not have the IT resources to manage the new demands being made of it. As a result, they are having to use email and other third-party software systems (e.g. Microsoft teams, Zoom, etc.) while

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5456

they ramp up their IT systems. This then raises issues of efficiency and security that need to be addressed.

As a final observation, the need to urgently introduce changes has meant that courts have sometimes proceeded without sound legal foundations. So, for example, the Queensland Magistrates Court provided in a Practice Direction that local courts within its system would make up local guidelines for conduct of cases in those courts. The Practice Direction also provided that the local guidelines could override the Court's Practice Directions. The legal status of these Guidelines is not entirely clear. Interestingly, a fortnight later this Practice Direction was repealed and replaced by a new Practice Direction with more detailed provisions governing the conduct of business in the times of Covid-19 (including adjourning all but a few specified types of civil and criminal matters to date to be fixed in due course by the Court). In South Australia some of the changes were simply decided by the chief and/or senior judges and conveyed in letters on the court website.

Covid-19: Brazilian Perspective

Hermes Zaneti Jr., Professor, Federal University of Espírito Santo - Vitória / Brazil, email: hermeszanetijr@gmail.com.

Date 21 April 2020

General View of the Impacts in the Law

We are living in a period of disaster. This pandemic virus has spread and changed our present lives and certainly shall result in a new era, a new normal as has been said. Maintaining the stability of law is an important part of law in time of disasters.[1] In Brazil there is a real concern to maintain the stability and the applicability of the law during the pandemic.

The Federal Law 13.979 / 2020 is the general rule to fight against Covid-19 and organize our legal system. Also, many executive orders and MPs, a kind of statute of emergency issued by the President and confirmed by the Parliament have been issued.

The Brazilian Supreme Court already decided that is not possible for the government to decide public policies without allow control of information by the public sphere[2] and based on scientific evidence. That means judges can rule against measures decided by the government if they are not founded.[3]

The Covid-19 Era in the Brazilian Judicial System

Brazil has more than 78 million cases pending in the judicial system. Impacts of the Covid-19 in the pending cases and in the judicialization of new cases are expected. Because of that, the judicial system started a general preparation for case management of the new cases regarding the pandemic spread of the 2019 novel coronavirus (SARS-CoV-2), establishing a new taxonomy in the national register for cases and incidents involving the subject[4] and general measures to avoid the lockdown of the judicial system, as resolutions 133 and 134 of the National Judiciary Council. Those same resolutions discipline the suspension of the deadlines of the procedures and that the online courts will restart on 4 May without any suspension.

To exemplify the use of the new taxonomy and its effects in the control of the caseload, the Supreme Court has already decided 941 times and have a caseload of 1 212 cases pending

---

[1] GERRARD, Michael B. Emergency exemptions from environmental laws. In: PISTOR, Katharina. Law in the Time of Covid-19. Columbia Law School, 2020, p. 81.

[2] STF ADI 6.351, Justice Alexandre de Moraes, applying the constitutionality control in an act of the President.

[3] Just to illustrate, there are two ADPF, constitutional remedies, in the Supreme Court granted provisional measures by Justice Luís Roberto Barroso, and a class action interlocutory relief ruled by a Federal Judge, ordering the President Jair Bolsonaro's administration to suspend a campaign “Brazil Cannot Stop”, that promotes the return to work, which was contrary to measures suggested by WHO and imposed by regional governors to contain the Covid-19 (https://bit.ly/2VOtiEQ; https://bit.ly/2KnyyK7).

[4] To access the panel of new action regarding the Covid-19 in the judicial system go to https://bit.ly/2VLa4Qu.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5458

on the subject of Covid-19, including proceedings to control the constitutionality of the new statutes and executive orders, habeas corpus and interlocutory appeals, all registered in an electronic panel.[5]

Important decisions have been given such as the decision that recognizes simultaneous competence of states, municipalities and the Union in the fight against Covid-19[6]. It is important to notice that regardless of the possibility of judicial review there is a general posture of self-restraint and respect to the governmental strategies, only controlled when in contrast with the public health policies that have already been established.[7]

E-Process and Online Justice in Brazil

Brazil have e-processes in the Code of Civil Procedure[8] and in our law.[9] These are national rules and are applied to all federal and state courts. Several courts were already working with electronic proceedings before the Covid-19 crisis.

However, the geographical and political situation in Brazil means that we have very pronounced disparities in the justice system, including the distribution of financial resources, investment in infrastructure, personnel and technology.

The country has continental dimensions and very different realities. As an example, it is not the same thing to talk about online hearings (videoconference) and electronic processes in the Supreme Court (STF), in the São Paulo State Court and in the Espírito Santo State Court.

The STF is the most important Court with constitutional jurisdiction and is responsible for establishing precedents about the meaning of the Constitution that are binding for all other Courts. The Supreme Court has already adopted e-process and is very well organized in having enough material and personnel to facilitate a fast adaptation to this new era. During the interval between 03/12/2020 and 04/20/2020 more than 6.979 proceedings have been received, 9.270 cases concluded, 10.006 individual and 1.973 collective decisions have been made, demonstrating that the Court still worked in this period.[10]

On the other hand, São Paulo is one of the major Courts, if not the major, in South America, with hundreds of thousands of cases and one of the most complex judicial systems. Espírito Santo, is one of the smaller Courts. They worked as well, but with different results.

For instance, in my State, Espírito Santo, we were late in using online justice and e-process. There has only been a system of e-processes in small claims courts, interlocutory appeals, and enforcement of criminal final decisions.

Notwithstanding, the practice of electronic procedural acts is possible even in physical processes. That means that is possible to give decisions, and file suits and injunctions electronically. Because of that, even in the suspension time of deadlines in the proceedings,

---

[5] To access the cases pending on the Supreme Court go to https://bit.ly/2VNOzhW.

[6] https://bit.ly/3bqrkRu.

[7] See the quoted decisions above and the Supreme Court decisions in the ADPFs N. 661 and N. 663 Justice Alexandre de Moraes allowing a special legislative proceeding during the pandemic.

[8] Law N. 13.115 / 2015. For the English version, see https://bit.ly/2yRoZAN.

[9] Law N. 11.419 / 2006 (https://bit.ly/39WBIPh).

[10] https://bit.ly/2xEYxu5.

judges continue to decide pending cases that were already ready (mature for decision), even if the deadlines for appeals and procedural acts in general are suspended across the country. The Resolution N. 314 of the National Justice Council is recommending the digitalization of the processes and the passage to the e-process whenever possible.

Law Schools and Doctrine

Law classes have been suspended in most of the public law schools. The private sector instead is moving quickly to online teaching, and many faculties of law are now having classes online with professors struggling with this new trend. Probably, for the time being even the public law schools will convert to online teaching and it is very feasible that this tendency will stand after the end of the crisis.

Online books, articles and interventions are being published every day. In a country with more than 1.1 million lawyers registered at the bar and more than 1 thousand law schools, the contribution of the doctrine discusses the actual impacts in the current life of law and the future of the law after Covid-19. The main fields of interest are contracts, corruption control, bankruptcy law, frivolous individual and class actions and the conversion to online justice and e-process. As a last but not the least observation, the doctrine must remain vigilant and critical to prevent the use of precedents and controversial decisions from being based solely on the consequentialist economic argument of the impact of the virus.[11]

[11] In a recent decision Justice Alexandre de Moraes suspended indefinitely all class actions with an impact throughout the national territory to discuss the territorial limits of the decisions, a procedural issue.

The Canadian Justice System's Response to Covid-19

Catherine Piché, Professor, Faculty of Law, University of Montreal, email: catherine.piche@umontreal.ca

Date 21 April 2020

In light of the outbreak of COVID-19, governments across Canada have had to respond to the pandemic and impose emergency measures in each jurisdiction, specifically impacting the judiciary and the judicial systems of each of the provinces. This note will provide an overview of some of the measures that have been taken in some provinces in the past few weeks. Obviously, the situation changes every day and there are bound to be additional noteworthy responses to discuss on a continuing basis.

The organization of Canada's judicial system is provided in Canada's *Constitution Act*, 1867. By virtue of that Act, authority for the judicial system in Canada is divided between the federal government and the ten provincial governments. The federal government has the exclusive right to legislate criminal law and the provinces have exclusive control over much of civil law, including over the administration of justice in their territory. Almost all cases, whether criminal or civil, are heard in courts that have been established provincially or territorially. Federal courts only hear cases concerned with matters which are under exclusive federal control, such as federal taxation, federal administrative agencies, intellectual property, some portions of competition law and certain aspects of national security.

Canada's 10 provinces and 3 territories have responded to the pandemic in similar ways. They have limited their operations, and access to the court system, in order to help contain the spread of COVID-19 and protect the health and safety of those using and working in the courts. Filing deadlines have also been suspended or modified, and limitation periods have been modified in two provinces. This note will provide an overview of changes to court services, filing deadlines, and limitation periods in respect of civil matters principally in the provinces of Quebec and Ontario, as well as the Federal courts level.

What must be underscored at the outset, however, is how terribly unprepared the Canadian justice system was to face this crisis, technology-wise. Court staff and judges to this date are not equipped to work remotely, and almost everything – filing and pleadings-wise – is done in-person or by paper. The Covid-19 pandemic has forced every province and territory to halt its court operations almost completely. At this point in time, court administrators are tremendously preoccupied with the horrendous backlog and the future challenges associated with it. Perhaps this pandemic will provide the impetus needed to modernize our civil justice system?

Quebec

On March 13, 2020, the Minister of Health and Social Services of the province of Quebec issued an order in council 177-2020 declaring a state of health emergency for a duration of 10 days, due to the outbreak of Covid-19. The government used these powers to adopt

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5459

various measures affecting the justice system. Thus, in the wake of the order in council, two days later, the Chief Justice of Quebec and the Minister of Justice jointly adopted another order which took effect immediately, thereby suspending time limits pertaining to extinctive prescription and forfeiture in civil matters as well as civil procedure time limits, the whole for the entire duration of the health emergency. The order also set out certain conditions for serving pleadings in civil matters on the Attorney General of Quebec. Deadlines for filing notices of appeal or applications for leave to appeal as well as the time limits for filing briefs, memoranda and books of authorities in civil matters were notably suspended. Urgent matters such as proceedings in habeas corpus and child abductions continued to progress notwithstanding the suspension of civil procedure time limits. Time limits in criminal matters were not suspended.

In the Court of Appeal non-urgent filings are urged not to be filed. If the Court considers the situation urgent, it contacts the parties to schedule the hearing either in person or using technology. Importantly, the Court of Appeal has accelerated its pilot project regarding the electronic filing of notices of appeal in civil matters, and on April 9, 2020, opened its digital Court office, which allows parties to digitally file notices of appeal, as well as proofs of service and notification, in civil matters which may be appealed as of right. Parties are strongly encouraged to use e-filing in these cases. As for the Superior Court and Court of Quebec, their court offices remain open for the filing of urgent proceedings, and non-urgent proceedings are encouraged to be filed by mail.

Hearings in the Court of Appeal were postponed, and urgent matters may still be decided at the discretion of the court. In the Superior Court of Quebec and Court of Quebec, urgent civil applications may be heard – including injunctions and other matters judged urgent. Insolvency matters and others heard before the Commercial Division of the Superior Court of the District of Montreal may be heard on a case by case basis at the discretion of the court. Telephone conferences and video conferences are preferred to allow urgent hearings to proceed at a distance. In late March, a first trial on the merits was heard entirely by videoconference. Access to court buildings where court services are provided has been restricted since the first order in council. All in all, priority was given to maintaining essential services justice services throughout the province of Quebec.

Interestingly, a Covid-19 Legal Aid Clinic was created. The telephone hotline offers free legal assistance thereby clarifying rights and obligations during the current pandemic.

Finally, it is important to explain that on March 15, 2020, the Chief Justice of Quebec and the Quebec Minister of Justice jointly exercised – for the first time ever! – the emergency powers conferred to them by the Quebec Code of Civil Procedure to suspend certain limitation periods and procedural deadlines. The order suspends all extinctive limitation periods, periods of forfeiture of rights and civil procedural deadlines – except for urgent matters – until the public health emergency is lifted, and unless otherwise ordered by the Chief Justice of Quebec and the Quebec Minister of Justice. Accordingly, limitation periods and filing deadlines for prescription, forfeiture and civil procedure will be extended by the number of days of the suspension.

Ontario

The Ontario Superior Court and Court of Appel have temporarily suspended normal court operations. On March 17, 2020 all ongoing trials were adjourned until a date after June 1, 2020, and even if those hearings were scheduled to be heard by videoconference or phone.

Furthermore, no new trials are to be held until May 29, 2020 unless otherwise ordered. The same is true for other Ontario tribunals such as the Landlord and Tenant Board and Human Rights Tribunal of Ontario.

Ontario courts consider it a constitutional responsibility to ensure access to justice remains available. To promote access to justice, and to maintain the effective administration of justice in Ontario, the Superior Court of Justice has expanded its operations for "time sensitive and urgent matters". For civil matters, at a minimum, urgent cases are those where "immediate and significant financial repercussions may result if there is no judicial hearing".

On April 6, the Superior Court started to hear other matters remotely by way of telephone or video conference, including pre-trial conferences and select motions. Judges require lawyers to act co-operatively and to be flexible to achieve a timely, just and fair hearing. On the Superior Court website is a promise that "Counsel, accused persons and all court participants can anticipate that the judiciary will, in turn, make every effort to respond with flexibility and creativity, where feasible and appropriate." The Court of Appeal similarly suspended all scheduled appeals, except urgent ones. There are to be no in-person hearings conducted during the emergency. Instead, hearings will occur either remotely through videoconferencing or teleconference, or in writing.

Ontario courts recognize that strict compliance with the rules might be difficult and that rules in general were not drafted to apply to virtual court hearings conducted in a pandemic. Thus, given the state of emergency, the inherent jurisdiction of the Superior Court of Justice may be relied upon, as it is entrenched in s. 96 of the *Constitution Act, 1867* and as confirmed in s. 11(2) of the *Courts of Justice Act.* This jurisdiction provides a unique power that may be relied upon sparingly and with caution to relieve compliance with procedural rules, regulations and statutes when it is just or equitable to do so, reasonable and necessary to control the Court's own process during this time of emergency, required to render justice between litigants, essential to prevent obstruction and abuse of the Court, or necessary to secure convenience, expeditiousness and efficiency in the administration of justice. The open court principle remains applicable throughout the COVID-19 pandemic, which means that efforts will be made to provide Ontarians with information on how they may hear/observe the proceeding.

As for as additional adjustments to regular administration of justice go, the requirement to gown for an appearance in the Superior Court of Justice is suspended, and replaced by an appropriate business attire. This rule is applicable to counsel and judges. Additional directions were enacted regarding email communications with court staff.

Interesting measures specific to criminal proceedings have been taken as well. Effective April 2, and until further notice, electronic filing is applicable and dispenses with the requirement to file documents personally and in hardcopy in criminal cases. The Superior Court of Justice accepts electronically signed documents where a signature is required and dispenses with the requirement for personal service where personal service is required. In place of personal service, it directs service of all materials to be done by email to the opposing party with proof of service.

Finally, the Government of Ontario issued an order suspending the operation of any provision of a statute, regulation or rule that sets out either a limitation period, or the time within which a step must be taken in a proceeding before a court, tribunal or other decision-

making body. The Court of Appeal similarly issued a practice direction stating that time periods for filings are suspended until further notice, except for urgent family-law matters and matters that have already been scheduled for a hearing and have not been adjourned.

Federal Courts

The Federal Court of Canada and the Federal Court of Appeal have suspended their operations except for urgent matters. Hearings scheduled through to May 15 have been adjourned, but case management hearings and a few other matters are handled through telephone and video conferences. Of course the Federal Court remains available for urgent matters, which include those "where hardship or substantial financial consequences are likely to result from delay."

The Federal Court issued a revised practice direction on April 4 suspending the operation of all timelines under the court rules and in any court order until May 15. Filing deadlines are suspended in the Court of Appeal until May 15. Those suspensions do not apply to statutory deadlines for commencing actions, applications, judicial reviews, or appeals.

Denmark

Clement Salung Petersen, Professor, University of Copenhagen, Faculty of Law, email: clement.petersen@jur.ku.dk

Date 19 April 2020

The Danish government decided to close down most of the public sector as well as significant parts of the private sector in Denmark starting from 12 March 2020. On this background, the Courts of Denmark implemented emergency procedures taking effect from 13 March 2020. Most judges and other court personnel have since then been working from their homes, and it appears that the courts have been able to uphold several of their important judicial and administrative functions. Thus, they have to a large extent held preparatory meetings in civil cases via telephone or using online/video technology. Furthermore, in matters of a "critical nature" physical meetings have been upheld, including certain preliminary statutory meetings in criminal cases, decisions on coercive criminal justice measures and certain enforcement cases.

However, the Danish courts have also to a very large extent postponed court hearings (in particular, main hearings/trials) in the following types of cases:

- Most criminal cases, including several criminal trials already started

- Most civil trials, including those already started. In the appeals courts, several cases have been decided on a written basis (instead of the usual oral hearing).

- Enforcement cases, except for the most urgent ones

Last week, the Danish government decided to re-open some parts of both the public and private sector. On this background, the Courts of Denmark issued a press release on 17 April 2020 stating that the courts will gradually re-open from 27 April 2020 with (expectedly) a 75 % efficiency to start with. The press release also emphasized that civil and criminal cases will be prioritized.

There is currently a public debate about how the Danish courts can "catch up" on this case-load. Suggestions (from lawyers, mainly) include the scheduling of court hearings outside usual court hours (evenings and weekends and even in the month of July, which is a holiday month for most judges). It remains to be seen what the Danish courts will do in this regard.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5460

English and Welsh Courts in the Age of Covid-19

John Sorabji, Senior Teaching Fellow, University College London, email: j.sorabji@ucl.ac.uk

Date 21 April 2020

The Coronavirus pandemic (the pandemic) has produced a rapid series of changes to the delivery of civil justice in England and Wales. Since 2016, the English and Welsh courts have been subject to a reform programme that has sought to gradually transform its processes through a digitisation process. That process had reached the stage at the start of 2020 where electronic filing had been, and was continuing to be, rolled out, where online claims processes where being piloted and where video hearings were being piloted. The pilots were at very degrees of development, with video hearings being the least developed. The pandemic changed the landscape almost overnight, with courts now operating, almost by default, remotely through the use of technology such as Skype for Business, Microsoft Teams etc, with case management hearings and, where possible, trials being held via video technology. In stark contrast to the formal video pilot scheme, these remote hearings, as there are known, have become commonplace. An outline of the main changes is set out as follows.

Remote Hearings – Legislation

In 2017, the Prison and Courts Bill was to have introduced a power to permit civil proceedings to take place remotely through enabling them to be broadcast and/or recorded via video or audio.[1] As such it would have allowed proceedings to take place via, for instance, video-link e.g., via Skype for Business or an equivalent technological means. Those proceedings could then have been broadcast either live or at a later date in a court building. Thus the provisions were intended to secure the constitutional principle of open justice. Those provisions were, however, lost when the Bill fell with the general election held that year. The Bill was not reintroduced subsequently. They were, however, introduced into law on a temporary basis via the Coronavirus Act 2020.[2] The provisions now permit the court to direct that civil proceedings can take place remotely, such that no participant in the proceedings is in a physical court building but takes place via an entirely online process. On 27 March 2020, civil proceedings, other than proceedings before the Court of Appeal,[3] were livestreamed over the internet for the first time.[4] Prior to the enactment of the 2020 Act,

[1] See clause 34 and schedule 5 of the Prison and Courts Bill 2017.

[2] See Coronavirus Act 2020, section 34 and schedule 25, which inserted new sections 85A to 85D into the Courts Act 2003 (https://www.legislation.gov.uk/ukpga/2020/7/schedule/25/enacted). The Act is in force from 25 March 2020 for a two year period, see sections 87 – 90 of the 2020 Act.

[3] Livestreaming Court of Appeal proceedings has been authorised since 2013 under The Court of Appeal (Recording and Broadcasting) Order 2013.

[4] *National Bank of Kazakhstan v The Bank of New York Mellon* (Claim No FL-2018-000007) in the Financial List (QBD) on 27 March 2020.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5461

such an approach would have been a criminal offence under section 41 of the Criminal Justice Act 1925, which renders taking pictures, include video, of legal proceedings.[5]

Remote Hearings – Changes to Rules of Court

The legislation has been supplemented by changes to the Civil Procedure Rules. As the rules are secondary legislation, amendments generally have to be effected through statutory instruments. Given the short time available to make them a different approach had to be taken. Part 51 of the CPR provides a power to modify or vary rules of court via Practice Direction. Practice Directions are issued by the Master of the Rolls, who is the Head of Civil Justice for England and Wales and the most senior civil judge, with the concurrence of the Lord Chancellor. As they are not statutory instruments they do not need to go through the parliamentary process applicable to passing secondary legislation. Part 51 can, however, only be used for the purpose of pilot schemes, which are intended to test new procedures. Further to this power to make pilot schemes, a Practice Direction was introduced on a temporary basis: Practice Direction 51Y - Video or Audio Hearings Pilot during the Coronavirus Pandemic – Pilot Scheme.[6] It is in force from 17 March 2020 until 30 October 2020.

The rationale for the Practice Direction's introduction is to test procedures, which supplement the powers introduced by the Coronavirus Act 2020 to provide for remote hearings. In particular, it is intended to ensure that those powers are exercised consistently, as far as possible, with the requirements of open justice. As such it makes clear that wholly remote hearings i.e., those authorised under the 2020 Act where no participant is in court are to be held as public hearings. The general principle of open justice must therefore apply to them. In order to secure that principle, as far as practicable, access to such hearings is to be made available, particularly to the media. The media being both members of the public, and the mean by which the public are provided with access to court proceedings.[7] Where remote hearings are held, the Practice Direction makes clear that the court may only hold the hearing in private if doing so is justified consistently with the generally applicable test for derogating from open justice i.e., that to do so is necessary in the interests of the administration of justice. It further provides that wherever practicable such hearings must be recorded either by video or audio. Members of the public may then seek the court's permission to access i.e., listen to or watch those proceedings at a later date. While this latter is not a substitute for the requirement that the public can access a hearing while it is taking place, this is intended to provide a secondary form of scrutiny and thus democratic accountability of remote hearings.

Remote Hearings – Guidance

Legislation and rule changes via Practice Direction have also been supplemented via a variety of guidance issued by the senior judiciary and Her Majesty's Court and Tribunals Service. The former provides, amongst other things, detailed guidance to courts and parties

---

[5] *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] E.M.L.R. 16.

[6] See http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic

[7] See *R (Mohamed) v SoS for Foreign & Commonwealth Affairs* [2011] QB 218 at [38].

on the approach to be taken to proceedings where they are held remotely,[8] the most important of which in terms of providing guidance to parties on how to operate in the new digital era was again focused on how to ensure effective access to the courts and how remote hearings would take place.[9] The guidance generally stressed the judiciary's ability and intention to ensure that the courts would continue to administer justice, and to do so remotely. As the Lord Chief Justice put it in the first of such guidance to be issued,

'*The rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything. Any legal impediments will be dealt with. . .*

The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely.'[10]

The latter, HMCTS guidance, is updated on a daily basis and focuses on practical operational guidance to litigants, such as how to issue claims, pay court fees and which courts are open.[11] Guidance was also issued by the Inns of Court College of Advocacy, to assist barristers and solicitor-advocates in approaching advocacy in remote hearings.[12]

Steps to Manage Proceedings

In addition to taking steps to facilitate remote hearings, the courts have also taken a number of steps to manage proceedings to take account of both the need to minimise the risk of harm to the health of judges, court staff, litigants and the public, while taking account of the reductions in their numbers due to the pandemic on the administration of justice. As such orders of general application, previously practically unheard of in England and Wales, have been issued staying certain types of proceedings, such as those relating to the taking of evidence in other jurisdictions.[13] Furthermore, the Master of the Rolls issued three further pilot scheme Practice Directions under CPR Pt 51, which stayed for 90 days from 25 March all possession proceedings, with limited exceptions, in order to secure public health and further secure the effective administration of justice,[14] and also varied the CPR to

---

[8] See https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/

[9] Civil Justice In England and Wales Protocol Regarding Remote Hearings (https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf)

[10] Coronavirus (Covid-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts (https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/).

[11] See https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak. Also see https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation; https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak

[12] Principles of Remote Advocacy (https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf).

[13] See Order of the Senior Master, dated 25 March 2020, IN THE MATTER OF the Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Taking of Evidence Regulation (Council Regulation (EC) 1206/2001) and IN THE MATTER OF the Coronavirus Act 2020.

[14] Practice Direction 51ZA - Stay of Possession Proceedings and Extension of Time Limits—Coronavirus – Pilot Scheme (http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-

enable litigants to agree case management directions to vary procedural time limits by way of extending them for 56 days without the need to obtain the court's consent to the variation.[15]

Conclusion

The English and Welsh courts have responded rapidly to the coronavirus pandemic. In doing so they have, via action taken by the senior judiciary, the Ministry of Justice and Her Majesty's Courts and Tribunals Service (which is operated as a partnership by the judiciary and government) embraced the use of available online technology. Changes have been implemented at a rapid pace.[16] Undoubtedly there will be a period of critical reflection and review of the changes that have been implemented both during the ongoing pandemic situation, and afterwards. It is likely that what has been done now will form the basis of lessons to be learnt for the more permanent changes that will flow from those made now in response to the crisis, and will shape the ongoing and longstanding digitising programme. Undoubtedly some of the steps taken will be subject to criticism, albeit it will be the critical analysis that comes with the benefit of hindsight and a time for reflection that was not always available during an emergency situation. What is certain, however, is that the current pandemic will have a profound and undoubtedly enduring effect on the future evolution of the English and Welsh civil justice system.

possession-proceedings,-coronavirus), as amended by Practice Direction – 120th Update (http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/civil-120-pd-making.pdf).

[15] Practice Direction 51ZA – Extension Of Time Limits And Clarification Of Practice Direction 51Y – Coronavirus (http://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus).

[16] Also see http://remotecourts.org for comparative approaches in other jurisdictions.

Corona-Jurisdiction in Finland

Laura Ervo, Dr., Professor of Law, Head of the Law Unit, Örebro University, Sweden, Docent at the Finnish universities Helsinki, Turku and Eastern Finland, email: laura.ervo@oru.se

Date 20 April 2020

- What kind of provisions, if any, regulating emergencies/exceptional situations existed in your country at the onset of the Covid-19 crisis? Have they been helpful and sufficient?

Emergency Powers Act 29.12.2011/1552 includes some rules on the administration but nothing about judiciary, which is good. It is namely important that the fair trial and other guarantees of the rule of law are followed even and especially in exceptional situations.

The judiciary in general function as normally as possible even in a crisis.

- Are any particular rules or practices problematic in the current situation?

No, because the possibilities to use technology is quite wide even normally. It is also possible to use these possibilities wider in the current situation.

Also, the enforcement service continues to serve its clients normally. Most enforcement matters can already be dealt with in the e-services.

- Have any new statutes been enacted, any rules amended, as a response to the Covid-19 crisis? What has been changed and why? What is the impact of these regulations?

No. So far, there is only regulations.

- Is technology available in courts both regarding equipment (videoconferencing, recording witness statements, laptop computers for judges) and regarding programs (case management systems, systems for digital signatures, systems for filing cases, etc.)? Have technological limitations had an impact on the response to the current situation? If so, how?

Yes, this is the main tool to tackle the exceptional situation. The remote trials and other possibilities of e-services are widely used to protect the health of the personnel and clients at courts.

First of all, the primary modes of contacting the judicial authorities are the telephone, email and electronic services.

The courts have moved exceptionally quickly to electronic case management. Operation via remote connections has been more successful than expected. The courts are constantly looking for ways to develop their operations, e.g. so that the decision-making process and part of the oral proceedings could be held remotely. However, digitisation does not preclude so-called ordinary court hearings.

The National Courts Administration has published a guide for all courts on using remote connections at a trial. The guide has been drawn up only for the current exceptional situation, and it is not intended to change existing policies, instructions or

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5462

recommendations. The goal of using remote connections more effectively is to minimise health risks by avoiding gatherings of several people. The aim is to lower the threshold of using remote connections and offer information based on experience on how to solve any practical problems that may arise.

Even in normal circumstances, the legislation allows fairly extensive use of remote connections. Regulations on issues such as the obligation to appear, quality of the remote connection in each situation, taking of evidence and publicity remain in force unchanged.

It must be considered separately in each case whether the case can be heard via remote connections. Remote sessions require planning and preparation in advance with all participants of the hearing. The chair of the trial decides if the conditions for a remote hearing are met.

Usually, remote presence at a trial requires that the person heard via a remote connection consents to the procedure and has access to the technical equipment required to participate. The person in question must receive sufficient information on when and how the remote participation will take place and what is required of them. In some cases, a remote hearing from another agency or court of law may be necessary. The publicity of an oral hearing via remote connection must always be ensured.

- Do Covid-19 related cases raise any interesting procedural issues?

Courts may have to postpone hearings and cancel some already scheduled hearings. These changes in the operating environment may unfortunately lengthen the duration of consideration.

The courts will inform the public about any changes in their activities on their websites. Persons summoned to a hearing will be personally informed of any cancellations and changes to the hearing.

There are challenges involved in using remote connections. Their use is limited by factors such as data protection and information security, as well as technical issues and the requirements of publicity. The most important thing is, however, that no-one’s health or safety is endangered even during remote sessions.

Oral sessions are postponed at the low threshold if parties are ill.

The coronavirus epidemic also affects the functioning of the courts indirectly and in the longer term. Extensive social impacts are inevitable. Strong restrictive measures always also have negative effects. They will appear in due course in court cases. The number of certain cases will inevitably increase due to exceptional circumstances. For example, an economic downturn would increase insolvency issues. Incidents related to child protection may also increase.

Once the crisis has eased, the courts have an important role to play in supporting a return to normalcy and economic recovery by resolving cases as expeditiously and safely as possible.

The bar association recommends that the plea bargaining system would be used more during the crisis.

The National Prosecution Authority has closed its all customer service points. It is possible to contact them by phone or email only.

Sources (all visited 20 April 2020):

https://www.kho.fi/fi/index/ajankohtaista/tiedotteet/2020/04/khojakkovahvaoikeusvaltiokantaaylikriisiajan.html

https://www.kho.fi/fi/index/ajankohtaista/tiedotteet/2020/03/hallintotuomioistuimetturvaavatkansalaistenoikeudetpoikkeusoloissakin.html

https://www.kho.fi/fi/index/ajankohtaista/tiedotteet/2020/03/koronaviruksenvaikutuskhontoimintaan.html

http://www.tuomioistuinvirasto.fi/fi/index/loader.html.stx?path=/channels/public/www/tuomioistuinvirasto/fi/structured_nav/ajankohtaista/2020/zBDhWgDxU

http://www.tuomioistuinvirasto.fi/fi/index/loader.html.stx?path=/channels/public/www/tuomioistuinvirasto/fi/structured_nav/ajankohtaista/2020/457pl2pTQ

http://www.tuomioistuinvirasto.fi/en/index/loader.html.stx?path=/channels/public/www/tuomioistuinvirasto/en/structured_nav/ajankohtaista/2020/KULLC6zB6

https://asianajajaliitto.fi/2020/04/suomen-asianajajaliiton-ehdotukset-riita-ja-rikosasioiden-kasittelyn-jarjestamisesta-koronapandemian-aikana-ja-suositukset-etayhteyksien-kayttamisesta/

https://syyttajalaitos.fi/en/frontpage

French Civil Justice during Corona Times

Frédérique Ferrand, Professor, Director of the Institute of Comparative Law Edouard Lambert (IDCEL), University of Lyon/ Augsburg, email: frederique.ferrand@univ-lyon3.fr

Date 20 April 2020

The coronavirus pandemic has led to the enactment of many exceptional legal provisions relating to French civil justice. A Law Act no 2020-290 of 23 March 2020 '*d'urgence pour faire face à l'épidémie de covid-19*' (emergency law act to deal with the Covid-19 epidemic) allowed the government to declare a state of public health emergency. The government was also given the power to pass *Ordonnances* (ordinances) in matters that are normally handled by Parliament[1].

A few days later, a first ordinance relating to civil justice[2] was passed (*Ordonnance* no .2020-304 of 25 March 2020[3]). The same day, a second ordinance was passed to deal with the extension of time limits (*Ordonnance* no 2020-306 of 25 March 2020[4]) A third one was passed three weeks later (*Ordonnance* no 2020-427 of 15 April 2020[5]) which clarifies some issues related to time-limits. All these legal texts create a state of exception; some of their provisions have been challenged before the administrative highest court (*Conseil d'État)* but the claimants did not succeed[6].

The main adjustments of civil justice are contained in the first ordinance no 2020-304 of 25 March 2020 which shall apply only between 12 March 2020 and the expiration of a one-month deadline from the end of the state of public health emergency declared by the

[1] For the functioning of administrative, criminal and civil courts, see Law Act no 2020-290 of 23 March 2020, art. 11, 2°, c.

[2] For administrative courts, see *Ordonnance* no 2020-405 of 8 April 2020 *portant diverses adaptations des règles applicables devant les juridictions de l'ordre administratif.* For criminal courts, see *Ordonnance* no 2020-303 of 25 March 2020 portant adaptation des règles de procédure pénale, *Journal Officiel* 26 March 2020.

[3] *Ordonnance* no 2020-304 of 25 March 2020 *portant adaptation des règles applicables aux juridictions de l'ordre judiciaire statuant en matière non pénale et aux contrats de syndic de copropriété*, *Journal Officiel* 26 March 2020. See also the circular CIV/02/20 of 26 March 2020 of the Minister of Justice presenting and commenting the ordinance (C3/DP/2020030000319/FC*, BOMJ* compl. 27 March2020). See also Loïc Cadiet, 'Un état d'exception pour la procédure civile à l'épreuve du coronavirus', *JCP G* 14 April 2020, no 471.

[4] *Ordonnance* no 2020-306 of 25 March 2020 *relative à la prorogation des délais échus pendant la période d'urgence sanitaire et l'adaptation des procédures pendant cette même période, Journal Officiel* 26 Marc 2020. This ordinance deals with deadlines that expire within the period of public health emergency and the adjustment of proceedings during this period.

[5] *Ordonnance* no 2020-427 of 15 April 2020 *portant diverses dispositions en matière de délais pour faire face à l'épidémie de covid-19*, *Journal officiel* 16 April 2020.

[6] The *Conseil d'État* has received several urgent claims aiming at safeguarding fundamental freedoms, see e.g. CE, ord. réf., 10 avr. 2020, n° 439883 et 439892, *CNB et autres, SAF et autres* (claims brought by several lawyers' associations). See also *Le Monde* 16 April 2020, p. 11.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5463

government[7]. Therefore, the period of application of these derogating measures cannot be set accurately.

It refers[8] to the second ordinance passed the same day (no 2020-306) with regard to the extension of deadlines that expire during the period of public health emergency (*période d'urgence sanitaire)*.

Ordonnance no 2020-304 of 25 March 2020 deals with three main topics: 1) The courts' organisation during the state of emergency; 2) The course of the proceedings; and 3) The court decisions.

The Courts' Organisation

The ministry of justice (for civil courts, the department *direction des affaires civiles et du sceau)* prepared a business continuity plan that focused on the urgent cases that should be dealt with in spite of the pandemic (proceedings for urgent interim relief called *référés,* protection of vulnerable persons and, especially in case of domestic violence, the possibility for the family judge to issue protection orders as soon as possible).

When a court is totally or partially unable to function[9], *Ordonnance* no 2020-304 allows the president of the court of appeal[10] to assign all or part of the cases to another court of same nature within the jurisdiction of the court of appeal. This allotment of cases lasts only for the duration of the state of emergency and at the end of this period, the cases (also the ones pending) will be sent back to the court that has jurisdiction. Publicity measures[11] are required to inform all practitioners and parties.

Within a court, the court panel can also be adjusted to the number of available judges. The first instance civil court (*tribunal judiciaire)* and the court of appeal can give a decision in all matters with a single judge (*juge unique*)[12] even if the normally applicable provisions require a panel of three judges. This adjustment is decided by the president of the court. The single judge must be a fulltime professional judge[13]. Before the commercial court (*tribunal de commerce*), the president of the court may decide that the public hearing will take place before a single judge who belongs to the court panel and who shall report to the panel. For labour courts (*conseils de prud'hommes)*, a specific solution applies: instead of four judges (two employees, two employers), the court panel may consist of only two (one employee, one employer). All these changes do not require the parties' consent. However, although the ordinance aims to facilitate the maintaining of judicial activity, it appears that most courts are more or less closed and that most cases except the very urgent ones are not dealt with.

---

[7] This period of time is described as a 'legally protected period' (*période juridiquement protégée)* in the circular of the minister of Justice.

[8] Art. 2 Ord. no 2020-304.

[9] Because the number of available clerks, of judges is not sufficient.

[10] Before issuing such an order (*ordonnance*) the president must consult the attorney general of the court of appeal as well as the presidents and the registry directors of the courts possibly affected by the measure.

[11] See Art. 3 Ord. no 2020-304.

[12] Art. 5 para 1 Ord. no. 2020-3064.

[13] It cannot be a honorary judge, Art. 5 para 2.

Extension of Deadlines

The extension of deadlines is dealt with in Ordonnance no 2020-306 of 25 March 2020 and in Ordonnance no 2020-427 of 15 April 2020. The legally protected period started on 12 March 2020 and shall end one month after the government has declared the end of the state of emergency.

Ordonnance no 2020-306 of 25 March 2020 states an extension of all deadlines that expire during the period of health emergency (= legally protected period). However, it states some exceptions to this rule in some urgent matters for which specific rules have been enacted:

- For proceedings before the liberty and custody judge and on appeal before the court of appeal: procedural deadlines remain the same if the court's activity goes on (which is not always the case, depending on the court and the available judges and court clerks);
- For proceedings before juvenile courts[14], specific measures have been taken;
- For enforcement proceedings relating to immovables (seizure of immovables), deadlines are suspended[15].

Deadlines that expire during the legally protected period are interrupted and will start again at the end of the state of emergency for a maximum duration of two months. E.g.: 1) The appellant has one month to lodge an appeal from the time of the service of the court decision; if the deadline expires for example on 20 April 2020, he will have again one month from the end of the state of emergency. 2) the appellant must send his pleadings to the court and serve them to the defendant within three months from his statement of appeal. If the 3 months deadline expires during the legally protected period, for example the 16 April, the appellant will have two months from the end of the state of emergency to send and serve his pleadings.

Article 3 of Ordonnance no 2020-306 also states that some measures such as protective, instruction, conciliation, mediation measures that expire during the legally protected period are automatically extended until the expiration of two months from the end of this period[16].

A second ordinance no 2020-427 of 15 April 2020 also related to deadlines and time limits has supplemented the first one in some respect.

---

[14] Specific provisions are provided in Chapter III of Ord. no 2020-304 for juvenile courts and the cases brought before them.

[15] See Ord. no 2020-304, Art. 2, II., 3°.

[16] According to the last para of Article 3 (as amended by Ord. 2020-427 of 15 April 2020), these provisions do not prevent the court or the competent authority from modifying or putting an end to the measures where this is justified, or from ordering new measures with a deadline set while taking into account the constraints of the state of health emergency.

These exceptional rules are necessary since civil and commercial courts are mostly at a standstill[17]. The electronic communication between the lawyers and the courts is blocked, the preparation hearings and main hearings are cancelled[18].

The Course of the Proceedings

The exchange of pleadings and of written evidence between the parties or their lawyers can now be done by "any means" (*tous moyens)*, provided the court can ensure that the adversarial process is respected (Article 6 Ord. no 2020-304). What kinds of means can be used? The usual ones (*réseau privé virtuel des avocats*, RPVA, which is the secured network used by lawyers to communicate with courts) if they still function, or a registered letter with acknowledgment of receipt, a normal letter, an email…

However, for some proceedings before the first instance civil court (*tribunal judiciaire)*[19] and before the court of appeal, the circular of the minister of Justice CIV/02/20 of 26 March 2020 indicates that only electronic transmissions are allowed; this is not mentioned in the ordinance and a circular does not have any binding force since it is only supposed to explain and clarify the Law Act. However, in several respects, the circular adds rules to the ordinance, which can be questioned.

The courts may decide to postpone (*renvoyer)* hearings; if so, they have to inform the parties and their lawyers (Article 4 Ord. no 2020-304). The way this information is provided depends on the procedural features of the case. If the parties are assisted or represented by a lawyer or if they have consented to receive the procedural on the state electronic platform called *Portail du justiciable*, they will receive the information from the court registry by any means, mostly electronically. If the parties are not assisted or represented by a lawyer or haven't consented to the use of electronic communication, they will be informed by other means such as a simple letter or a phone call[20].

The hearing (*audience*) is also impacted by the pandemic. Therefore, the ordinance no 2020-304 allows the court to deviate from the publicity principle during the emergency period. Several possibilities are mentioned in Articles 6, 7 and 8 of the Ord. no 2020-304: *First*, the president of the court may decide before the beginning of the hearing that publicity will be

---

[17] See *Le Monde* 15 April 2020, p. 13. For example, on 9 April 2020, only 15 judges were present at the first instance court (*tribunal judiciaire)* Pontoise that has 102 judges. At the *tribunal judiciaire* in Paris, only 20 of the 125 prosecutors were present. In Marseille the family section of the *tribunal judiciaire* has 7 judges and about 15 clerks; only one or two of them were present in the court building.

[18] See Romain Laffly/ Matthieu Boccon-Gibod, 'L'enfer commence avec L', Club des juristes, blog du coronavirus, https://www.leclubdesjuristes.com/blog-du-coronavirus/categories/coronavirus/. See also about the functioning of the family sections of the courts, Mélanie Courmont-Jamet, 'Le fonctionnement du pôle famille des juridictions pendant cette période dite juridiquement protégée… et après?', Club des juristes, blog du coronavirus.

[19] These are the ordinary written proceedings and specific proceedings in case of urgency (*procédure à jour fixe).* In these proceedings as well as before the court of appeal, parties must be represented by a lawyer.

[20] To protect the defendant who does not appear in court and did not personally receive the summons, the ordinance no 2020-304 states that the judgment shall be given by default even if appeal is admissible, which derogates from the French CPC-rules.

'restricted' (Article 6) whatever that means[21]; the hearing shall not be public but take place in the *chambre du conseil* if it proves impossible to guarantee the necessary conditions to protect the health of the persons who are present at the hearing[22]. *Second,* the judge or the president of the court panel may decide that the hearing shall take place via a videoconference (Article 7 para 1)[23]. If such technology is not available (some courts are not yet equipped, or some parties), the court may decide that the parties and their lawyers shall be heard by any electronic means, also by phone (Article 7 para 3). When using such technologies, the judge shall conduct the proceedings and ensures that the rights of the defence and the adversarial character of the proceedings are safeguarded. *Third*, where the parties must be represented by a lawyer or where they are assisted or represented by a lawyer although this is not mandatory, the judge or the president of the court panel may decide that the proceedings shall be exclusively written so that no hearing shall take place. This also applies in family matters although the hearing is especially important in such proceedings. Parties who are informed by 'any means' of this decision may object to it within two weeks (Article 8).

The Court Decisions

Article 9 of Ordonnance no 2020-304 of 25 March contains a shocking derogating rule that applies to proceedings for urgent interim relief – *procedures de référé* – in civil cases. The court may dismiss the claim *before the hearing* via a non-adversarial order if the claim is not admissible or if there is no need for urgent interim relief. This is a severe restriction of the access to court and to a trial[24].

According to Article 10, parties shall be given notice of court decisions by 'any means', which does not exclude, however, the obligation of one of the parties to serve the judgment on the other through a bailiff since only this service triggers the time limits for appeal and makes the judgment enforceable. The notice by 'any means' is explained in the minister of justice's circular: use of the RPVA (private network of the lawyers), of email to the professional address of the lawyer etc. If no lawyers was appointed by the parties, notice of the judgment can be given to them by letter, email or even a phone call from the party.

Conclusion

One could imagine that all these exceptional rules allow the French civil justice to maintain at least a partial but large functioning. This does not seem to be the case. Most hearings are cancelled and postponed. Many deliberations have been postponed. Technical problems prevent some judges from having access to the secured network of the court from their homes; and the registry staff does not have such an access, so that proceedings and

---

[21] The president of the court can e.g. restrict the number of persons who can be physically present in the court room.

[22] A specific provision is dedicated to the journalists and allows them to attend the hearing even if it takes place *in camera,* under the conditions specified by the president of the court. This of course only applies to cases in which the hearing would normally have been public (not family matters for example).

[23] In that case, the identity of the parties shall be ascertained, the quality of the transmission and the confidentiality shall be ensured.

[24] Similar provisions have existed for a long time in administrative proceedings, see Art. L. 522-3 *Code de la justice administrative.*

judgments are delayed[25]. In almost all the courts, some court sessions are organised for very urgent matters (in Paris for example the continuity for urgent family cases is provided by two morning sessions per week[26]). After the lifting of the state of emergency, all the courts will be overloaded with pending and new cases. Especially the court's registry will be overloaded with work.

For some of these cases, electronic mediation or conciliation could be an option[27]. Many mediators can now be seized online, videoconferences are possible. The Paris bar has created a possible mediation by videoconference on its platform[28]. Other initiatives could also be mentioned. Finally, it could be that this pandemic generates an unexpected consequence: the expansion of ADR as a simple, easily accessible way to settle a case pending before closed courts!

[25] See *Le Monde* 15 April 2020, p. 13.

[26] See for the functioning of the family sections of the courts, Mélanie Courmont-Jamet, "Le fonctionnement du pôle famille des juridictions pendant cette période dite juridiquement protégée… et après?", Club des juristes, blog du coronavirus, https://www.leclubdesjuristes.com/blog-du-coronavirus/categories/coronavirus/.

[27] See Natalie Fricero, "Médiation en période de crise sanitaire: maintenir le lien social, résoudre les conflits, envers et contre tout", Club des juristes, blog du coronavirus, https://www.leclubdesjuristes.com/blog-du-coronavirus/categories/coronavirus/.

[28] For urgent family matters, a lawyer-mediator can organise a first virtual meeting within one or two days from his appointment, see Natalie Fricero, *ibid.*

Litigation in the Time of Covid-19: Some Observations from Germany

Wolfgang Hau, Professor, Ludwig-Maximilians Universität Munich, Judge, Higher Regional Court of Munich, email: wolfgang.hau@jura.uni-muenchen.de

Date 22 April 2020

If one wants to analyse the effects of the pandemic on German civil procedure law, it seems advisable to first take a look at the status quo ante. In principle, the Code of Civil Procedure (CPC) requires a public oral hearing of the case before the court may render its decision in a civil or commercial matter. Written proceedings are only allowed if stipulated by the parties, or for very small claims (up to € 600). There is, however, an important alternative: The creditor may obtain an enforceable instrument without a court hearing by way of summary proceedings for a payment order ('Mahnverfahren'). While some 8.5 million summery proceedings were initiated in 2018, less than 2 million ordinary actions were brought before the local and regional courts.

Even where an oral hearing must take place, physical presence and face to face interaction in the courtroom are not necessarily required: Already since 2001 the CPC provides for the possibility of video and audio transmissions. The 'new' rules allow the virtual participation of the parties, their attorneys and advisers, but also of witnesses and court experts.[1] The German courts are technically very well equipped, and training courses for judges are constantly being offered. Nevertheless, German judges are very reluctant to make use of such IT instruments. The parties cannot insist on video or audio transmission, but this is at the judge's discretion. Unfortunately, while IT has long been a matter of course for all generations in private everyday life, in the judicial workplace it is widely regarded as complicated, mysterious and unreliable. Every judge and every lawyer has heard of stories in which all kinds of things went wrong, but not too many have their own practical experience. Therefore, cases in which the 'new' rules are actually applied have been very rare so far.

One might think that Covid-19 has fundamentally changed this situation. There is no data available yet as to whether the courts have worked more intensively with IT technology in recent weeks. However, there is much to suggest that everything is more or less the same so far: apparently most judges are more inclined to simply postpone oral hearings that are not particularly urgent than to accept a fundamental change of their procedural routine. In

[1] Cf. Section128a CPC: *(1) The court may permit the parties, their attorneys and advisers, upon their filing a corresponding application or ex officio, to stay at another location in the course of a hearing for oral argument, and to take actions in the proceedings from there. In this event, the images and sound of the hearing shall be broadcast in real time to this location and to the courtroom. (2) The court may permit a witness, an expert, or a party to the dispute, upon a corresponding application having been filed, to stay at another location in the course of an examination. The images and sound of the examination shall be broadcast in real time to this location and to the courtroom. Should permission have been granted, pursuant to subsection (1), first sentence, for parties, attorneys-in-fact and advisers to stay at a different location, the images and sound of the examination shall be broadcast also to that location. (3) The broadcast images and sound will not be recorded. Decisions given pursuant to subsection (1), first sentence, and subsection (2), first sentence, are incontestable.*

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5464

Germany, most courts, with the exception of the so-called supreme federal courts, are a matter for the Länder. In Bavaria, which has been taking the lead in fighting the crisis so far, the Ministry of Justice has announced on 19 March 2020: 'Whether a court hearing takes place is to be decided by the judge as a matter of judicial independence. Also, the decision whether to cancel or postpone a hearing is made solely by the court. The Ministry of Justice can only make recommendations. […] In view of the worsening of the Corona crisis, it is important to focus on core tasks, set priorities and reduce public hearings to the bare essentials in order to protect health. […] In civil proceedings and in non-contentious matters, hearings should be held only in urgent cases. This applies, for example, in family and child care matters to cases involving protection against violence, threats to the well-being of children or forced placement.'

Two aspects seem particularly noteworthy here: firstly, that the official recommendation does not specifically refer to or promote the benefits of electronic communications, and secondly, that the question of whether the courts are open or closed is not to be decided by the ministry or at least by the presidents of the courts, but by every single (presiding) judge. In practice, the courts follow the official recommendations and have apparently become well accustomed to the situation. Fortunately, the initial fear that the pandemic will bring the administration of justice to a more or less complete standstill[2] has not come true. While more and more academic articles on the legal consequences of the crisis are being published,[3] the situation does not appear to be worsening too much in practice, especially as the crisis has presumably led to fewer new cases reaching the courts, at least for the time being. If one looks at some blogs where practitioners deal with civil procedure issues these days, it can be seen that most discussions mainly concern rather technical questions of case management (e.g. on the extension of time limits or the postponement of hearings). Many judges are working on their files in their home offices, and it is expected that oral hearings will take place again in the not too distant future. Even the fact that the public does not have access to the courts during curfew is not considered a particular problem, at least in civil law cases: It is considered that the principle of orality and public access can be restricted in the interests of public health.

All this may explain why the German legislator has so far seen no reason for further action. New rules were implemented surprisingly quickly to protect debtors (especially tenants) in the crisis.[4] But there have been no efforts to amend the CPC. As far as can be seen, new procedural rules are currently only discussed as regards the labour and social security

---

[2] Cf. Sec. 245 CPC: *Should, as the consequence of war or of any other event, the court cease its activities, the proceedings shall be interrupted for the duration of this situation.*

[3] In the meantime, even a new journal on 'Covid-19 and the law' was founded ('COVuR', Verlag C.H. Beck). The first issue will be published in May 2020 and will inter alia contain a lengthy article by Thomas Rauscher on 'Covid-19 and civil procedure'. There are also more and more current articles in general periodicals, in particular in the much-read 'Neue Juristische Wochenschrift': von der Heide, NJW 2020, 1023 (Prozessrecht in Zeiten der Corona-Pandemie); Kulhanek, NJW 2020, 1183 (Saalöffentlichkeit unter dem Infektionsschutzgesetz); Vorwerk, NJW 2020, 1196 (Corona/Covid-19 – Wiedereinsetzung oder Unterbrechung?).

[4] Act of 27 March 2020 to soften the consequences of the Covid-19 Pandemic under private law, insolvency law and criminal procedure law, Federal Law Gazette part I of 27 March 2020, p. 569.

courts.[5] This can be explained by the fact that in labour law cases lay judges are involved and that an employee has to file his lawsuit within a very short period of time after a dismissal if he wants to defend himself in court.

Finally, two points seem remarkable, which were perceived with some astonishment in the scene. Firstly, the Länder and the bar associations have just now agreed on an increase in attorney's fees, and at the same time court fees are also to be increased. Secondly, some major law firms, which have been earning very well for many years, have started to lay off legal staff immediately after the crisis began. But that is life: Those who do not have too many scruples can profit from every crisis.

[5] Draft bill to ensure the functioning of the labour and social courts during the Covid-19 epidemic and to amend other laws of 9 April 2020.

Extraordinary Measures Concerning Civil Justice Adopted by the Italian Government in Connection with the Emergency Caused by Coronavirus

Elisabetta Silvestri, Associate Professor, Department of Law/ Dipartimento di Giurisprudenza, University of Pavia, Italy, email: elisabetta.silvestri@unipv.it

Date 14 April 2020

As a consequence of the rapid and uncontrolled spread of the Coronavirus infection, the Italian Government has adopted a series of statutory instruments aimed at enforcing the recommendations that the World Health Organization has issued with a view to containing the tragic effects of the pandemic. The statutory instruments address a variety of subjects, but a few rules affect specifically the administration of justice, whether civil, criminal or administrative.

Browsing through the most recent and comprehensive statutory instrument (law decree no. 18 of March 17, 2020), one can find a number of provisions concerning civil justice. The statutory instrument lays down different rules for two different timeframes. The first one runs from March 9 through April 15. During this timeframe:

- all hearings are postponed *ex officio* to a date later than April 15;
- all deadlines provided for by the laws in force as regards the performance of any activities concerning adjudication are suspended. If a deadline is set to begin to run during the suspension period, the deadline will instead begin to run only at the end of the suspension period;
- similarly, all deadlines concerning out of court mediation and assisted negotiation (when they are mandatory and supposed to take place within specific deadlines) are suspended.

A few exceptions to these rules are contemplated. They concern urgent matters such as alimony and child support cases, as well as the adoption of interim measures for the protection of fundamental rights, just to mention a few examples specifically listed. There is also a general clause according to which no suspension affects the proceedings in which delay could cause 'serious harm' to the parties to the case, according to an evaluation of the circumstances of the dispute at hand made by the judge who is presiding over the court before which the case is pending.

The second timeframe is scheduled to run from April 16 through June 30. During this timeframe other steps can be taken: in particular, the heads of the judicial offices will be able to implement the measures that appear necessary with a view to guaranteeing that all the health requirements laid down by the Ministry of Health are complied with. For instance, access to the courthouses could be limited, and new guidelines for the management of proceedings could be announced.

As far as virtual hearings are concerned, from the reading of the statutory instrument one might infer that they could be authorized only after April 10, that is to say during the second

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5465

timeframe. As a matter of fact, though, it seems that they are already taking place, at least for urgent matters and when interim measures are requested. According to the relevant rules, virtual hearings can take place only provided that the equality of arms of the parties is guaranteed and insofar as the personal presence of the parties themselves is not required. According to the technical provisions issued by the Ministry of Justice, the programs to be used for virtual hearings are Skype for Business and Teams, keeping in mind that both programs must employ infrastructures and areas of data centers that are restricted to the Ministry of Justice.

A more recent statutory instrument (issued on April 8, 2020) provides that all deadlines concerning civil, criminal, and administrative procedures are extended to May 11, 2020. The entering into force of several statutes governing bankruptcy and insolvency procedures is postponed to September 1, 2021.

As far as hearings in civil cases are concerned, if the case falls within the list of matters that are deemed urgent and not delayable, the hearing can take place via remote connection, provided that the attendance of only the attorneys for the parties is required (meaning that the personal attendance of the parties is dispensed with). In any other case (and always provided that the attendance only of the attorneys for the parties is required), the hearing will be replaced by an online exchange of written briefs whose contents will be limited to the petitions and conclusions of law advanced by the parties. The order will be issued by the judge in charge of the case later on, meaning outside the hearing.

The High Council for the Judiciary has prepared a number of protocols that courts and local bar councils can sign laying down the rules applicable to hearings conducted via remote connection and to hearings replaced by an online exchange of written briefs. More protocols have been drafted by judges presiding over courts of first instance for the management of cases. The basic idea is that, at least in these times of emergency and mandatory social distancing, adjudication will have to rely more and more on written briefs and motions exchanged via the web, since orality will be confined to the appearance of lawyers and judges thanks to the application software that makes it possible to conduct hearings via remote connection. Of course, a more extensive use of the rules governing online civil cases (in Italian, PCT or *Processo Civile Telematico*) presupposes that lawyers, bailiffs, court clerks, and judges master these very rules, which is not always the case. Furthermore, the state of cabling throughout the country and, in particular, the fiber optic wiring, is not optimal in a few areas, most of all in the South. When the emergency is finally over, it will be necessary to reconsider the entire national policy in the field of IT innovation, for the strengthening of the technological devices and systems designed to allow online adjudication and mediation, smart working, teleworking, distance education and the like, so as to be properly prepared should future situations arise like the emergency brought about by the coronavirus pandemic.

Activities of Lithuanian Courts During Covid-19 Pandemic

Dr. Vigita Vėbraitė, Associate professor, Vilnius University Faculty of Law, email: vigita.vebraite@tf.vu.lt

Date 21 April 2020

Courts in Lithuania haven been quite modernised till the pandemic, especially courts, which hear civil cases. Already in year 2004 a unified information system of Lithuanian courts LITEKO was launched. This system is being modernised all the time.

From 1 March 2013, Article 175 (2) of the Code of Civil Procedure came into force and legitimised the use of information and communication technologies (video-conferences, teleconferencing, etc.) during court hearings. It can be mentioned that this has not been often used for civil cases till the pandemic.

In Lithuania there has been no special legislation no court proceedings regarding Covid-19 pandemic. It is believed that legal norms of Code of Civil Procedure (concerning possibilities to hear cases via technological means) is enough to apply them also nowadays.

In Lithuania courts strive to become digital and online as much as possible in terms of weeks. It is planned to finish setting up hardware and software to enable all judges work from their homes and be connected to litigants at least for documents' exchange and written proceedings. Possibilities of online videoconferencing for replacement of oral proceedings is also on the table. Almost all cases, which can be heard in written procedure, have been finished in time (especially in appeal and cassation instances). Most of civil cases, which had to be heard orally and it is not possible to use written procedure, have been adjourned to May or June. At this moment quarantine has been introduced in Lithuanian till the 11th of May.

Only cases concerning child rights are heard according to schedule and usually by the means of technologies. If in urgent cases oral hearing is inevitable, it is organized in the manner and time prescribed, taking all precautionary measures relating to the prevention of the spread of Covid-19, while maintaining a maximum distance between the participants in the courtroom.

Mediation can be also organised online, but till now only several mediation cases have been conducted online. Enforcement procedure and communication between bailiffs and courts have been conducted already for several years.

The situation is much more problematic with criminal cases. Most of them are adjourned and will be heard after quarantine. Amendments of Code of Criminal Procedure have been presented before Easter to use technological means also for criminal cases. Till now it has been only possible to hear witness or expert via video-conferences in criminal cases.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5466

Dutch Civil Procedure and the Pandemic: Some Remarks

Bart Krans, Full Professor Civil law and Civil procedure law, Leiden University, email: h.b.krans@law.leidenuniv.nl

Date 21 April 2020

As a result of the pandemic the judiciary in the Netherlands have adjusted their working method, as they state themselves.[1] Access to court buildings is very limited. This does not mean, of course, that courts are not handling cases. Dutch courts are doing as much as possible, so they state, to continue handling cases.

Temporarily Regulations: General and More Specific

In April 2020 an Urgent Act containing temporarily regulations on the field of the legislative process, the judiciary and public administration was brought before Parliament.[2] In addition, for the situation from 7 April and on, so called 'General rules on dealing with cases Judiciary' were made up.[3] This set of general rules is not a formal Act, but a set of general rules made up by the board of the council of Presidents of courts. These general rules contain provisions on presence in court rooms, safe mailing and closed hearings.[4]

Starting point of these 'General rules' is that courts will keep dealing with all 'very urgent' cases. A case is defined as very urgent if an early judicial decision cannot be omitted.[5] The set of regulations contains a general overview of cases per area of law that can be considered as very urgent. For civil law it concerns, inter alia, certain summary proceedings, certain so called 'partial dispute proceedings' for personal injury cases, emergency requests for seizure of evidence and certain types of insolvency cases. It is left up to the court to decide if a case is considered very urgent, if a hearing takes place and if so, in which way that hearing will take place. In principle no oral hearings with physical presence of the parties take place. Courts are also trying to deal, as much as possible, with cases that are qualified as 'urgent'.[6]

---

[1] This is stated on the formal website of the Dutch judiciary (www.rechtspraak.nl). This website also provides updates.

[2] *Tijdelijke wet COVID-19 Justitie en Veiligheid.* On 16 April 2020 the second chamber of the Parliament approved this Act.

[3] In Dutch: *Algemene regeling zaaksbehandeling* Rechtspraak. For the 'pandemic-situation' before 7 April 2020, previous special 'Covid-19 rules' applied. This regulation can be found on www.rechtspraak.nl (consulted in April 2020).

[4] Just to give an idea: this set of rules consists of 6 paragraphs. Each paragraph contains several 'rules' or starting points'

[5] The 'very urgent' cases can be found on the so called, 'list 1' and are dealt with in paragraph two of the before mentioned general rules.

[6] The 'urgent' cases can be found on the so called 'list 2'.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.54567

In addition to these general rules for the judiciary for certain areas of law specific temporarily rules for these pandemic times are drafted and made public.[7] There are temporary rules for, inter alia, civil law, penal law, tax law and for courts of appeal.

Civil Courts in Practice

For civil courts in first instance it may look, at least at first glance, business as usual, in spite of Covid-19. This is partially true. Courts are in function and producing. New cases can be brought before the courts, parties can submit documents and judges are deciding on civil cases. Written proceedings, or the written part of proceedings, in civil cases, are moving forward.[8] So the machinery of civil courts has far from stopped.

What is different for civil cases these days of the pandemic? Of course, several things are. Let me mention just two different elements. The first is rather practical. For documents submitted by parties, the option of 'safe mailing' with courts is used, in contrast to non-pandemic times.

A second difference concerns hearings. One of the elements of the temporary regulations for civil cases in first instance is that as a starting point there will be no hearing in Covid-19 times.[9] This deviates from the starting point for civil proceedings in regular commercial cases in first instance in non-pandemic times. In normal times, after a first round in writing (statement of claims and of statement of defense) in principle a hearing takes place.[10] According to the temporarily regulations concerning Covid-19 times in principle a hearing does not take place in regular commercial civil cases.[11] Courts in first instance are in these Covid-19 days handling civil cases without a hearing, at least as a starting point. In urgent cases a hearing can take place if the courts allow so. If the court allows it, the hearing will be done remote (as much as possible).[12]

As a result, there is reduced number of hearings in these Covid-19 times. The postponed cases will have to be dealt with at a later stage and are therefore increasing backlogs. At the same time civil courts in first instance, at least some of them, can spend more time on cases without a hearing or cases in which a hearing already took place before the outbreak but were pending for a ruling.[13] So, in that respect, the current situation may provide an option to eliminate backlogs for certain cases. Those are not necessarily the most urgent cases.

---

[7] These are the *Tijdelijke regelingen vanuit Landelijk Overleg Vakinhoud*; this can translated more or less as 'Temporary arrangements from the National Platform on the subject matter'. These regulations can be found on www.rechtspraak.nl (consulted in April 2020).

[8] There will probably be differences between various types of civil cases.

[9] For commercial civil disputes law this regulations is called *Tijdelijk afwijkende regeling voor civiele dagvaardingszaken bij de rechtbanken vanwege de bijzondere omstandigheden door de Corona-crisis*; this means something like 'Temporary derogation for civil cases to the courts due to the special circumstances of the Corona crisis'.

[10] Art. 131 Dutch Code of Civil Procedure.

[11] *Tijdelijke regeling Civiele dagvaardingszaken rechtbanken i.v.m. Corona*, version 2 april 2020.

[12] There may be differences between district courts.

[13] I have not found any formal numbers on this point. In an interview published in a Dutch newspaper the President of the District Court of Rotterdam has stated that the good news is that backlogs in certain civil cases

What is the situation for civil cases in appeal? In 'non-pandemic times' civil cases that are brought before a court of appeal a hearing (in some form) can take place, but not in every case. As a starting point cases in appeal are in Covid-19 times dealt with without hearing.[14] Nevertheless, if for example, parties persist on an oral hearing, the case will be postponed. So, courts of appeal in these Covid-19 days are handling cases without a hearing. Those cases are not necessarily the most urgent cases.

Proceedings before the Dutch Supreme court are still in progress and being handled. That is not surprising because in the vast majority of the cases handled by the Dutch Supreme Court there is no hearing. Civil cases before the Dutch Supreme Court are digitized. Since March 2017 lawyers are obliged to use a digitized system for proceedings at the Supreme Court. That system can also be used during the pandemic.

Four More General Observations

Zooming out this brings me to four more general observations

More and less backlogs? Civil cases in which no hearing takes place are being handled in Covid-19 times, at least that is the starting point. In these cases the decisions of the courts are based on the documents provided by parties. During the pandemic (digital) hearings only take place in so called urgent cases, at least as a starting point, and only if the court allows. The definition of urgent cases is not based on the pre-existing procedural structure nor on the question whether the pre-existing nature of the proceedings (mainly written or less written) was suitable for remote handling or not, but on the content of the issue. That is an obvious choice. So it is clear that there are less hearings in Covid-19 days. That will lead to backlogs. As stated, for certain types of civil cases it may very well be that several courts in first instance can reduce certain backlogs for other types of cases. Once the Covid-19 measures will be lifted there will be questions concerning priorities.

Written proceedings. My third remark concerns an obvious matter: written proceedings do certainly have benefits these days. One can understand that judges do take the opportunity, if time and circumstances allow, to proceed with written proceedings, or written parts of proceedings. That makes sense. At the same time there is a limit to handle cases only based on documents: the right to fair trial, inter alia concerning an oral hearing.

First instance and appeal. Secondly, it is likely that the temporary rules for Covid-19 times do have more impact on cases in first instance than for cases in appeal. Whether this observation is in line with what happens in practice is not entirely sure,[15] but if so, that may very well be the consequence of the pre-existing structure of these respective proceedings.

Digitization. A fourth more general topic concerns another obvious aspect: digitization. In recent years in the Netherlands an ambitious project on digitization of inter alia civil cases was set up.[16] A serious amount of money was invested, the Act on that project was approved by Parliament and two courts of first instance were already using the system as a

---

are diminishing (in April 2020 consulted on https://www.ad.nl/rotterdam/zo-werken-rechters-tijdens-de-coronacrisis-we-blijven-urgente-zaken-behandelen~aa11c3fb/).

[14] This is only a starting point.

[15] I have not found any numbers.

[16] The project was called KEI (the first letters of the Dutch words for Quality And Innovation).

pilot. Nevertheless, in 2018 the project was put on a serious hold, due to technical reasons. Perhaps it will turn out that the pandemic will reinforce that project on digitization, or parts of it, or some of its idea's. In fact, at least some courts of appeal were on a voluntarily basis already working digitized, in the run-up to the enforcement of that project on digitization. Although that project was put on hold, in these Covid-19 times it can very well be that theses courts may benefit from the way they had adjusted their working methods in the run up to it. Perhaps the current situation will serve to enhance digitization in a practical way that seems to work for parties and courts in civil cases.

It Is Not Over, Yet

Hopefully some of the actual measures will prove to be valuable and develop in a way that they are more or less fit for use in the upcoming years. If in some way the experiences that are gained now in Covid-19 times, are useful for the future some of the actual measures and are perhaps more permanent than we now expect. Will the crisis enhance digitization of civil proceedings? Will it put more emphasis on the written elements of proceedings? It remains to be seen. At this point it is unclear what the status of the measures in a couple of month (or years?) will be.[17] Of course it is to be hoped that hearings in civil cases which are now being postponed can take place as soon as reasonably possible.

For justice systems globally several questions will arise once the situation comes back to normal, for example concerning prioritization of handling postponed cases and hearings. In addition, it can be expected that civil courts will have to deal with several types of new civil cases that result from this pandemic (contract cases, liability case, insolvencies, evacuation from houses etc.). It is undeniable that economically hard times are in front of us. From a procedural point of view one can only hope that courts will be ready to deal with them in an adequate way.

[17] The before mentioned Urgent Act is, at least for now, applicable until 1 September 2020.

Civil Procedure in Norway and Covid-19: Some Observations

Anna Nylund, Professor, Faculty of Law, UiT The Arctic University of Norway, email: anna.nylund@uit.no

Date 21 April 2020

The Norwegian government announced a partial lockdown of the country in the evening of 12 March 2020, urging citizens to work from home and restricting access to all public buildings. Compared to many other countries, the number of infected and hospitalised persons has remained low. The government has since taken steps to gradually reduce the restrictions put in place.

Remote Hearings

During the first weeks of the partial lockdown, practically all civil and most criminal hearings were postponed, as physical access to court buildings was restricted. Each court and judge decides on how to proceed with each individual case. Practically all main hearings in civil cases have been postponed, although some courts have hearings with the parties present in parental responsibility, cases on civil restraint issues and interim measures, and in some criminal cases. The Norwegian government, in particular the Norwegian Courts Administration has advocated for maintaining as many court functions as possible to enable the third state power to remain operational.[1]

Courts are slowly returning to a more normal level of activities. Many courts have had some hearings via telephone or video, particularly in parental responsibility cases and small claims. The Supreme Court has held its first video conference hearing. Larger, more complex cases are still largely postponed as judges learn new case management techniques. However, as case management hearings are as a rule conducted via telephone, the current restrictions have had less pronounced impact on them. Still, a case management hearing is futile if the court cannot designate a tentative date for the main hearing.

Norway is currently in a process of installing video-conferencing equipment in courts. Hence, some courts have access to advanced equipment and are used to recording evidence, while other courts must resort to makeshift solutions.[2] In this regard, Norwegian pragmatism is opportune. Differences among the courts is considered a problem: it endangers equal access to justice and judges at some courts could be at significant risk of being infected by the virus.[3] The Courts Administration is in the process of issuing

[1] The Courts Administration has assessed the impacts of the partial lockdown: https://www.domstol.no/nyheter/konsekvenser-av-redusert-drift/

[2] https://www.domstol.no/nyheter/domstolene-behandler-saker-digitalt/

[3] https://rett24.no/articles/-dommere-kan-ikke-vaere-i-en-smittemessig-saerstilling.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5468

guidelines, albeit only pertaining to sanitization and social distancing. The proposed guidelines do not address procedural issues.[4]

One problem is how to enable the general public to access video conferences. One solution is to stream the hearing online, as the Oslo District Court has decided to do in a few cases.[5] Another solution is to give access to the video conference on request.

The Dispute Act[6] section 13-1 foresees the use of video conferencing with the consent of the parties, and section 21-10 allows distance examination, viz. examination via telephone or using video conferencing, of witnesses, experts and parties. The legislator and the Courts Administration designed the rules and technical solutions to enable one party (and his/her counsel) to attend remotely, while the judge or panel of judges, the other party and the legal counsel of one or both parties would be present in the courtroom. They did not foresee the judge sitting at home, and the parties and their legal counsel being present in their own homes or offices, i.e. perhaps five different locations instead of just two locations.

The temporary decree on measures that enable the justice system to function during the coronavirus outbreak, enacted on 27 March,[7] allows distance hearings when the court considers doing so 'necessary and unobjectable' (*nødvendig og ubetenkelig)*. Hence, courts can opt for video conferences against the wish of a party. The temporary decree hinges on the temporary Corona Act,[8] which is subject to renewal once a month. If it lapses, all decrees based on it will automatically do the same.

Oral and Written Proceedings

The main challenge for enabling the civil justice system to function as normally as possible is the highly oral litigation culture in Norway. Despite efforts to increase the use of written elements, for instance written arguments pertaining to complex, technical legal and factual issues, Norwegian lawyers still present these types of legal and factual arguments orally the main hearing by citing fairly long passages of relevant texts. Consequently, main hearings are time consuming, the median is approximately 10 hours (two days), with 13 % taking maximum 5 hours (one day) and 18 % more than three days.[9] The current situation could propel a much needed cultural shift towards making use of more written elements and

---

4 https://juristen.no/sites/default/files/H%C3%B8ringsnotat%20nasjonal%20veileder%20smittevern%20domstoler.pdf

5 https://www.domstol.no/Enkelt-domstol/oslotingrett/nyheter/begjaring-om-midlertidig-forfoyning-om-a-stanse-riving-av-y-blokka/. The case concerns demolition of the Y-building of the government headquarters. The Y-building and the neighbouring buildings were damaged in the terrorist attack on 22 July 2011. There have been many controversies regarding the future of the buildings, particularly the Y-building since it has a few Picasso murals and is also in other ways an important representative of its architectural style.

6 Lov om mekling og rettergang i sivile tvister (tvisteloven) 17 June 2005 no. 90. (Act relating to mediation and procedure in civil disputes). Unofficial English translation is available at https://lovdata.no/dokument/NLE/lov/2005-06-17-90.

7 Midlertidig forskrift om forenklinger og tiltak innenfor justissektoren for å avhjelpe konsekvenser av utbrudd av Covid-19 FOR-2020-03-27-459, https://lovdata.no/dokument/LTI/forskrift/2020-03-27-459.

8 Midlertidig lov om forskriftshjemmel for å avhjelpe konsekvenser av utbrudd av Covid-19 mv. (koronaloven) 27 March 2020 no. 17.

9 Unpublished study by the Norwegian Courts Commission.

concentrating the main hearing to central, disputed facts and law, and in reducing the number and scope of witness statements.

Current procedural rules already provide for flexibility. By the mutual request of the parties, the court can allow the proceedings to be fully or partially written (Dispute Act section 9-9 subsection 2). Additionally, the court can request that the parties deliver written submissions on selected legal or factual issues, and limit the scope and duration of examination of experts and witnesses. However, judges have been reluctant to make use of these powers, and the requirement of mutual consent enables one party to delay the proceedings by refusing to consent to written proceedings. Despite the fact that (partially) written proceedings are possible within the scope of current rules, temporary amendments could be instrumental in bringing about change. The Ministry of Justice did not seize the opportunity for facilitating this process, however, by limiting extended access to written proceedings to certain criminal cases.

The question is whether the current situation, at least if social distancing must be practiced for months, forces courts and lawyers to adapt their practices. Video conferences are often more tiresome to attend, which could impel the parties and the judge to narrow the scope of the main hearing both by narrowing the scope of the presentation of evidence and delivering legal arguments and complex evidence at least partly in writing.

Appellate Proceedings

A shift in the role and function of appellate courts is also needed to cope with the backlog of cases that the pandemic will inevitably result in. The 2005 Dispute Act (in force since January 2008) was intended to produce a shift from appellate proceedings being a *de novo* hearing of the case, to appellate courts reviewing the case with respect to the application of the law, the legality of the proceedings, and the evaluation of the evidence and limiting hearings only to selected issues.[10] However, the intended transformation of the functions of appellate courts and proceedings has not taken place. In this regard, the pandemic could be instrumental in inducing a shift in legal practices and the underlying conceptions, since change does not necessitate amendments of the Dispute Act. There are, in fact, some signs of a burgeoning shift in the attitudes to the nature of appellate proceedings.

The challenge is therefore not primarily the lack of technology, or the need for temporary amendments to legal rules; the main problem is to bring forth a shift of the litigation culture.

Court-Connected Mediation

Some court-connected mediation sessions were conducted using telephone before March 2020 and thus some judges have proceeded with mediation sessions as planned, and some other judges have conducted their first remote mediation sessions. Mediation has a significant advantage over litigation in that the sessions are closed to the public and that no witness or expert evidence is provided. Hence, the judge who mediates the case only needs to establish a connection between the parties and their lawyers. The fact that scheduling remote mediation sessions is relatively easy, mediation renders justice more efficiently than

[10] NOU 2001: 32 Rett på sak – lov om tvisteløsning (tvisteloven), p. 355 ff. https://www.regjeringen.no/no/dokumenter/nou-2001-32/id378579/.

litigation does in the current situation, and consequently, mediation could become more popular.

Problems Arising from Travel Restrictions

A final anecdotal observation is that local restrictions on the freedom of movement have had detrimental effect on the operation of courts. Most municipalities in northern Norway have ordered anyone who has been in the southern parts of the country to self-isolate for two weeks. Since many large law firms are situated in Oslo, often at least one of the parties has a legal counsel based in Oslo. The Hålogaland Court of Appeals, which is competent for Northern Norway, has been unable to conduct hearings: lawyers from Oslo refuse to attend the hearing as they would have to self-isolate for two weeks before attending the hearing. The legality of the municipal rules has been debated, and since 14 April, many of the municipal orders have been discontinued.[11]

[11] https://rett24.no/articles/advokatforeningene-ber-regjeringen-gripe-inn-mot-lokale-karantener.

Covid-19 and the Civil Justice in Poland

Dr hab. Piotr Rylski, Associate professor, University of Warsaw. Email: p.rylski@wpia.uw.edu.pl

Date 21 April 2020

In Poland, since 14 March 2020, the Minister of Health has formally declared an epidemic emergency, and since 20 March 2020 - an epidemic. However, this decision wasn't connected with the introduction of any special regulations concerning court proceedings. In practice, it caused a lot of chaos. Most courts formally continued to function, although as a rule, open hearings were cancelled (postponed) and proceedings were held where possible in closed session. At the same time, the doctrine raised the question whether, as a result of the introduction of a state of epidemics, it is possible to speak of a suspension of proceedings by law (*iustitium*) on the basis of Art. 173 Polish Code of Civil Procedure. Most representatives of the doctrine are opposed to this, because it requires a complete interruption of activities by a particular court, and this was not common in the entire judiciary in Poland[1]. This meant that deadlines in court proceedings (e. g. to bring an appeals) were continued. This had a negative impact on the legal situation of citizens who were obliged to stay at home. They could not, therefore, in practice, carry out the procedural actions within the prescribed period.

It was not until 31 March 2020 that specific pandemic arrangements for the judiciary were introduced (in the Act called 'anti-crisis shield'). However, these regulations have been limited to interruption of all the time limits in court cases, which were pending on 31 March, until the state of the epidemic ceased. In addition, public hearings in court cases have been expressly prohibited by law, except in the case of strictly listed cases which were considered urgent (e. g. criminal matters relating to imprisonment, family matters, etc.). The president of the court of appeal or the president of the Supreme Court was also entitled to designate a competent court instead of a court which could not act due to the pandemic. However, a clear provision has been introduced stating that all actions taken in courts during an epidemic are effective. This means that the courts should continue to act. These changes provided an argument in favour of the thesis that all proceedings were not suspended by law pursuant to Art. 173 CPC.

The above mentioned solutions are considered insufficient. This is due to the fact that the Polish codes (including the Code of Civil Procedure) lack universal solutions enabling cases to be conducted only by electronic means or only in a closed session. In addition, the suspension of deadlines in all cases has made life very difficult for citizens, for example in non-contentious cases (successions, land register cases), as it makes it impossible to finish these cases. In these cases, on the one hand the courts may render a decision, on the other hand it cannot become final as the time limits for appeals do not start running.

[1] According art. 173 CCP 'proceedings shall be stayed by operation of law when the court ceases its actions due to force majeure'.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5469

For this reason, the Ministry of Justice has prepared in recent days proposals for amendments aimed at: the suspension of deadlines will not apply to certain cases[2] and that the courts will be able to conduct their hearings more often by videoconferencing and will also be able to hear them in closed session. It will not be necessary for the party or witness to be present in another court, but it will be sufficient for them to be present at home (via Skype, Google Meet, etc.). The same draft provides for the possibility of adjudicating in civil cases in single-member panels (also in appellate proceedings) and allows cases to be designated for judges out of order.

However, the proposed amendments raise doubts as to whether they do not interfere too much with the transparency of the proceedings and the parties' right of access to the file (there are no electronic court records in Poland). In addition, these changes are prepared in a short period of time and their legislative level is not high. Polish civil proceedings are not sufficiently prepared for the sudden electronization of several million court proceedings. There is also a fear that many of these changes will become permanent practice, so that after the state of the epidemic ceases. This is all the more justified because some of the proposed amendments explicitly stipulate that they are also to apply one year after the end of the epidemic.

[2] The list of these cases is to be announced by the Minister of Justice.

Slovenian Civil Procedure in the age of Covid-19

Aleš Galič, Professor of civil procedure, University of Ljubljana, Faculty of Law, email: Ales.Galic@pf.uni-lj.si

Date 21 April 2020

Starting with mid-March 2020, as a response to the coronavirus outbreak, Slovenia has found itself in an almost complete lockdown. The courts have been no exception. On the contrary, while the universities were the first institutions that shut their doors for face-to-face education, the courts of law were the next to follow.

The Immediate Response: A Lockdown of Courts and a Suspension of Proceedings

The existing legal basis in Article 83.a of the Courts Act (*Zakon o sodiščih*), which sets out rules concerning the operation of the courts in case of extraordinary circumstances such as natural catastrophes and large scale epidemics, enabled for such swift response.. The power to determine that extraordinary circumstances have come into existence, is vested with the President of the Supreme Court, who may act upon a proposal by a minister of justice. In casu, the President of the Supreme Court has issued such decree on 13 March 2020.[1] Extraordinary measures may be in place for two months at most (but can be prolonged by a new decree).

The law provides that in such case, the courts cease operations, except in 'urgent matters', as defined in Art. 83 of the Act. Insofar relevant for civil cases urgent matters are considered to be applications for provisional/protective measures, securing evidence and adopting restraining orders, proceedings concerned with enforcement of child custody and maintenance matters, compulsory commitment of psychiatric patients, as well as insolvency proceedings. Except in urgent cases, oral hearings are not held, procedural deadlines are suspended and judicial documents are not served.

The operation of the courts in the case of extraordinary circumstances can be compared with the 'court recess' (*sodne počitnice*) in the period of 15 July – 15 August (Art. 83 of the Courts Act). In regard to ordinary civil litigation, this means that proceedings come to a complete halt; not only are there no oral hearings, but there is no exchange of written documents and briefs, no preparatory measures may be adopted, regardless of whether they would concern only procedural acts in writing. Judicial documents are not served and if they (by mistake) are, procedural deadlines start running only after the extraordinary circumstances are proclaimed to have ceased to exist. Procedural deadlines that started running already before 13 March 2020 (thus before the decree on proclamation of the extraordinary circumstances came into force) do not run and will continue running once the extraordinary circumstances are proclaimed to be over. This is an important detail which distinguishes the consequence of a proclamation of extraordinary circumstances (the same applies to court summer recess) from the suspension of proceedings *ex lege* pursuant to Art.

[1] *Odredba o posebnih ukrepih zaradi nastanka pogojev iz prvega odstavka 83.a člena Zakona o sodiščih. Su 315/2020 of 13 March 2020.*

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5470

205 Civil Procedure Act. If proceedings are suspended within the meaning of the Civil Procedure Act (e.g. if the court ceases operations, due to a war of other extraordinary circumstance), the deadlines, which were suspended, would start running anew (thus from the start) once the suspension of proceedings is lifted. Yet, suspension of proceedings pursuant to Art. 205 CPA was (fortunately) not an option, since the extraordinary circumstances of the coronavirus outbreak were not of a such nature, that would require the courts to fully stop operations.

Following the aforementioned decree of the president of the Supreme Court, a special legislation concerning the functioning of the justice system in the era of Covid-19 was adopted (*'A Law on temporary measures in judicial, administrative and other public matters in order to damage control of the spreading of the SARS-CoV-2 (COVID-19[2])')* and it came into force on 29 March 2020. In regard to civil matters, the law did not bring anything new. It confirmed that all deadlines (except in urgent matters) – substantive and procedural – are suspended and that they will continue to run after the measures determined by the Law will expire. The measures are allowed to stay in place until 1 July 2020 at latest. Further measures affecting certain types of civil cases (enforcement of judgments and insolvency proceedings) can be found in legislation that has addressed the consequences of the Covid-19 outbreak for the economy (the so called 'Corona Mega-Law').[3]

Art. 83a of the Courts Act authorises the President of the Supreme Court with the power to further limit the list of urgent procedures. For that reason, a new decree of the President of the Supreme Court was issued on 31 March 2020 further limiting the list of urgent matters and thus further tightening the lockdown of courts.[4] Most importantly, insolvency matters are no longer considered urgent within the meaning of Art. 83a of the Courts Act, thus no action can be taken in insolvency proceedings until further notice (not even a distribution of funds to creditors in case the debtor's assets have already been sold).

It is further stipulated that all oral hearings in urgent matters are to be held via videoconference, if the technical and spatial conditions are fulfilled. All scheduled hearings in non-urgent matters are cancelled. It is again explicitly stipulated that judicial documents are not served as of 16 March 2020. Except in urgent cases, the parties, their counsel and others are not allowed to enter court buildings, regardless of the reason (e.g. for inspection of the court file).

The second kind of measures relates to ensuring the containment of the virus. E.g. (in urgent cases, where the oral hearings are still held) the judge is authorized to restrict the constitutional right to public trial and exclude public from the oral hearing, if such measure is justified by the need of prevention from the spread of contagious disease and to ensure protection of health and life. All courts have designated single entry points with all

---

[2] *Zakon o začasnih ukrepih v zvezi s sodnimi, upravnimi in drugimi javnopravnimi zadevami za obvladovanje širjenja nalezljive bolezni SARS-CoV-2 (COVID-19)*, Official Gazette, No. 36/20.

[3] Act Determining the Intervention Measures to Contain the Covid-19 Epidemic and Mitigate its Consequences for Citizens and the Economy; *Zakon o interventnih ukrepih za zajezitev epidemije COVID-19 in omilitev njenih posledic za državljane in gospodarstvo*. Official Gazette, No. 49/20).

[4] *Odredba o posebnih ukrepih zaradi nastanka pogojev iz prvega odstavka 83.a člena Zakona o sodiščih. Su 315/2020 of 30 March 2020*
http://www.sodisce.si/mma_bin2.php?nid=2020041013584651&static_id=2020033107131032

necessary preventive measures in place. Judges and court staff, except for urgent cases, are ordered to work from home. IT support for enabling effective work from home, such as remote desktop access and secure exchange of large files, is being implemented.[5]

The measures, described above, which brought regular civil litigation practically to a standstill, are adequate insofar they prevented the chaos and undue harsh effects in the initial phase of the nation's lockdown. However, after already more than a month since these measures are in place, critical voices are increasingly raised, most importantly by the Bar Association (and some other professional associations, e.g. of Insolvency administrators). Understandably, a practically total standstill of courts has negatively affected professional operations of numerous law firms. Already on 10 April 2020 the Bar Association has issued a document calling for a graduate opening of courts and for adoption of measures (such as videoconferences and e-service) which would enable a smooth unfolding of all proceedings, not just those which fall under the category of "urgent".[6] In view of the Bar, the almost total closure of courts and suspension of practically all of their operations (including such that would not require any in-person meetings) until 1 July 2020 disproportionately restricts the Parties' right of access to court and the right to trial without undue delay. The Bar Association also, for good reasons, criticizes the practice of the courts, that no judicial documents are served. This leads to absurd situations that judges, in matters where proceedings are closed, are writing judgments but they may not serve them on the parties' counsel (and thus do not allow them to start working on possible appeals or enforcement measures). Once the extraordinary circumstances are lifted though, there could be a landslide of judgments served on the counsel within a very short time-frame, making it very difficult for them to adequately work on appeals. Formally however, the law is clear: no judicial documents are served in the time of proclaimed extraordinary circumstances.

In response to the objections of the Bar Association, the Supreme Court argues that the deadline of 1 July 2020 is merely the last possible date, and that, circumstances allowing, restrictions could be lifted earlier. Furthermore it submits that a partial closedown of courts is essential in order to prevent court buildings to become epicenters of the virus spreading.[7]

The Forthcoming Task: Toward Electronic Communications, E-justice and More Flexibility in Organizing Proceedings

The courts' closedown and suspending court proceedings (as swiftly implemented in Slovenia) can only be sustainable for a short period of time. This is a very rigid and 'all or nothing' approach. Urgent matters can proceed, whereas all others are totally stopped, regardless of whether at least a part of proceedings could be made in writing and thus without causing any health concerns.

---

[5] Strojin G., Slovenia, in: CEPEJ, Management of the judiciary - compilation of comments and comments by country https://www.coe.int/en/web/cepej/compilation-comments#Slovenia (last accessed 21 April 2020).

[6] Lovšin P., Odvetniki pozivajo k odprtju sodišč [The Bar calls for the Opening of Courts], Dnevnik, 10 April 2020. https://www.dnevnik.si/1042926869

[7] Ibidem. See also Lovšin P., Kdaj bodo tudi sodišča odprla vrata [When will the Courts Open Doors], Dnevnik, 21 April 2020.

Alternatives that would enable for a safe, yet smooth unfolding of proceedings, in particular those in the sphere of e-justice along with adequate additional tools for case management, need to be found. There are numerous reasons for this need. The right to a trial within reasonable time for the benefit of litigants in pending proceedings must be guaranteed. It must be prevented, for the benefit of all future litigants, that the backlogs to accumulate during the time of standstill. Third – which also needs to be said openly – it must be ensured to the greatest possible extent that, like in all other sectors of the economy, that jobs and businesses in the legal services sector are not lost.

However, both a legal basis as well as technical infrastructure for a further implementation of e-justice is deficient. E-service of judicial documents and e-filing has long been foreseen in the Civil Procedure Act, however subject to implementation of technical measures. In light of the Lawyers' Associations recent pleas (see supra) however, it has to be reminded that it was precisely numerous lawyers, who persistently lobbied against introduction of effective e-service of judicial documents and e-filing of their submissions in Slovenia. Probably, this is surprising for an outside observer, but not for those, who know how a beloved tool it is for many lawyers in Slovenia to use avoidance of service as a dilatory tactic. On the other hand, E-service and e-filing has already been successfully implemented in certain specific fields, like 'enforcement based on a trustworthy document' (in essence, a kind of payment order procedure), land register proceedings and insolvency.

The legal basis for organizing hearings through videoconferences are provided for (Art. 114a Civil Procedure Act). It is sufficiently broad to include both non-evidentiary hearings (such as preparatory hearings) as well as evidentiary hearings. It is also sufficiently broad (although it has not been used in such way before) to enable that the 'second limb' of the video-link does not necessarily need to be in a court building (in another court, under a supervision of another judge), but in any 'other place'. The practice has so far been restrictive and it was perceived to be necessary that a video-link can only be established between two courts of law. It has been argued that in particular where witness testimony is contemplated, there should be another judge present in the place where the witness is giving testimony (in order to prevent undue interference with the witness testimony). But this might – in the light of current needs – change.

Another issue is the organization of in-camera sessions of chambers of appellate courts and of the Supreme Court (in Slovenia, there is practically never an open hearing in appellate courts and in the supreme court; the appeal is decided in written procedure, in an in-camera session of the chamber). There is no explicit legal basis that a chamber of e.g. an appellate court could hold the session via videolink. Neither is there any official IT support for such sessions. According to the Courts Act, the sessions of chambers are held in court buildings, whereas according to the emergency anti Covid-19 legislation, judges must – except in urgent cases – work from home. Nevertheless, rather *praeter legem*, some appellate judges have reported that they have held sessions via zoom platform and that some cases have been decided on appeal in such manner. The recent reports of security concerns regarding meetings held via the zoom platform have not helped this approach to flourish though.

There is another aspect which proves that the Slovenian civil procedure has been 'caught off-guard' by the coronavirus outbreak. A proper response by the judiciary is much easier to achieve if the rules of civil procedure are flexible and allow a judge a broad discretion as to how to adapt the course of proceedings to the specific circumstances and characteristics of

every case. If the procedural rules enable the judge, ideally in the agreement with the parties or at least after giving the parties' the right to comment, to choose between e.g. either more orality or more written procedure, either written witness statements or oral testimony, either scheduling preparatory hearings or opt for a written preparatory procedure. Unfortunately, both the law as well as the general perception within judiciary and the bar is still that a rigid procedural regime is preferred while the broad judicial discretion as to the conduct of procedure is frowned upon. It would exceed the scope of this paper to elaborate deeper on this point, but certainly one has to be aware of the inherent link between a general flexibility or rigidity of civil procedure rules on the one hand and the possibility for the courts to adapt to specific circumstances caused by the coronavirus outbreak on the other. In Slovenia for example, even in the agreement with the parties, if there are any facts that are in dispute (regardless of whether these could be established on the basis of documentary evidence) the oral hearing may not be waived and replaced by purely written procedure, at least not in general type of litigation.

The Attempted Reduction of Judges' Salaries as a Part of the Anti-Coronavirus Package

The situation, developments and dilemmas described above probably do not make Slovenia much different from numerous other countries hit by the outbreak. There however is a specific point where Slovenia is probably "endemic". It concerns the government's attempt to reduce judges' salaries as one of the measures within the "anti-corona measures package". Moreover, the issue of (possible) reduction of the judges' salaries was literally the very first issue concerning the impact of the coronavirus outbreak on the functioning of the judiciary.

A bit of the background: on Friday, 13 March 2020 the new government was sworn in after the previous coalition collapsed (this was not related to the coronavirus outbreak). Practically one of the first measures of the new government (14 March 2020) was to increase its own (i.e. of the prime minister and the ministers) salaries (for ca 10%).[8] As by then, the coronavirus outbreak already hit hard, this sparkled an outrage in the public opinion, following which, two days later, the government announced that it would decrease, temporarily, salaries of all state functionaries by 30%. It was announced that this would affect the prime minister and the government's ministers and state secretaries, furthermore the members of the parliament, the president of the Republic and the heads of certain governmental agencies, altogether around 150-200 people (in Slovenia, there are two categories of employment relation with the state: state functionaries, which are immediately vested with exercising state powers on the one hand and public servants on the other). Yet – which was not mentioned at the time - the measure would also affect judges, as they – as the exponents of the judicial branch of the state power – also have the status of 'state functionaries', not 'public servants'. In fact, this would be, by numbers, by far the most relevant group (there are around 900 judges in Slovenia).

An interesting controversy has developed, with possible broader implications. The representatives of the judiciary (the president of the Supreme Court and the president of the Judges Association) opposed the measure and stressed that guarantees concerning

[8] The response of the government was a denial, arguing that 'they did not raise the salaries, they just put them into a different (higher) category of the schedules of salaries…' https://vfokusu.com/post/536941/ukom-vlada-si-ni-povecala-plac

judges' remuneration are inherently linked with the structural independence of judges and independence of the judiciary vis-à-vis the other two branches of state power. It was not – correctly, in my view – argued that there would be an absolute (constitutional) ban on judges' remuneration reduction. It was in principle acknowledges that judges may be expected to share their part in harshness of economic depression. However, a precondition thereof is that a pressing need would need to be established (of which it was still difficult to speak on the first day of the lockdown), that legislation should not be adopted hastily and representatives of the judiciary should be consulted and involved in the drafting process.[9] Furthermore, due care should be given to the necessary preservation of the esteem of the profession. Concerning the latter, the representatives of the judiciary warned that a flat 30% reduction of salaries would disproportionately affect younger judges in first instance courts and it would make their monthly salary lower than the average monthly salary in Slovenia.[10] Warnings were raised that if adopted, the measure would cause that a salary of many judges would become lower than the salary of their assistants and, in many cases, even lower than the salary of the courts' administrative staff.[11] This would be neither proportionate nor compatible with the need to preserve the symbolic appearance of the esteem and responsibility of the judicial office. The government, realizing that a reduction of the judges' salaries cannot be achieved through a interventionist urgent anti-corona legislation, then publicly called the president of the Supreme Court that the judiciary should itself lower its salaries. The (expected) answer was that the president of the Supreme Court has no powers to do that, only the legislature can.[12] The final outcome was that the adopted law decreased, temporarily, the salaries of all state functionaries except judges.[13]

Rather, this was the final outcome merely in the formal sense. The practical effect however was that the public trust in judiciary was further diminished. Not surprisingly, in this time, the public opinion is not much sensitive about the principles of judicial independence. On the contrary it is much more receptive to pictures portraying judges as a stringy elite which is not prepared to do its part in sharing the burdens of the (forthcoming) economic crisis. There are not few who suspect that the weakening of the judiciary in the eyes of the public

---

[9] Musić I., Koliko bodo za omilitev posledic epidemije prispevali sodniki, SiolNET, 2 April 2020. https://siol.net/novice/slovenija/koliko-bodo-za-omilitev-posledic-epidemije-prispevali-sodniki-video-522316, Lebar J., Nižje plače ne veljajo za sodnike in tožilce, MMC, 25 March 2020. https://www.rtvslo.si/slovenija/nizje-place-ne-veljajo-za-sodnike-in-tozilce/518313

[10] Lovšin P., https://www.dnevnik.si/1042925533/slovenija/sodniki-ne-vidijo-zakonske-podlage-za-znizanje-svojih-plac. According to the CEPEJ STUDIES No. 26: European judicial systems Efficiency and quality of justice (2018) among all member states of the Council of Europe Slovenia has the lowest average gross salary of judges in relation to the national average gross salary (on the other hand however, it has the second highest – except the miniature states – number of judges per capita). https://rm.coe.int/overview-avec-couv-18-09-2018-en/16808def7a

[11] Lebar J., Nižje plače ne veljajo za sodnike in tožilce, MMC, 25 March 2020. https://www.rtvslo.si/slovenija/nizje-place-ne-veljajo-za-sodnike-in-tozilce/518313

[12] Planinšič E., Protikoronski ukrepi: Vlada sodnikom ni znižala plač, a je nanje naslovila poziv; Večer, 24 March 2020 https://www.vecer.com/portikoronski-ukrepi-vlada-sodnikom-ni-znizala-plac-a-je-nanje-naslovila-poziv-10147053

[13] Act Determining the Intervention Measures to Contain the Covid-19 Epidemic and Mitigate its Consequences for Citizens and the Economy; *Zakon o interventnih ukrepih za zajezitev epidemije COVID-19 in omilitev njenih posledic za državljane in gospodarstvo*. Official Gazette, No. 49/20).

opinion was the actual real purpose of the whole operation. The current ruling political party in Slovenia has been at odds with the judiciary for a long time. In an optimistic view however, this was, just like many other measures in this unprecedented time, an inadvertent error, committed under time-pressure, where it was simply overlooked that judges fall within the category of state functionaries. Still, the recent title in the newspaper, controlled by this party is telling: '*Do judges expect that for working from home they will even get a salary increase, when they should, like the government did, voluntarily accept a 30% decrease of their lucrative income for the time of the crisis*!?'[14]

Many aspects of the attempted decrease of judges' salaries as literally the first response to the coronavirus crisis, described above, have a distinct Slovenian – for many readers probably exotic – flavour. The whole issue however has much broader implications. In case the pessimistic predictions of economic depression come true, it will be inevitable that similar questions will be on the table worldwide. The interface between principles of structural judicial independence on the one hand and a legitimate expectation that the judges are not exempt from sharing the harshness of the economic downturn on the other hand will need to be critically reassessed.

[14] Kranjc R., Si sodniki zaradi dela na domu obetajo celo višje prihodke, namesto, da bi se po zgledu vlade v času krize odpovedali trideset odstotkov svojih visokih plač?!, Demokracija, 25 March 2020.

A Distance Process: Covid-19 in Spain

Jordi Nieva Fenoll, Full Professor of Procedural Law (Chair), University of Barcelona, email: jordinieva@ub.edu

Date 22 April 2020

We never thought of living in a pandemic. A disease that we could not control, somehow, easily. Something that has forced us to confine ourselves most of the time in our homes. This situation could cause as well some changes in our mentalities, regarding some of the activities that we previously carried out only in person, and now are being done remotely.

Even if this confinement ends, some measures of social distancing are going to last for a while to a greater or lesser extent. But adjudication has to continue. In Spain, when the state of emergency was declared, it was decided to close all courts drastically, leaving only active some urgent services mostly in the criminal jurisdiction, namely the protection of women against violence. The suspension of terms and deadlines was decreed, which was consistent with the situation of force majeure, as already provided in art. 134 of the Spanish Civil Procedure Code.

But life goes on, and after the initial surprise, a country must continue its activity even if distancing measures persist, because otherwise the damages of all kinds will be even more serious than this pandemic. In the judiciary there is going to be a remarkable delay in the courts agenda. Economy also depends highly on judicial processes. For this reason, and bearing in mind that this situation may lengthen or that new spikes in the pandemic may emerge in the future, perhaps it would be time to start thinking about remote judicial process. It is perfectly achievable with the means we have today.

Orality must change its perspective nowadays. In general it came to our processes during different decades of the 20th Century – depending on the country – because writing was highly criticized as it encouraged judges to be absent from the evidence–hearings. Nevertheless, thanks to extensive empirical research into the field of the psychology of testimony, we know today that it is very difficult to extract useful information from a witness. Judges have enormous difficulties in correctly assessing their credibility, and even if they did, it is impossible to enter a person's mind to find out if they are really telling the truth. Therefore, although testimonies impress judges more than we actually think, those impressions can very often be misleading. At the end of the day, the only relevance of the judge being present in a witness statement is that the judge can moderate the examinations of the lawyers and ask questions of his own motion to the witness.

In addition, a statement of the parties – the plaintiff and the defendant – is not actually relevant evidence considering that for sure they have prepared their statement in advance with their lawyers. Their errors usually come because they get nervous, and not because they might lie. In fact, testimonies in general are mostly relevant only in criminal proceedings, because sometimes we have nothing but witnesses, the victim and the defendant. In civil procedure however, witnesses are often of little help, and parties just repeat what their lawyers have said in their claims. If the distancing measures should last,

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5471

judicial processes will have to be more written, restricting the use of the testimonial evidence.

Almost all of the rest of the acts of a process can be carried out in writing, and if necessary by videoconference. The 'preliminary hearing', for example, as it exists in some procedural laws –art. 414 of Spanish Civil Procedure Code, art. 183 of Italian Codice di Procedura Civile or partly in §275 German Zivilprozessordnung – has no longer the importance it had when it was introduced in the Austrian ZPO of 1895. Nowadays, procedural exceptions are rarely raised, which can also be resolved in writing. The 'preliminary hearing' is often an act that can be ignored. If the evidence is reduced to the documents and experts, and this is very often the case, a process needs no hearings.

The motivation of judgments should also be reduced. In many very frequent simple processes – payment summons, evictions, etc. – motivations are almost always alike, and therefore could be automated. In other processes, judges should be instructed to reduce motivation to the essentials. Extensive explanations are not regularly necessary to decide on a point of law. Brevity makes judgments more understandable. This has long been understood by judges in some countries, and in particular by those of the Court of Justice of the European Union, who are usually quite synthetic.

Finally, the entire procedure should be redone. Not only a general introduction of case management is needed, but many of the bureaucratic formalities of our procedures are nothing more than shadows of the past. The procedure must be re-regulated *ex novo*, avoiding to copy the current regulation, bearing in mind the idea that usually people will no longer be managing it, but AI. Therefore, the exchange of writings between the parties should be automated and judicial intervention during the process should be reduced, restricting it above all to the final phase. At this time, the judge should present a draft judgment to the parties in order to confront it with their opinion, before the judgement is definitely released. A better quality of the judgment is expected this way. Doing so, some appeals shall be avoided.

These contingency measures should not be definitive, because they represent a huge change in our procedural tradition. After this exceptional period, it is necessary to return to normality and duly evaluate if some of the referred changes should be kept.

Concluding Remarks on Covid-19 and Civil Justice

Bart Krans, Full Professor Civil law and Civil procedure law, Leiden University, email: h.b.krans@law.leidenuniv.nl and

Anna Nylund, Professor, Faculty of Law, UiT The Arctic University of Norway, email: anna.nylund@uit.no

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.

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5472

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 are 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 senses 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.