

**THE FUNCTIONING OF COURTS  
IN THE AFTERMATH  
OF THE COVID-19 PANDEMIC**

**DISCUSSION PAPER**

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## A. INTRODUCTION

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The Covid-19 pandemic has created considerable challenges for the rule of law in a number of States, including for the functioning of courts during these states of emergencies, curfews and lock-downs. Yet, courts have a vital function during and after the pandemic, in particular to ensure judicial scrutiny of emergency legislation, and to provide an effective remedy against excessive emergency measures in individual cases. Access to courts is also required in other urgent legal matters. Courts have been shut partially or in some cases completely in many states and the judiciary and legal profession have had to adapt to different ways of working within a very short period of time.

It has been apparent that this situation, and the immediate aftermath, has had a number of consequences:

- A **speedy shift to online working** in order to deal with the consequences of lockdown and social distancing;
- The **adoption of emergency legislation**, sometimes with limited parliamentary oversight;
- The **myriad of laws, regulations and policies directed towards the judiciary**, which are not always consistent in their approach, and the speed at which they are changed;
- A **lack of consultation with judicial self-governing bodies and judges associations** as to what the measures should be;
- Some **tensions between the judiciary and other stakeholders** (such as the legal profession) or state authorities (such as the executive) with each having their own priorities and demands;
- A **lack of unified approach** to justice during the state of emergency and throughout each country.

The responses to the Covid-19 pandemic have also taken place against a backdrop of challenges that courts have been facing in a number of states for many years. Financial constraints, ineffective procedures, and inability to deliver speedy justice remain and the backsliding of the rule of law observed in several countries, have been exacerbated by the crisis.

Yet not all courts in all states have experienced the same issues. There is significant variation in how different countries have approached the management of courts and disparities within those countries among various types of courts and locations.

The focus of this discussion paper is to provide an initial overview of some of the challenges faced by courts in the aftermath of the pandemic, and offers some preliminary guidance for the immediate future.

Drawing upon desk-based research and (a series) of informal webinars with members of the judiciary and judicial organisations, this discussion paper identifies three areas that are of particular pressing concern.

## B. THE RULE OF LAW AND HUMAN RIGHTS

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Underpinning the operationalisation of the courts are a number of key standards which remain and which in many instances are increasingly at risk during this time.

- The **right to a fair trial**, as set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR). This encompasses the principle of the presumption of innocence; the rights to a public hearing and to defence.
- **The arbitrary deprivation of liberty** is prohibited by Article 9 of the ICCPR and Article 5 of the ECHR, requires trial within a reasonable time, for example, and deprivation of liberty to be determined by a competent court.
- The use of **emergency powers** to enable derogation from certain, but not all, rights or restrictions. International law obligates that such measures should not exceed that which is required by the exigencies of the situation and should be supervised and adhere to principles of necessity and proportionality. There is a risk that some of these will become normalised particularly where no limit has been provided. The emergency measures should be constantly reviewed and reassessed.
- The obligation of states to provide **access to justice and an effective remedy** for rights that have been violated;
- The principle of **legality and legal certainty**: many laws, regulations and policies have been adopted quickly in response to the pandemic, sometimes without the necessary parliamentary oversight. Although flexibility and a case-by-case approach is needed during this time, legislation and practices also need to be consistent in their application;
- Upholding the **independence of the judiciary and the principle of separation of powers** to ensure that issues that should be regulated by and subject to the authority of the courts are not taken on by the executive or other state authorities or indeed private entities;
- The **disproportionate impact** that the responses to Covid-19 have had on certain groups, in particular the **most marginalised and vulnerable** in society. This includes the impact on women judges, prosecutors and lawyers, who face(d) the challenge of delivering in the workplace while bearing the primary responsibility in childcare and other caring responsibilities;
- **Freedom of expression** and the ability of others to discuss and, if necessary, critique the actions taken by the executive and to hold it to account;
- **The inability of trial monitors and those monitoring places of detention** to access hearings and facilities thereby undermining the prevention of violations.

Overall, the considerable risks of the erosion of the rule of law are apparent in responses to the pandemic.

While limitations on rights may only be temporary, it is crucial to ensure that they are maintained and kept at the forefront of discussions. These international standards can also provide a framework and benchmarks in guiding courts and the authorities in the way forward.

## C. HEALTH AND SAFETY OF JUDGES, COURT STAFF AND USERS OF JUDICIAL PROCEDURES

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As States emerge from lockdown social distancing is one of the tools being utilised to ensure safety and reducing the transmission of the virus. This has various implications for courts.

There may be different challenges for different courts, including depending on the size of courts and whether they are in urban or rural areas (e.g. larger courts may be able to function as they have bigger rooms enabling social distancing, but smaller courts may need to remain shut).

One of the challenges the judicial system faces is how to re-open physically at least some courts and begin face-to-face hearings, particularly in light of standards on fair trial and a public hearing (this may be easier for some courts, such as appeal courts, which may not require hearings); and how to manage those that do not need a presence in person.

There are a range of individuals who use the courts, both remotely and in person, who may mostly be adults but can include children. These include:

- Judges
- Court staff (ushers, legal advisors, security officials, cleaners, etc.)
- Defendants and respondents, some of whom may be in custody
- Applicants and complainants
- Lawyers
- Prosecutors
- Witnesses
- Support agencies, such as probation, witness support, interpreters
- Journalists and media
- Trial monitors
- Members of the public or those supporting parties attending the court.

Considering how they each interact with the courts, their needs and restraints can help to provide a framework to address some of the issues below.

### *Managing the physical space*

- The **availability of court rooms** which are large enough to permit the physical distancing required; or sufficiently equipped with IT that enables parties and the public to attend in person with the required social distancing; or which provides the ability to live-stream the hearings into another room in the courthouse (which may vary depending on the type of hearing);
- How individuals will enter and leave courthouses (including security checks at entrance, etc.), **move in and around courthouses**, enter and leave rooms, etc. Changes may need to be made for fire exit routes;
- Availability of **waiting space and waiting rooms** for witnesses waiting until they are summoned; members of the public; parties in advance of their hearings;
- Consideration of how all parts of the building will be **cleaned**; the regularity of that cleaning and when cleaning will be required (for example, during hearings if necessary).

### *Determining personal security*

- Management of the **usual security arrangements** (such as metal-detector scanners

and pat-down checks) as well as **new requirements**, such as the wearing of masks; use of hand sanitiser; glass screens; taking temperatures, etc. Depending on the local requirements, will it be necessary for courts to be providing this equipment themselves? Will there be difficulties in obtaining such equipment?

- If persons refuse to comply with such arrangements, it then becomes necessary to consider **coercive measures** to assure that such protocols are respected. The need for binding and clear rules to deal with breaches of such arrangements and a modus which details how they will be enforced in court buildings.
- Particular consideration will need to be given to:
  - **Public access:** whether numbers will need to be limited bearing in mind the need to satisfy fair trial requirements and the requirement for certain hearings to be held in public and in the presence of the defendant.
  - Rooms which provide **confidential spaces** for lawyers to speak with their clients; and for other services such as probation to meet with individuals;
  - Suitable rooms that permit the necessary distancing between individuals for witnesses, jurors, interpreters, relatives, etc.
- The management of individuals **within cells and secure facilities** given the close proximity of staff to individuals.

These matters will necessitate evaluation of the availability of members of the judiciary and staffing:

- Whether **members of the judiciary and staff are present** to enable courts to function (remotely and in person), bearing in mind some may be self-isolating, unable to work due to other health conditions or restrictions, including childcare and caring responsibilities, to get to court on public transport, and in particular where only some courts are open;
- There may be an expectation that **judges will be asked to take more risks** than others: the Bangalore Principles of Judicial Conduct determine that 'a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly';

Other considerations arise with respect to protection of staffing and the judiciary in remote/on line delivery of justice (such as privacy and data protection) and this is dealt with below.

Finally, there will be a need for additional **financial investment** for adjustments to the infrastructure of courts, for technological amendments, regular cleaning/ disinfection, face masks, additional security personnel to enforce social distancing and other safety rules, etc. The judiciary in the US for example has requested Congress for supplementary funding to deal with such emergency measures.<sup>1</sup>

Some of the possible ways forward and examples of what has already been done include:

- The **phased return** of judges or alternating their presence in court, depending on the day, or week;
- Creating an **inventory of suitable courthouses and rooms** which could be used for face-to-face hearings of different types; and which ensure the necessary IT equipment;
- **Creating a list of other buildings** that could be used in the meantime, such as those on university campuses (there is evidence of university moot courts, for instance, having been used in the past by courts for hearings, and suggestions in England that commercial premises could be rented), available through local authorities;

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<sup>1</sup> <https://www.uscourts.gov/news/2020/05/05/judiciary-seeks-funding-legislative-changes-aid-covid-19-response>

- **Undertaking a survey** of not only the availability and preparedness of staff and members of the judiciary to return to work physically, and their capacity to work remotely (bearing in mind the closure of schools) but also the IT knowledge of staff and members of the judiciary to enable them to work remotely if appropriate;
- **Limiting the number of participants who need to be physically present** and facilitating engagement through, for example, as in a high profile case in the Netherlands, by providing online broadcasting; streaming the hearing into another room in the court buildings for the public; or, as in New Zealand (*Tarrant*) by choosing someone among the victims who can represent their views.
- **Ways of managing public access** to procedures have included, for example, prior registration or accreditation for attendance and designated seats for a limited number of members of the public or press, in addition to online broadcasting, as has been adopted by the High Council of Justice in Ukraine. In Austria, an Ordinance by the Justice Minister in March 2020 amended the rules of procedure for the courts of first and second instance. The measures for protection of staff and users of the court included abandoning the usual time regulations for when staff have to be present in court; use of plexiglass to avoid spread of infection; requiring those who wish to attend the building to arrange this in advance.<sup>2</sup>
- When face-to-face **jury trials** resumed in England and Wales specific measures were put in place such as sitting for less hours; making another courtroom available for adjournments; limiting the number of trials taking place; and having another courtroom from which others can watch the trial being streamed. Others have suggested reducing the number of jurors or increasing trial by members of the lay judiciary (thus providing some degree of independent judicial oversight).
  - The Normative Act of Albania Art 3(4) provides for a series of measures to be taken to deal with court proceedings:
    1. *Such measures shall relate to:*
      - a) *restricting the entry of the public in court premises, guaranteeing, - in line with the rules specified for this purpose, - only the access of individuals who must conduct urgent activities;*
      - b) *regulating access in services, by reservation, also through telephone or electronic communication, making sure the users may use the services within a certain timeframe, as well as approving any measure considered necessary to avoid gatherings;*
      - c) *posting mandatory guidance on the restriction and method of movement of persons. The guidance shall be published in the webpages of the courts and councils;*
      - ç) *closed-doors conduct of all public court hearings, for cases envisaged in point 3 of this article, pursuant to point 2 of Article 20 of Law No. 49/2012, “On the organisation and operation of administrative courts and adjudication of administrative disputes,” Article 173 of the Civil Procedure Code, or Article 340 of the Criminal Procedure Code;*
      - d) *conduct of hearings on the grounds of documents, - in administrative and civil cases envisaged in point 3 of this Article, which do not require the presence of parties, - through the use of electronic means of communication for the submission of procedural acts and issuance of court decisions.*  
(Normative Act No.9, Dated 25 March 2020 On Special Measures In The Area Of Court Activity, During The Epidemic Caused By Covid-19)

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<sup>2</sup> <https://www.coe.int/en/web/cepej/compilation-comments>

## D. TRIAGE OF CASES AND PRIORITISATION

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As many courts have been shut during lockdown this has had a huge impact on the continuation of cases. The judiciary have had to consider which cases should be continued despite court closures or limited court operations compared to those which should be suspended; and how to organise the resources in re-opening courts, namely which cases can be dealt with remotely and which will require face-to-face hearings.

### 1. Determining what is urgent

Many courts have tried to continue operations, either remotely or face-to-face, during lockdown, dealing with what are considered urgent cases during this time.

As states emerge from these restrictions, what will be considered urgent may change (and is likely to change again over time). How the judicial system is able to manage this will need to be considered against the backlog of previous cases that have been postponed, as well as new cases that have arisen as a result of the pandemic (see below).

Some of the challenges courts are facing and will continue to face are:

- The **availability of courthouses, staffing and members of the judiciary**, which will impact on how cases are prioritised and allocated.
- There may need to be a **sharing of facilities**, buildings, staffing, for example between different courts (family, crime, civil, where they are separated) and these courts may have different criteria for what is considered to be urgent.
- **The rapidly changing environment: what is urgent is likely to change** depending on where countries (and indeed different regions within countries) are in the post-COVID phase.
- The criteria for determining what is urgent may be **decided by the judiciary or policy-makers or both** and this may impact on the independence of the judiciary.
- There may be **different or competing pressures** on what are considered to be priorities, including from the point of view of judges, lawyers (who pursue issues in the interests of their clients and access to justice, as they try to deal with loss of income, etc.).
- Some **laws and practices may be gendered or otherwise biased** and it will be important **not to 'maintain, reproduce or exacerbate [such] inequalities'**.<sup>3</sup>
- There will be a **potentially increasing backlog** caused by the suspension of hearings and other proceedings.
- It may be necessary to **distinguish** between those cases that need to be held face-to-face and those that can (continue to) be held remotely.
- Courts have been considering the **availability of forms of interim relief** where cases cannot be dealt with quickly and this may be useful to continue.
- Courts have been **extending limitation periods** and deadlines for motions and decisions. This may need to continue, bearing in mind the importance of time frames being clearly defined (e.g. not 'until the end of the epidemic').
- There is a risk that prioritization of cases following the end of emergency measures

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<sup>3</sup> The Gendered Face of COVID-19: Women and Access to Justice, Article by Dr J. Jarpa Dawuni, Executive Director of the Institute for African Women in Law for the UNODC Global Judicial Integrity Network: <https://www.unodc.org/dohadecclaration/en/news/2020/04/gendered-face-of-covid19-women-and-access-to-justice.html>.

could **over-emphasize economic interest above the protection of rights of individuals.**

Courts will need to retain **considerable flexibility** to adapt to the (often swift) changing nature of the pandemic and responses to it. A **case-by-case approach** in determining what is urgent may be appropriate as a way of ensuring judicial discretion and independence.

In deciding what is urgent, the following criteria have been identified by ICJ and others that may assist:

- Identification of individuals **who are subject to specific vulnerabilities**, including children, older persons, persons with disabilities, and women. Who is most vulnerable may of course vary depending on the particular court or procedure. The importance, for example, as noted by the Special Rapporteur on the Independence of Judges and Lawyers, of immediate protection for those in situations of **domestic violence**; or to prevent homelessness;
- The need to prevent **irreparable harm**;
- Those currently **deprived of their liberty**, such as those in pre-trial **detention** and in detention, and in particular those who have been held on remand longer than they would have been, bearing in mind the need to reduce (or at least not add to) the numbers in detention. Consideration of the processes for dealing with unjustified quarantine or detention.
- According to a recent report of the Fundamental Rights Agency (FRA) the new laws in Italy, Portugal and Slovenia stipulate that urgent acts in which **fundamental rights are at stake** - such as proceedings concerning minors at risk or urgent guardianship and domestic violence proceedings – be carried out.<sup>4</sup>

The criteria should be **objective, fair, clear and not undermine judicial independence, nor be discriminatory**. It should also be **transparent and available to others for consultation**, including members of the legal profession and their associations.

## 2. IT opportunities and challenges

Perhaps one of the most discussed aspects of the impact of Covid-19 on courts has been the rapid increase in the use of technology to manage the workload of courts and to maintain some functioning in the meantime. Thus,

- Technologies have been **introduced or expanded extremely quickly**, sometimes without a clear legal basis or with little preparation.
- There has therefore been a need to consider the **extent of access to the necessary technologies** by different persons involved in the courts, and **the knowledge to use the technology** necessary to engage with the courts;
- The **availability of equipment** (including appropriate bandwidth and connectivity) in courthouses and the subsequent impact on allocation, hearing dates and decisions. Funding may be needed to acquire or expand use of the necessary equipment. For example, there have been some suggestions that two screens or devices or additional cameras may be needed in virtual hearings in order to properly manage visual and documentary material. In addition, a recognition that the IT required to participate in

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<sup>4</sup> Fundamental Rights Agency, Coronavirus pandemic in the EU - Fundamental Rights Implications - Bulletin 1, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf).

court proceedings will be required by every participant.

- A **variety of different platforms** (such as Skype, Zoom, Microsoft teams, etc.) have been used by the courts, sometimes on an experimental basis, and may be subject to constant change. The Ukrainian State Judicial Administration has decided that it will allow the use of various different applications for videoconferencing, rather than relying on a single one. Participants have, however, to pre-register with a digital signature or login and password details.<sup>5</sup> Some of these have cost implications (such as Zoom whereby users may be limited to only 40 minutes of free time resulting in interruptions to proceedings).
- There is some recognition that use of this IT has been **beneficial in some instances** and that should be maintained going forward. However, this is against a backdrop in some states of a push by the executive to adopt remote systems as a cost-cutting exercise.
- Some countries have been **using technology and online court processes much more than others** and much that can be learnt from them. Countries where videoconferencing is used in civil/ criminal procedures include: Austria, Croatia, Hungary, Serbia, Portugal, Sweden (where also regular hearings are held), North Macedonia, France (videoconference hearings but also hearings by phone), Kazakhstan (where the app *TrueConf* is being used for court hearings), UK, Ukraine (where judges reportedly are allowed to use any video-conference application and where some are broadcasting hearings via *youtube* to ensure public access), and Slovenia.<sup>6</sup>
- There is a considerable **disparity among courts** depending on the systems they already use, even within the same jurisdictions. For some, for example, they moved from a paper-based system a while ago and have therefore experience in managing documents and hearings online. For others this has been a steep learning curve with significant changes having to be made very quickly.
- Similarly, **different types of courts and hearings raise different challenges** and so blanket policies on the use of technology and online delivery cannot simply be applied equally to all. For example, procedures involving witnesses, children, individuals who have been detained, may need special considerations.
- There is some evidence of a **reluctance and concerns** among some in the legal profession and judiciary to adapt to online delivery, in addition to concerns of their own ability to use such technology, and the risk of infringement of fair trial safeguards.
- Many of these technological tools have been employed as a **temporary measure**. Some of these solutions do not infringe fair trial rights. However, for other proceedings whilst the technical solutions may have been necessary and proportionate in an emergency situation, they will cease at some stage to become so as the country moves out of the emergency. It is important to consider their continued use as a way of reducing backlog or because it is more efficient and can deliver justice just as well in the medium to longer term. As Fair Trials note: 'It is essential that states do not rush to adopt these measures without properly considering their impact on criminal justice, and any decisions to make them more permanent should be based on sound evidence'.
- The use of this new technology or expansion into other areas will need some **basis in law**. **Concerns regarding the legality** of judges using videoconference hearings on the basis of a governmental recommendation or decree have been raised, alongside problems due to lack of **consistency** in the use of teleconferenced hearings (some judges use it, others do not, judges use it very differently).

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<sup>5</sup> Weekly analytics of the CPLR for 21 – 27 April 2020, <https://pravo.org.ua/en/>.

<sup>6</sup> Information recorded at a conference call organized by ODIHR on "The Functioning of Courts in the COVID-19 pandemic" on 9 April 2020, <https://www.osce.org/odihr/450385>.

### *a. Video conferencing and remote hearings*

Research into the use of video-conferencing, virtual trials and other hearings, for example, and more is coming out every week (See Appendix for list of resources). Given the complexities of these issues, some of which have been dealt with in much greater detail elsewhere, this section identifies some of the key issues to consider and examples of innovation that could be employed going forward.

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

- How to check the identity of the parties
- How to prevent witnesses or parties from being influenced or directed by third parties during testimony
- How to enable appropriate cross-examination and also the right (and in some jurisdictions the legal requirement) of a defendant to be present when a witness is summoned
- How to enable parties to observe the courtroom in its entirety
- Attorney-client privilege: how to enable confidential communication between client and lawyer in a videoconference hearing
- Public access (as required by Article 6 ECHR, 14(1) ICCPR)
- How to file and inspect evidence
- How to ensure that the defendant is not put at a disadvantage. For example, there is some preliminary research which suggests that defendants are more likely to face custody and less likely to be represented in remote hearings; those who were represented faced challenges in building a rapport; and some did not feel present in the same way as they might have done if the process was in person.
- How to provide translation if required.

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

The **effectiveness of legal representation** in such hearings has been questioned, noting that a hearing is more than merely conveying information. For example, videoconferencing deprives the parties and judge from observing non-verbal clues and from observing the courtroom in its entirety. It was also highlighted that while testifying via video-link parties and witnesses cannot be prevented from looking at 'cheat sheets' or receiving signals or cues from third parties.

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

Various issues arise in **managing participants** in virtual hearings. Court etiquette may need to be re-evaluated (what is appropriate dress for both judges and other participants to ensure the seriousness of proceedings are upheld; sounds; backgrounds; where the participants appear on the screen and what impact this may have on managing proceedings, and opportunities for interventions ('raising a hand' or using 'chat' functions) etc.). Conducting hearings with the 'necessary empathy and humanity' was very difficult in family proceedings, as a recent Nuffield Family Justice Observatory report noted.<sup>7</sup> Policies on how to require someone to 'leave' the courtroom if necessary, may be needed, as will how to engage individuals who are not participating sufficiently and picking up on non-verbal cues. Consideration of platforms that permit break-out rooms to enable lawyer/client discussions may also provide solutions in some instances. Policies for dealing with when individuals are deemed to be absent may also need to be re-evaluated.

The observation of trials and **trial monitoring** in video conference hearings is crucial and possible but in some countries access has been restricted.

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

**Support for vulnerable persons** must be considered. The complexity of the settings, clarifying the role of the different individuals involved in a proceeding, the conclusion of which can determine the future of those involved, needs to be an overarching consideration. Certain technologies may pose challenges due to disabling impairments, for example, following proceedings on a laptop screen rather than in person. Recognition of the suitability of the environment from which individuals are calling in is also a factor: is an individual able to give evidence to a virtual hearing safely from their own home? Conversely, taking evidence of vulnerable witnesses or individuals (such as children) remotely, from a place where they are safe and comfortable, may have certain benefits. This includes examining the safety and security of online communication if individuals are in detention and where there is a possibility that they may be being recorded or monitored. Some parties may not have access to a reliable internet connection, the software or knowledge to use the necessary platforms. There may also be concerns with the illegitimate recording of hearings.

### ***b. Access to files***

The ability of the judicial system to operate remotely requires that those involved have access to and are able to file documents electronically. As a Fundamental Rights Agency (FRA) report notes, this has been problematic if 'courts are not fully adapted to using such technology'.

- Fair Trials, for instance, note regulations that require files to be picked up from police stations or courthouses have raised difficulties, particularly when public transport is not available or there are restrictions on movement.
- Depending on the legal order, how lawyers can file motions and appeals is a factor in determining access to files and court registries.
- Some thought is required on how judges authenticate themselves and validate decisions (e.g. through electronic or digital signatures).
- Correspondence with the courts which formally used postal services have also been

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<sup>7</sup> Nuffield Family Justice Observatory, Remote hearings in the family justice system: a rapid consultation, 2020.

affected.

- Questions arise as to whether all files capable of being shared remotely in a secure way between the relevant parties and other individuals?

### *c. Data protection, security and privacy*

When using video-conferencing, sharing of files and electronic interaction between individuals, data must be transmitted securely and confidentially. The exponential and rapid increase in the use of different technologies and constant changes to different platforms raise concerns over the protection of such data. In addition, who owns the data (the provider or the court) is sometimes not always clear.

### *d. Ways forward*

- Courts could gather information on the circumstances where video conferencing was used in lockdown and where it was not (i.e. what cases still went ahead in person) and start to undertake an evaluation of their effectiveness and their impact on fair trial rights and other standards.
- Online tools and technology should be **used as much as possible** to deliver the key functions of courts, however, weighing the interest in continuing the procedure despite the shortcomings of videoconference hearings and paper-based procedures as compared to an actual trial. Many judicial functions and the delivery of fair trial rights mean that face-to-face interaction cannot be entirely replaced by IT solutions.
- A significant amount of research is currently being carried out by some organisations on the use of IT in courts and the judicial system;
- **Legislation and other policies and regulations may need to be adopted or amended** to permit changes to remote decision making and filing electronically. For instance, orders by the Supreme Judicial Council in Bulgaria permit the filing of documents to courts and the prosecutor by mail or electronically, with summons being served by phone or electronically.
- In Estonia, IDs of Estonians permit digital access to government services, thereby facilitating the filing of documents. 'Virtual meeting rooms' have also been established to enable courts to function.

Fair Trials and others have identified some factors that may assist in determining when remote hearings are appropriate:

- Decisions should be made on a **case-by-case basis**.
- Length of delay and their potential impact on rights of defendant and parties (including increased risk of detention)
- Nature of hearing:
  - How complex it is
  - Need for witnesses and interpreters
  - Impact on right of defendant (increased risk of detention)
- What equipment is available to all parties and persons involved;
- the existence of **impairments or other factors** that could negatively affect the parties' ability to participate in the proceeding (e. g. visual and other relevant disabilities and impairments, age/ familiarity with IT-systems)
- whether the parties/ the defendant have or will need **legal representation**
- the ability of party/ defendant and lawyer to **interact with each other confidentially**

- during the remote/ videoconference hearing
- the need to call witnesses
- the need to (physically) examine evidence.<sup>8</sup>

## E. NEW CASES AND TRAINING

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The Covid-19 pandemic has resulted in new types of cases reaching the courts. In some countries there has been a multitude of laws, decrees and instructions on court management and proceedings, some of which has been contradictory.

These cases, and the above technological adaptations, have resulted in the need for training for the various persons who use the judicial processes.

### 1. New cases

'New' types of cases have arisen during and as a result of lockdown rules and quarantine. For example:

- **Sanctions against individuals for breaches** of lockdown rules. Various issues arise for the judicial system:
  - Imposing sanctions against these individuals, including fines, arrest and detention;
  - Whether the offences were proportionate, well-defined in law and principles of legality;
  - Evidence in some instances of excessive fines for breaches, or force in enforcement of emergency measures, or their inconsistent application;
- **Lawsuits challenging the lack of legislative basis and judicial control** in managing quarantine and who is quarantined;
- The scrutiny of **emergency laws**, some of which are not time limited, and which may have been adopted swiftly and without the usual parliamentary accountability;
- **Unequal treatment** in the application of laws and responses to Covid-19, such as prisoners who did not qualify for early release, particularly those on remand;
- **Compensation claims** for negligence or mis-information.
- A **lack of remedy** for breaches by the authorities, and increase in judicial review;
- Reports of increases in **domestic violence** cases
- **Bankruptcy and insolvency**
- **Labour law** and employment rights claims
- **Housing and eviction** issues as well as homelessness
- **Health and safety** including responsibilities of employers and state authorities;
- **Insurance** claims
- **Privacy and data protection** as many work remotely, use of IT at home and work, and contact tracing.
- Claims for **loss of revenue** by various businesses.
- **False news** and also persecution of organisations for allegedly spreading false news.

Caution should be exercised regarding assignment of such cases to specialized judges as it bears a high risk of politicization or allocation to those who are deemed "convenient".

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<sup>8</sup> Based in part on Briefing of Fair Trials International, Safeguarding the right to a fair trial during the coronavirus pandemic.

## 2. Training needs

As the environment has changed and will continue to do so, there has been the recognition that many within the judicial system need or will require training for how to manage these new realities. However, this is against a backdrop in some states of the reduction in or cancellation of training that would normally have been provided to members of the judiciary and staff.

- Judges may not be automatically be familiar with relevant **international law**, in particular in concepts of necessity and proportionality of sanctions for breach of emergency measures. The National School of Judges of Ukraine has launched a remote training course for court staff on the ECHR.<sup>9</sup>
- Use of **relevant platforms** to access documents and video conferencing;
- Conducting **e-filing, sharing of documents and electronic signatures**;
- Understanding the requirements of **data protection and privacy**.

It may therefore be helpful to:

- Identify **who has the capacity** to work remotely and with various IT platforms in the immediate term, and what training is needed now and can be delivered quickly, and remotely;
- Some courts have used **surveys** to identify persons available to conduct relevant procedures and who have the necessary IT skills. The results of these surveys can then be used to highlight appropriate training needs;
- Consideration of selecting '**IT mentors**' from among the judiciary or staff who can assist their peers
- Identification of **organisations who may be able to assist** with delivery of relevant training. For the European region, for example, the *European Judicial Training Network* (EJTN) could play a role in training initiatives.

## F. NEXT STEPS

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This discussion paper is focused on addressing the immediate emerging from lockdown. In many jurisdictions plans and processes are being put in place to manage this transition and for the future.

- There is a need for a **phased, step-by-step** return.
- Some courts have started to develop their own '**exit strategies**'. For example, the General Secretary of Supreme Court in Slovenia is currently developing their plan
- The importance of approaching issues on a **case-by-case basis**, at least at the preliminary stages.
- A consideration of **who will be taking decisions** which impact on the courts and judicial processes, bearing in mind the need to uphold the principle of separation of powers;
- **Legislation, regulations and policies may need to be introduced or amended** to deal with measures that need to be adopted by the courts.
- A recognition that these processes may be **time consuming**.

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<sup>9</sup> <https://www.coe.int/en/web/cepej/compilation-comments>

- The need for any processes to be **transparent, inclusive and subject to regular review**.
  - Transparency to ensure that those who need to be aware understand the measures that are being taken and to reduce the risk of inconsistency.
  - **Inclusivity**, in terms of consulting with relevant stakeholders such as members of the legal profession and supporting agencies, such as probation, prison service and police. Conversely, the judiciary should also be consulted by others, in particular the executive, when drafting their own responses. The need for dialogue has been stressed on numerous occasions to avoid conflicts and tensions between different justice professions.
  - **Regular review** so that temporary measures do not inadvertently become permanent, unless this is considered desirable.
- **Coordination**: it has become important to share experiences and examples and to ensure coordination among different judicial sectors. Coordination groups can help to facilitate lessons learnt and examples of good practice. For example, a coordination group on European Arrest Warrants has been created by the European Commission. Judicial organisations and self-governing bodies should also engage in discussions on preparing for restoration of court activities.
- Discussion on the **financial implications** of the measures needed to be put in place to ensure the safety and protection of judges, staff and those using the judicial system; as well as delivery of justice in the immediate aftermath of the pandemic and beyond.
- **Data gathering by courts** themselves is also crucial. Collecting information on the cases handled under crises mode should not be forgotten. It is an important element to capture lessons learned, plan capacity and identify ways to prioritise cases for face-to-face hearings. This should be done even where the executive and other authorities may be carrying out their own data collection exercises. For example, in Denmark, a task force has been established to capture lessons learned. Courts reportedly operate on an emergency basis and focus on 'critical cases', while court and legal deadlines have been interrupted.<sup>10</sup>

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<sup>10</sup> According to informal notification in judicial network within the EU.