Series 1:
Safeguarding the Rule of Law in Challenging Times

Episode 3: Maintaining Access to Justice - Part 2: Administrative and Civil 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, Judge Domagoj Frntić discusses the Croatian experience in ensuring access to justice, Matt Pollard of the International Commission of Jurists provides a report on what the European Court of Human Rights has said about fairness in trials conducted by video-conference, and my colleague Freda Grealy here in CEELI shines a spotlight on the Judicial Manual on Independence, Impartiality and Integrity of Justice.

But first, I talked with Judge Edith Zeller from Austria, President of the European Association of Administrative Judges, about the crucial role of administrative courts and her observations on the operation of administrative law under pandemic conditions.

Judge Edith Zeller (EZ): I have to start with some general remarks, because I think it is very important to see the structure and to see the problems and the role of administrative courts as such. In general, we have a growing discrepancy between the different powers in a democratic state. The executive power in all of our European countries and Western countries worldwide has
grown in the last 10 to 20 years. The legislative power and the executive power are more and more intertwined — this is a fact. So, the only power which is left has more to do concerning checks and balances is judiciary. No matter if it is administrative judiciary or civil branch of the judiciary, any judiciary. So, this is a fact, and this has to be taken into consideration, specifically now, in these emergency measures times of the ongoing pandemic. And administrative judiciary effects your daily life, like administrative judiciary specifically controls the decisions of executive power and it also participates in the control of constitutionality in every state, either to disapply unconstitutional norms or to have a judicial dialogue with the national constitutional court. And administrative judiciaries also participate in the protection of fundamental rights coming from the EU legal order or convention and other international laws. So, this is what also is the core function of administrative judiciary and the role as such, not only in emergency times but also out of emergency times, in normal times.

In an emergency situation now — for sure — the executive branch needs to have more powers and discretion grows for sure, because the executive power has to react, has to do something quickly.

So, the discrepancy between the different branches of power in a democratic state worsens. So, this means that even the more judiciary must be there in order to fulfill the role of checks and balances with respect to these emergency measures. The legality, the proportionality of emergency measures that’s very important, nevertheless urgent cases decided and to give interim relief, which is very important, because also in this pandemic many fundamental rights have been affected.

CEM: So, it sounds like perhaps, unlike some of the other courts that are delaying a lot of their cases, that there’s many core functions that the administrative courts need to be continuing to deliver even though we are in this social distancing and reduction of service.

EZ: Yes, yes, definitely.

CEM: How has the emergency legislation affected the ability of yourself and your court, administrative judges generally, to do your jobs?

EZ: This pandemic now, this has a special feature, because it might affect also the personal health of every judge and the feature is changing depending on the area and depending on the time. It has for sure affected not only administrative judiciary but also every other branch of judiciary in the work during the times of the emergency. Because it’s very difficult, because of public health reasons and social distancing to hold oral hearings, but also to have proper deliberations in senates, to make decisions, judicial decisions, and also, for instance, I know that in some issues you also have collective judicial administration. For instance, we have to appoint, or we have to nominate a new
judge. This has been impossible or only via Zoom or other technical means, which is not the same as when you have a personal exchange with judge colleagues.

**CEM:** And in Austria have you been doing oral hearings remotely?

**EZ:** I mean, it depends from court to court. Austria is a federal state, so it is not unified in that way, but me personally I have been holding oral hearings. We have some protective measures like for sanitary issues or to have some mouth and nose masks, but it is possible.

Also, in Austria, like many other countries it is like for instance, IT developments like video-conferences, they are getting a boost now, it is very fashionable, it has been legalised in Austria by legislature. I think for sure it can give some comfort now in these times, and in some issues it is very relevant in order to give judicial protection. But one has to look at it very carefully and clearly — it must be checked — if it is correct with concerning where are the limits concerning a fair trial in the long run.

**CEM:** So, you are continuing to hold in person trials but are your numbers reduced? Do you anticipate a backlog in your court coming out of this?

**EZ:** For sure, it is not possible to continue as in normal times. So, there have to be sanitary measures in between, so you cannot do as many hearings as you have done before. The backlog is increasing so far, but I think the real backlog will come only afterwards with the additional set of cases coming.

**CEM:** Yes, and has your association been talking about what administrative judges will have to do to prepare for the backlog?

**EZ:** Yes, we have a working group on it — independence and efficiency and how to cover with it and how to deal with the backlog implies different means. I mean it depends how the judiciary is organised in every country. You cannot say one recipe works for every country, but for sure, you need to have some measures of efficiency, but you also have to see the quality of the judiciary must not be lowered.

**CEM:** And as we are talking about the association could you just tell me a bit more generally about what the Association of European Administrative Judges does? You mentioned you had working groups and just talk a bit about that.

**EZ:** Yes, our association is European wide judicial association for administrative judges from the area of the Council of Europe. We’re representing the interests of the administrative judges on the European level, having a network, and to exchange views and to discuss about cases. We have four different working groups on different areas of
law. Which means we want to broaden the knowledge of legal redress; we want to promote the interests of judges on a European level and to promote the professional interests for sure includes the promotion of rule of law and independence of the judiciaries. Therefore, we also, we try to inform and to be active also concerning Turkish colleagues and Polish colleagues, I always send out information, and in the working groups we talk about what is relevant for the practical work of administrative judges in Europe.

**CEM:** Sounds like pretty important work. And, finally, I was just wondering if you could tell me a bit about what you have learned from the past two months? What you think judiciaries will be taking with them from this time into what comes after the pandemic? And if there is any new practice that you’ve seen being adopted during the crisis that you think should continue after it is over?

**EZ:** I have learned the lesson of discrepancy of rule of law, at least as an Austrian administrative judge, and to see the danger existing for every judge in Europe. Because, for instance, the Austrian Federal Chancellor said well yes, we know there is no legal protection, we don’t have interim measures to control the legality, proportionality of the emergency measures for now but we don’t care. So, this is a lesson learnt how important it is to have checks and balances, not for our needs and our means, but for the persons, because many fundamental rights have been affected.

So, to see that the structural imbalance has worsened, one has to take care to have robust judicial system. Because, for sure, judicial systems have been affected and it is not so that the judiciary would be strengthened in the independence during times of emergency, for sure not — there is no time for it. So, everyone should do their homework in good times, in order to have a strong judiciary which is able to do checks and balances as far as possible in such emergency situations.

It is really relevant, and I want to repeat and to stress it — judges must be more sensitized on their role in concerning democracies, concerning rule of law in normal times and in times of emergencies.

A lesson learned, and I think this will be one of our issues in the future concerning daily work, is this boost on IT developments. Like what I’ve mentioned before — video-conferencing — and this will be definitely an issue, it’s all an issue. Judicial administrations are very powerful, have to be very powerful, it is very important to strengthen their independence in order to strengthen structural independence in the future.

**CEM:** Thank you Judge Zeller. While much of the focus on access to justice during the pandemic has been on criminal trials, Judge Zeller makes a compelling argument for the integral role of administrative courts. Let’s listen now to Judge Domagoj Frntić of Croatia, who underlines the
essential work of civil courts and highlights the importance of their continual functioning during the global pandemic.

**Judge Domagoj Frntić (DF):** It is widely known in recent months that we had a worldwide emergency because of the COVID-19 virus, and the role of the courts and rule of law are one of the topics in public discussion. And naturally, the roles of the criminal courts were mainly in the focus of the general public, but civil law is also important because there are many rights and privileges of the citizens that are in need of protection in front of the courts.

**CEM:** One of the things that a lot of the courts have been doing in the pandemic is only proceeding with urgent trials. What matters have been declared urgent in your court?

**DF:** There were some matters that were declared urgent and we didn’t stop doing that even during the most critical days and weeks — family matters come to mind and protection of children. Also, I can think about individuals with mental problems, they need periodical assessments because their human rights are in question. So, every three or six months they need to go to the court assessment, with the medical specialists, and if that was due during the crisis there was also a need to do that kind of proceedings. I’m talking about the actual sessions and proceedings, but the real work of the judges and the administrative staff didn’t stop at all, but maybe, the appearing of the parties stopped but judges continuing with their work.

We used the technology, but sometimes there were situations where the people actually went to the courts, with the masks and sanitation measures, even live appearances did not stop even during the most critical days.

**CEM:** So, when you were having the live appearances — especially at the height of the crisis — were you limiting the number of people in the courtroom, how were you managing?

**FD:** Exactly, so the protection in accordance to the recommendations by the medical authorities. So, everybody was wearing masks and gloves and you limit the number of persons in court. What happened is that usually before the disease, you will call say five witnesses for the same day, and now you divide those people in three different sessions, not to make crowd — even in a court corridor. And that’s the measure, now when we are opening up, that we decided to keep, because to avoid big crowds the judges are encouraged not to call too many people at once. And we also did some rearrangements in our court rooms, which was not very easy because they are not necessarily very big, but we tried to make as much space as possible and to keep people as far apart as possible. So, we had to shout especially through the masks.
CEM: Could you tell me a bit about who is at risk of falling through the cracks in this situation and what vulnerable populations should the courts be watching out for?

FD: There are vulnerable groups, poor people who are not in the biggest cities and so forth. So, I think that that concern was communicated by courts to the social workers, to be aware and to maybe check on such persons you know. Are they in need? Are they scared? One can also think about the people with mental difficulties. Here I can also mention the case of the Slovenian special law on COVID-19. It is a complex law dealing with the different matters concerning the health crisis, but also it stops the deadlines — so that is I think helpful tool when we talk about the vulnerable groups. Not to say in two weeks from now to some applicant sorry you're late by 7 days. So, for instance in Slovenia, it’s a law that stops deadlines and gives opportunity to the different applicants to have their chance later when the situation settles.

That law was also on the table in other countries, including mine, but we decided that we do have that institute in a civil procedural law that you can ask for your right even later if you're late. So, that also help to protect those people not in a position to seek their rights in time, and also, in the early period of the crisis judges were asked to consider all the requests and all the deadlines in light of that new situation to be not so rigid if it's not necessary. So, we are not turning blind eye also in that direction, we are trying not to ignore the situation that people are probably not in the possibility to approach the legal system in time, because for a couple of weeks even lawyers were off limits. So, I think the Slovenian example is a good one and it is very helpful for the rule of law because it is all there in writing — your deadline is not seven days but 37 days.

Again, there is a possibility that there will be vulnerable groups of people whose rights could be in danger because of their present circumstances. And both, strictly legally but also using common sense, the courts and the legal system in general are encouraged to consider the position of those people.

And just to finish that, I can say that the majority of European countries utilise the German system of the so-called constitutional court. And also we have that court in Strasbourg, Court of Human Rights, and I am more than certain that they will be reacting in a final instance if they realise that somebody really was not in a position to implement their right because of the rigidity of the national system, so that’s good.

CEM: Yes, it’s good to have those checks and balances. So, my final question, I was just wondering if you could tell us a bit about what you have learned from the past two months? What do you think judiciaries will take with them into times after the pandemic and are there new practices you have seen being adopted that you think should continue once things go back to normal?
FD: Right that's a good question and it was quite an experience, right, for the whole world, including us who are working in the legal system. First thing I will mention is that when the crisis situation started and all the institutions started to shut down, it's very important not to completely stop working but to somehow change gear in our work. So, basically, courts pretty much stopped having live sessions, but they maybe concentrate more on written type of work, which was very good, and some work has been done during that two months which is maybe waiting on the side.

The other thing that shut down on institutions led to a lot of postponements of the already set dates and my second observation is to do the postponements on an orderly manner. So, that lawyers and all the other applicants are aware of what's going on, because — especially among the lawyers — there was a lot of confusion and fear not to miss something. For instance, they are watching television and see everything is shutdown, so they don't go to court and somehow court is working. So, we went a long way in every file, we contacted all of the involved and informed them of the postponements and the new dates.

Third thing I will mention is that some things could be done more efficiently, and I noticed a general tendency to simplify the civil proceeding. It’s good to look up our procedural provisions and to simplify things as much as possible. Not to endanger the rights of the participants, so you have your right for a fair trial, but some things could be simplified, and I am connecting that also with the electronic communication.

I learned a lot from my colleagues from different countries, such as USA, and some states in the USA which are territorial big, like for instance Idaho, and the citizens are far apart, they use technology for a long time now. And we in Europe are using it, but now you know we can even use it in a bigger number of situations than before, and do things by telephone and by emails or you know electronic communications — which will be a change for the state of minds of the specialists lawyers of the civil law in Europe.

And finally, we all know from our life experiences that there are some jobs which are inherently connected with danger — doctors or firefighters, soldiers, policeman. And the situation shows that in some degree the civil servants and lawyers and judges and administrative staff are somehow also part of that group, I mean maybe not on the frontline. Also, it is expected of the judges and the administrative staff to work in critical conditions you know in health risks. We do have administrative staff who are wearing masks and work basically all the time. So, maybe, it is also a chance to reconsider their position and to have that in mind when we talk about their salaries and work conditions. Because it seems that it is common sense that all branches of government are supposed to work, even through the times of crisis. And what if it prolongs? It is only two months, but if it is longer we can also talk about training such people and about health risks.
So that is those four points: that it is very important not to completely shut down, to change gear and start to continue to work differently; that you keep your applicants and lawyers informed about the changes in schedule; then the third one is that there is a possibility to simplify all the proceedings and procedural norms in civil law; and finally that we must also see that the lawyers, judges, and civil servants and administrative staff are expected to work in a critical conditions throughout the health crisis and it is also a new experience for us.

**CEM:** Thank you Judge Frntić for those thoughtful comments. Of course, while each country in Central and Eastern Europe have their own specific and unique experiences, common standards on fairness in the context of trials conducted by video link have been determined by the European Court of Human Rights, as explained for us in a special report by Matt Pollard of the International Commission of Jurists.

**Matt Pollard (MP):** In a drastic situation like the COVID-19 pandemic, the role of courts in access to justice, human rights and the rule of law becomes even more important, even as carrying out that role becomes a lot more challenging. At the International Commission of Jurists, we have been encouraged by how so many judiciaries around the world are working to find ways to keep functioning in the context of the pandemic.

We have published a briefing note that looks at a bunch of different issues through the lens of international human rights and rule of law standards, but today I’ve been asked to focus on the specific issue of the use of video-conferencing in court proceedings, with a particular emphasis on jurisprudence of the European Court of Human Rights.

At the outset, I’d mention that we of course have not yet seen any judgments from European courts specifically about the COVID-19 pandemic and also, the judgments I’ll mention today didn’t involve measures in the context of any kind of state of emergency, where States might sometimes be able to adopt special measures and also these are cases that do not involve the consent of the person concerned to using the videoconferencing.

Another preliminary point is that international and European human rights law treaties recognise the right to a “fair and public” trial. And publicity is a safeguard for independence, impartiality, and fairness of the proceedings and it is an important form of accountability for judges and prosecutors, and key to public confidence in the justice system.

And, so far, we haven’t found case law specifically on how the requirement of “publicity” of the hearing might be considered in a health emergency. Interestingly, although the treaties give a list of reasons for restricting public access, “public health” isn’t in that list, even though that term does appear in similar lists for other rights in the same treaties.
But in practice, many judiciaries are alive to the publicity issue and either arranging for video broadcasting of hearings, or allowing journalists in, even if members of the general public are excluded, or establishing systems for individual members of the public to request access to view a particular video hearing. And it seems likely that simply holding a trial by videoconferencing, without considering alternative forms of access by the public, would itself give rise to a claim of a violation.

By looking at the caselaw we do have from the European Court of Human Rights, as well as a few decisions from the UN Human Rights Committee, which is a quasi-judicial body of independent experts under the International Covenant on Civil and Political Rights. There are a few key points on videoconferencing and I think that the first one is that the European judgments affirm that physical presence is particularly essential for the accused and his or her lawyer in criminal trials. Indeed, the Court’s judgments on videoconferencing repeatedly emphasise that the particular proceeding was a civil case, or a criminal appeal, or an administrative case, while really emphasizing that what they were dealing with was not a criminal trial, and they really emphasized that this is significant to their decision in each of these cases. Examples of this include the 2006 judgment in Marcello Viola v. Italy, and the 2010 Grand Chamber judgment in Sakhnovskiy v. Russia.

Well this implies that the room for videoconferencing is at its narrowest in criminal trials. And indeed, given what the Court says in these judgments, it is difficult to see how non-consensual videoconferencing of the accused and his or her lawyer could ever be compatible with the safeguards required for a criminal trial. And, I would note, actually that the Human Rights Committee has said the fundamental right to a fair trial is not something that can be validly suspended in any state of emergency.

A second type of proceeding where videoconferencing may not be ever appropriate, is the requirement under the treaties that anyone arrested or detained on criminal grounds be “brought promptly before a judge” or other judicial officer. In the process leading to adoption of guidance on this by the UN Human Rights Committee, several States submitted that the Committee should interpret the article to allow use of videoconferencing as a substitute for physical presence.

Well the Committee rejected that position in the final document it adopted in 2014 and linked the requirement of physical presence to the prohibition against torture and other ill-treatment – which again is something that is usually not potentially suspended by exceptions in times of emergency. And similarly, in the 2010 European Court judgment in a case called Repashkin v Russia no. 2, there the court found videoconferencing was acceptable in the hearing of an appeal from a challenge to the lawfulness of detention, but it stressed in its judgement the fact that the defendant had been personally present at the hearing on detention at first instance.
So, leaving aside these two categories of criminal trials – the review of detention or arrest of a person on criminal grounds – neither the Human Rights Committee nor the European Court have ruled out use of videoconferencing for other types of proceedings. The European Court has held though that the character of a particular hearing may make physical presence indispensable, such as matters where testimony of the affected person, and assessments of their credibility, are key. And the Court has found violations where the judge did not appear to have made an individual assessment, or provided reasons, on whether substituting videoconferencing for physical presence was appropriate in the circumstances of the particular case. An example of the European Court working through that reasoning is in the 2016 judgment in *Yebdoknov v. Russia*.

Finally, even where video-conferencing has been found to be generally acceptable, the European Court has found violations where insufficient attention was given to the confidentiality of access of the accused or defendant to their lawyer before and during the hearing. And in particular, in the 2010 Grand Chamber judgment and actually a subsequent 2018 regular chamber judgment in the *Sakhnovskiy* case I mentioned earlier, as well as the 2016 judgment in *Gorbunov and Gorbachev v Russia*, a violation was found based on doubts about the privacy of a videoconferencing system installed and operated by the State, as the sole means by which a person in remand prison was able to communicate with the lawyer. In *Sakhnovkiy*, actually, the Court contrasted that situation with the earlier *Marcello Viola* case, where videoconferencing had been found to be acceptable. But, in that case the court noted that there had been a separate direct phone connection in between the person and his lawyer.

Well it seems likely we will eventually see more jurisprudence on these issues in the specific context of COVID-19, but I hope that already the general parameters set out by these cases will assist judiciaries and others in responding to the situation as it develops.

**CEM:** Thank you, Matt. I am sure that jurisprudence will be incredibly relevant in the coming months as courts continue to rely heavily on videoconferencing to reduce physical presence. We’re going to turn now to my colleague Freda Grealy. Today, her spotlight is on a product created by our own Judicial Network: *The Manual on Independence, Impartiality and Integrity of Justice*.

**Freda Grealy (FG):** 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 that 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.
The Network which 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.

To this end, a group of 10 judges create the publication — Manual on Independence, Impartiality and Integrity of Justice. The manual is a thematic compilation of international standards, policies and best practices with the main goal of creating an easy-to-use reference tool to facilitate the day-to-day work of judges both in the region and worldwide. This manual is publicly available on our website and has an easy-to-use, interactive table of contents also. So, we encourage you to go to ceeliinstitute.org and look in the publications tab.

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

In our next podcast, we’ll talk about what comes next for courts as countries begin to move beyond emergency measures. We’ll chat with Judge Vera Doborjginidze about what re-opening looks like in Georgia, and with Andrea Huber of the OSCE’s Office for Democratic Institutions and Human Rights about broader issues for European courts that are making the transition out of emergency measures. We’ll also hear from Bilyana Gyaurova-Wegertseder from the Bulgarian Institute for Legal Initiatives about how her organization supports the judiciary in Bulgaria.

This is CEELI Talks. ‘Til next time, I’m Carolyn Elliott Magwood, thanks for listening.

For further information on the work of the CEE Judicial Network including our series of Podcasts and Webinars please contact Freda Grealy at Freda.grealy@ceeli.eu

This project has been made possible through the generous support of the Bureau of International Narcotics and Law Enforcement (INL) at the U.S. Department of State.