



Series 1: Safeguarding the Rule of Law Challenging Times

Episode 2: Maintaining Access to Justice Part 1: Criminal Courts

Carolyn Elliott-Magwood (CEM): Welcome to ‘CEELI Talks.’ My name is Carolyn Elliott-Magwood and I am Senior Rule of Law Fellow at the CEELI Institute, Prague. This initial series of four podcasts from CEELI features interviews, conversations, and reports with leading judges, civil society actors, and representatives of European institutions that advance the rule of law.

Coming up in this podcast, Ilze Tralmaka from Fair Trials discusses concerns and observations on the effects of the COVID-19 pandemic on the rule of law and Freda Greal, a colleague here in CEELI, continues her spotlight series with a look at the bi-weekly Webinar Roundtable Discussion Series we have been conducting with the Judicial Exchange Network.

But first, I talked with The Right Honourable Lord Justice McCloskey, President of The Northern Ireland High Court, about the opportunities and pitfalls of conducting hearings by videoconference, and I started by asking him about the changing role of the judiciary rendered by this global pandemic.

The Right Honourable Lord Justice Bernard McCloskey (BM): The role of the judiciary has changed dramatically from the advent of the COVID-19 pandemic. Judges have become seriously underemployed as a result of the lockdown restrictions, closure of court buildings, and

the lack of planning which has resulted in a reactive and not proactive response to the emergency.

CEM: *And so, in middle of this reactive response, what are the core functions that the judiciary has to continue to perform?*

BM: It is essential to the rule of law that the judiciary remain as visible, as active, and as productive as possible. This entails identifying those judicial services and functions which can still be delivered in the best possible way. The fundamental difficulty is the lack of access to court buildings as a result of the lockdown restrictions. This has switched the focus of attention overnight, and without proper planning, to remote hearings, video, telephonic, and so forth.

CEM: *And what have you been seeing in terms of these remote hearings? What's been working well? What hasn't been working well as courts have tried to adapt to this reality?*

BM: What we are discovering as a judiciary is that not very much judicial business can be effectively transacted by remote hearing mechanisms. Any case involving live evidence, contested facts, or a jury is by almost universal consent not suitable for the remote hearing mechanism.

So, if you pause there, the judicial function is all about adjudication and adjudication requires a dispute. Thus, the vast majority of cases entail some significant element of disagreement about facts, or the impact of facts, or inferences to be drawn from facts, that the consequence is that we have spent some considerable time identifying those judicial services which can nonetheless be provided.

CEM: *Can you give me an idea of what those services are that can still be provided by courts while they're functioning in a largely remote environment?*

BM: Yes, first of all, we have tried to identify cases which have the main priority. Those are cases involving any person with any kind of legal, or other mental, or perhaps indeed physical incapacity or disability of any kind. These are the users of the legal system who require top priority. Similarly, our attentions have turned to cases involving the liberty of the subject. In this way, one of the mechanisms which I have been strongly advocating of the parties in a variety of litigation contexts — is maximum agreement of the facts. If the main facts can be agreed, then the judicial function is normally capable of being performed. In the cases involving the liberty of the subject, bail hearings can be transacted effectively by remote mechanisms. They are not quite as efficient, they may have a stop-start dimension, they might have to be adjourned for further evidence and so forth.

The second main category of cases involving the liberty of the subject, that is, those persons who are being prosecuted for a criminal offense, and are in custody, and do not qualify for the grant of bail. These cases in our jurisdiction pose a very major difficulty, because the majority of them involve trial by jury.

As of today, we have not identified suitable mechanisms for resuming trials by jury. Some experimental cases will be proceeding in the jurisdiction of England and Wales in the very near future, and we shall watch those with interest.

CEM: *So, what is happening to jury cases that would have been scheduled in the past two months or that are scheduled to take place in the upcoming months while the physical distancing regulations are still in place?*

BM: Regrettably, these cases are court files that are gathering dust. In a small minority of cases, dealing here with serious crime of course, trial by a judge alone without a jury is a possibility and we are hopeful that court rooms can be reopened to accommodate that kind of trial.

If I then focus on the less serious crime, that is cases involving road traffic offences, minor public order offences, minor assaults, and things of that nature, many of these can be still transacted subject to the same difficulty — namely if they are contested, then they remain by and large unsuitable for remote adjudication.

If I might identify another important category of cases whether they are civil, or criminal, or family, and perhaps of other legal categorizations, many appeals do not involve the reception of evidence — therefore there are no witnesses involved. Many appeals simply involve a review of the case at first instance and/or an appeal on a point of law. These cases have been quickly identified as being suitable for remote adjudication.

The experiences of fellow judges and myself of cases of this kind is that remote adjudication is acceptable. However, most feel that it is not as satisfactory as a conventional form of hearing. My personal view is that we will all have to be patient, we will have to strive together, we are devising new protocols, and I am optimistic that this kind of hearing will prove increasingly satisfactory for everyone: judges, parties, and the administration of justice in general.

CEM: *This raises one of the issues that I am interested in, which is the idea of trade-offs, because right now we can't have our cases happening in-person, so we are doing what we can, and judiciaries are making trade-offs —they are trying to balance rights. Can you speak a bit about whether you think courts are doing a good job of doing that balancing act, or if there needs to be a realignment?*

BM: Yes, I have devised a protocol which can be widely used in various courts and tribunals in our jurisdiction, and the over-arching principle is that of a fair hearing to all parties. And the out workings of that principle in the protocol are that remote hearings must be conducted and planned in such a manner as to ensure there is no impairment of any party's right to a fair hearing. My personal opinion is that constant alertness to that over-arching principle will serve to ensure the correct selection of appropriate cases for remote adjudication.

CEM: *You've talked about the relevance of legal culture to determining what remote approaches will work. And so, looking at different legal cultures, is it this over-arching principle that you would recommend guide decisions that are going to be made, perhaps, differently in different jurisdictions about what can be heard remotely and what can't?*

BM: Those countries which — by tradition and culture — have always determined certain types of litigation in a paper or other remote form can of course continue to do so, and those countries will be the least affected by the impact of the pandemic on the administration of justice.

These countries can teach others. However, in those countries where there has always been a heavy emphasis on an oral hearing, you encounter the difficulties which I have previously identified. This dimension places the spotlight, also, on what one might call case management or procedural rulings. In some countries, these have normally been undertaken in open court.

However, it is becoming progressively clearer, that judicial decisions of this kind, which are in effect procedural orders and directions can, in the vast majority of cases, be made fairly on paper, having received both parties' contributions.

CEM: *Do you think a move towards paper-based case management decisions is something that might continue after the pandemic, as the countries that tend towards oral hearings are addressing the backlog coming out of this? Or do you think that will be temporary, and that we will go back to oral case management?*

BM: That is an excellent question. I consider this to be a paradigm illustration of an innovation at which will almost certainly continue indefinitely post-pandemic. Not only because it is less resource-intensive than other forms of adjudication and it will, therefore, have the supreme advantage of diverting judicial resources to areas where they will be most needed whenever we can resume something approaching normal and conventional judicial service.

CEM: *Another thing I am interested in, and this again goes back to your over-arching principle of a fair hearing for all parties, is who are the people who are most at risk of falling through the cracks right now?*

BM: The cohort that has emerged with some clarity as requiring special attention is that of unrepresented litigants. Now, they always present challenges and difficulties for any court and or any tribunal. These, in my view, have become magnified as a result of the extraordinary circumstances. We have ongoing examples in our courts of unrepresented litigants whose cases appear to be stagnating because they, due to their personal circumstances, are simply unable to devote time, attention, and financial and other resources to the preparation and presentation of their cases.

As regards other vulnerable litigants, they happily, in my view, continue to receive the same high level of attention and priority which they always did.

CEM: *Have you heard anything about the experience of vulnerable victims or witnesses, and how they are affected by moving towards remote trials or by the delays that this crisis is creating?*

BM: Yes, we have had some limited reaction, it is anecdotal, not of a formal kind. Interestingly enough, one of the main reactions which has been expressed is that people you just mentioned don't feel that they have been through a proper court process. The idea of access to justice for virtually every member of the population, in my view, is physically moving to a place where justice is recognizably and visibly transacted. And that means travelling to a building that is called the courthouse and observing all of the formalities and trimmings of a court process.

CEM: *Yes, and hopefully we will come out of this time and really think about this unplanned experiment in remote trials, and how it should or should not be applied to the way the courts function in normal times.*

BM: Yes, and I think there is an important issue of trust there as well, because the rule of law and the administration of justice will only function effectively if its users and beneficiaries trust the system. And if an unrepresented litigant is being confronted with the suggestion of a remote hearing of a video kind, with none of the features that I have just mentioned, I can readily understand why they would not trust what they are being presented with. Why should they have any confidence in it? They haven't had previous court experience — unlike the lawyers — and there is a massive distinction here therefore between the represented litigant and the unrepresented litigant.

If evidence is going to be taken by some kind of live link, then we really got to ask ourselves — what confidence can we have in the evidence of a person who has never had contact with the legal system or the court system previously, but who is being asked to go to a room in their house and press a few buttons, and then is swearing an oath and answering questions about contested, factual events.

CEM: *Yes, many questions are being raised by these practices. Now, to conclude, I'd like to ask you what you've learned in these past two months? What do you think you'll take with you when we move beyond this immediate crisis?*

BM: Some lessons of the last couple of months, which are evolving in nature, are first of all the need to be open to new mechanisms and systems, and the willingness to self-educate in technical matters. The vital importance of communication, all of a sudden, there is a heavy emphasis on the spoken word rather than the written word.

Equally, the crucial importance of the relationship between the legal profession and the judiciary. Reciprocity of trust and confidence are absolutely essential to give these new procedures and systems any realistic prospect of being effective and addressing some of the negative consequences of the pandemic.

CEM: *Thank you Justice McCloskey for your time and thoughts. As Justice McCloskey said, trust and confidence in our justice system are required now more than ever, and this is what's at the heart of the work of the Fair Trials organization. With offices in Brussels, Washington, and London, Fair Trials monitors and measures the efficacy of justice, especially for the criminally accused. I spoke with Ilze Tralmaka of their Brussels' office, who talked about the integrity of the criminal justice system under pandemic conditions and her related work at Fair Trials.*

Ilze Tralmaka (IT): I am a legal and policy officer in Fair Trials. Our main goal is to see the world where everyone's right to a fair trial is respected, and we are working mostly from defence perspective. So far during this pandemic, we have the COVID-19 Justice Project where we are monitoring the impact of how the measures that are taken by the states in response to COVID-19 are effecting criminal justice systems and the right to a fair trial. And what we aim to do with this project is to create a hub of cross-border information on these measures and to compare what is going on in different countries, identify the good practices and also the bad practices.

We get information and first-hand insights from our network of defence lawyers, of partner NGOs, and academics. And we have identified areas that are most impacted by the measures that states are taking in response to this public health crisis, and we are looking at how court closures affects access to justice in accelerating [delaying] the proceedings. Also, the introduction of the remote justice tools such as video and audio hearings, how they impact the defendant's right to a fair trial. We have also developed a guide on remote justice proceedings where we try to identify the risks, and also, make recommendations to safeguard the right to a fair trial in these procedures.

CEM: *And with regards to remote hearings and video conferencing — what are some of the opportunities and the limitations of using this technology in the courts?*

IT: Over the last two months, we have seen a very rapid switch to remote justice on a massive scale, and it is done on an emergency setting to keep the courts open for the essential functions. Reality is that the full extent of opportunities and limitations we haven't seen being properly assessed, but the overall conclusion I would draw from the information that is accessible at the moment — is that we really need to take a cautious approach on bringing trials online.

Starting with the limitations, is first access to justice and effective participation, and the most obvious and rightly reported issue that we have seen — is properly working equipment. There have been echoes, interruptions, overlapping speech, sound or video not coming through. So, those issues would make it difficult for anyone to follow any kind of meeting, let alone a complex criminal proceeding. So, right to be present at the trial — is not — right to listen in passively or to observe something that is going on without the defendant's involvement.

Right to be present involves a right and an opportunity to understand what is going on in the hearings, and on that basis to intervene and to contribute — either by the defendant himself or through his lawyer. We hear judges referring in press to video hearings as being successful, but it is important to understand that going through a hearing without technical glitches does not mean that the defendant has had full and effective use of his rights — and that should be the real measure of whether a hearing is successful.

The participation in remote hearings is not another form of presence that would be equal to physical presence. The European Court of Human Rights has made it very clear, that in the case law of the video hearings, that appearance through video is a restriction on the right to presence and there is a reason for that, and these are the limitations of the technology. Participating remotely disengages the defendants. Research repeatedly shows that defendants feel isolated, and they do not tend to raise concerns, and do not intervene as often as they would in traditional court. So, what is also concerning is that these effects of isolation and somewhat confusion that could be created by participating remotely are more profound on vulnerable defendants.

The second aspect of this participation is meaningful legal representation. That is very key, especially in remote proceedings, because they seem to be more complex for the defendants to navigate. And so, it is very important, and this is what right to a lawyer means. That they are able to meet with the lawyer before the hearing, discuss the case, review the evidence, and form defense strategy. Those meetings, especially in the initial stages, with clients are very important. They build trust, they build case for the defense, and it is especially important in pre-trial hearings which usually happen very, very quickly and those are the first times, a lot of the times, when lawyers are meeting with their clients.

And also, during the trial, one of the limitations of the technology is that the lawyers are not able to confer and to discuss details of the case discreetly during the trials. Sometimes it is necessary because the defendant knows a piece of information that could be relevant when examining evidences and so on. So, this possibility to talk for the lawyer and client at the moment involves a procedure of requesting a short recess, and then either other participants are put on hold, or if the lawyer is present in the court room the others have to leave, or the lawyer has to leave to go to a secure place to discuss.

But speaking of opportunities, technology can make the process more efficient and one of the aspects is electronic submissions. We have seen that during the pandemic many courts started to accept submissions electronically, it is either through emails or special portals they have created before. It is not a new idea but, so far, the states have been slow to set these systems up.

Another very important aspect that we see some courts starting to implement — is remote access to case file. It's difficult in many countries where the lawyers have to go to the physical location of the case file and look at the case file, make notes. It is usually in the working hours of the police stations or court houses, these meetings have to be scheduled, they are limited in time, and sometimes lawyers are not even able to make copies of the file.

And now, some courts, in France and elsewhere, are giving access to electronic case files and lawyers can access these case files remotely, which means that they have less restricted access and more time to inspect them. Which is very important for equality in criminal proceedings, because we see that prosecutors and police have unrestricted access throughout the whole criminal proceedings.

The last aspect that I see that technology could improve the efficiency of criminal trials, is if videoconferencing could be used for shorter hearings and more technical, organizational issues such as preliminary hearings. A lot of the time, these hearing take just fifteen minutes and the lawyers have to travel to the courthouse to wait for the hearing to start. Also, if the defendants are detained there is a transfer time and cost to the courthouse for these highly technical and organizational meetings.

CEM: *I think you touched upon this already in your previous answers, but I was just wondering if you had any final thoughts on how you think this experience will change the way that trials are operating after the pandemic?*

IT: After the crisis, what I am seeing is that the courts will inevitably face at least two obstacles. One is going to be the backlog of the cases piled up during the pandemic that have been postponed. And, most likely, also the justice system will face financial constraints. So, there will be a lot of pressure to deal with the cases quickly and in a cost-efficient manner. So, remote hearings seemingly address both of those aspects.

Our main concern is that the changes do not happen without proper impact assessment — this is very important. Our observations in the previous research give enough reason to just pause and gather more information, otherwise there is a risk that time and costs will be saved at the expense of fairness.

When you're talking about criminal justice, we are also concerned that the new extended police powers — especially surveillance powers — will remain in place after the pandemic and will impact also the right to a fair trial.

At the moment, surveillance of mobile phone data and tracking apps lack transparency, and law enforcement can access data with no prior judicial authorization and no clear time limits on the use of the data. Our concern is that the data can eventually be used to prosecute people for crimes that are not related to the pandemic and this could spill over to regular criminal proceedings.

But on the positive side, we are hoping that the use of the technology that I mentioned before can actually benefit defendants and defense rights, and that way also make the criminal justice more efficient — without necessarily posing a risk to the fairness and to the defense.

***CEM:** Thank you Ilze for ending on that positive note, which is much needed in these challenging times. Next, my own colleague Freda Grealy of the CEELI Institute, is going to talk about our on-going work with the judicial network in the form of a bi-weekly Roundtable Discussion Series.*

Freda Grealy (FM): This podcast series is designed to highlight the challenges faced by judges, particularly during this time of COVID-19, to inform the public about the work judges are engaged with, and also to tell you a little bit more about the CEELI Institute and, specifically, our work with the Central and Eastern European Judicial Exchange Network.

In this episode, we want to highlight a recent initiative involving a series of webinars on the topic of videoconferencing in support of remote access to courts, and both Judge McCloskey and Ilze Tralmaka, the interviewees in today's episode, took part.

The Judicial Network itself has been going since 2012 and is comprised of some of the best and brightest young judges from eighteen countries in the region, who gather regularly to share best practices on issues of judicial independence, integrity, accountability, and court management.

As international in-person meetings are likely to be limited for some time to come, the webinar series ensures that the network can continue to meet its mandate to improve

judicial integrity and court efficiency in Central and Eastern Europe, despite the global lockdowns resulting from the coronavirus pandemic. The topic, videoconferencing in support of remote access to courts is particularly relevant to the judiciary in the current climate, but also has on-going relevance beyond the current extraordinary circumstances.

The first webinar series, which took place bi-weekly between April and May, is available on demand to all network members through the CEELI Online platform, and it provides participants with a greater understanding of the potential for, and limitations of, using videoconferencing and other technologies in the courts.

We are currently hosting a second series with particular focus to access to justice during and after the pandemic. This deals with exit strategies and what the future may hold on safeguarding rights within videoconferencing and remote justice contexts.

In our webinar sessions, we are very pleased to be joined by our Judicial Network members who share their direct experiences of remote judging. Other colleagues from civil society organizations, and other European institutions, together with judges from wider Europe and the United States. Further information, contact details, and information on how to join this webinar series are available on our website at ceeliinstitute.org.

CEM: *Thank you Freda and thank you to all our contributors. For more information, resources, and the transcript of the show you can visit us at ceeliinstitute.org.*

In our next podcast we have a jam-packed schedule. I talk to two judges about the effects of the pandemic on their courts: Edith Zeller, President of the European Association of Administrative Judges, and Domogoj Frntich, a civil judge from Croatia. As well, Matt Pollard from the International Commission of Jurists will lead us through some European caselaw on fairness and videoconferencing in the courts.

This is 'CEELI Talks' from the CEELI Institute, Prague. I'm Carolyn Elliott-Magwood, till next time — thanks for listening.



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