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Challenges and Opportunities Raised by Covid-19 for the Judicial Systems in Europe

Sfide e opportunità create dal Covid-19 per i sistemi giudiziari in Europa

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Abstract

This contribution examines and analyses the challenges and opportunities created by the spread of Covid-19 for the European justice systems, putting them in relation with educational needs that are arising. The Covid-19 crisis has acted as a stress test, as unexpected as it is energic, for the resilience of national systems and has shed light on the lack or delay in the digitalisation of justice systems, whereas throughout Europe, due to the limited availability of the national systems, recourse to alternative dispute resolution mechanisms has increased. The adjustments that have been made necessary to deal with the period of Covid-19 could radically and permanently change the way justice will be rendered in the post-pandemic world, also creating an opportunity for evolution and modernisation. The need to draw on shared best practices for the development of new protocols to ensure an effective functioning of the justice system must be balanced with the respect of fundamental rights such as access to justice and right to a fair trial. To this end, all stakeholders in the judiciary face a steep learning curve for developing new skills necessary to actively and consciously take part in the paradigm shift that justice is encountering.

Keywords: Covid-19; justice; judicial system; digitalisation; fair trial.

Sintesi

Questo contributo prende in esame e analizza le sfide e le opportunità create dalla diffusione del Covid-19 per i sistemi giudiziari europei, mettendole in relazione con i bisogni formativi che stanno emergendo. La crisi legata al Covid-19 ha costituito uno stress test, inatteso quanto energico, per la resilienza dei sistemi nazionali e ha messo in evidenza la mancanza o il ritardo della digitalizzazione dei sistemi di giustizia, mentre in tutta Europa, a causa della disponibilità limitata dei sistemi nazionali, si è assistito ad un aumentato ricorso a modi alternativi di risoluzione delle controversie. Gli adeguamenti che si sono resi necessari durante il periodo del Covid-19 potrebbero modificare radicalmente e permanentemente il modo in cui la giustizia sarà resa nel mondo post-pandemico, creando anche opportunità di evoluzione e modernizzazione. La necessità di attingere a best practices condivise per lo sviluppo di nuovi protocolli e procedure atti a garantire un funzionamento efficace deve essere contemperata con il rispetto dei diritti fondamentali, quali l'accesso alla giustizia e il diritto ad un giusto processo. A tale scopo, tutte le parti interessate nel settore giudiziario si trovano ad affrontare una curva di apprendimento ripida per lo sviluppo delle nuove competenze necessarie ad una partecipazione attiva e consapevole al cambiamento di paradigma che la giustizia sta affrontando.

Parole chiave: Covid-19; giustizia; sistema giudiziario; digitalizzazione; giusto processo.

1. The Impact of Covid-19 on the Judicial Systems in Europe

The emergence of coronavirus (Covid-19) in January 2020 and its rapid spread from China to other regions of the world caused a global health crisis. On 30 January 2020, the World Health Organization (WHO) declared Covid-19 a public health emergency of international concern, a notion that corresponds to WHO's highest level of alarm and that is defined in the International Health Regulations (WHO, 2005). On 11 March 2020, WHO made the assessment that Covid-19 can be characterized as a pandemic.

In addition to the health concerns and the economic consequences entailed by the spread of Covid-19, the pandemic and state's responses have had an unprecedented effect on the functioning of justice systems globally (UNODC, 2020).

Given the potential impact on the right to access justice in a timely, fair and effective manner, the European Law Institute (ELI, 2020) has elaborated a document intended to guide all European States, detailing fundamental principles that should be complied with when adopting and implementing measures related to the Covid-19 pandemic. Pursuant to these principles, the judicial system should "do all that is reasonably practicable to continue to conduct proceedings and trials, particularly though the use of secure video and other remote links where available to the courts. In any case, the judicial system should maintain a minimum level of operations to deal with urgent matters, safeguard the rule of law and provide proper remedies to litigants, provided that the right to a fair trial, including the right to defence, is not infringed" (ELI, 2020, p. 3). The ELI principles could also serve as a source of inspiration for the measures that will be taken after the pandemic (Lasserre, 2020).

At the European level, the Covid-19 crisis has acted as a stress test for the resilience of national systems (EC, 2020a). Most European countries have enacted specific measures to extend the procedural deadlines and the activity of the judicial systems has been significantly reduced (Jean, 2020a). An overview of Covid-19 related measures has been established by the European Commission in a comparative table that sets out the impact on the judicial organization of each European Member State (EC, 2020b). By way of example:

- in Belgium, all hearings in civil matters that were scheduled between 10th April and 17th June 2020 have been either cancelled or postponed, depending on an analysis to be conducted on a case-by-case basis by each court;
- in Denmark, each court had to identify which cases had to be given priority status and therefore be heard and which cases could be postponed;
- in England and Wales, hearings were largely held on a wholly remote basis. For instance, on 19 March 2020, Mr. Justice Teare ruled that the trial of *National Bank of Kazakhstan and Another v. The Bank of New York Mellon and Others*[1] would be held remotely, although it related to a complex commercial case and it involved testimony from expert witnesses in different jurisdictions. The case was held via Zoom and streamed live on YouTube (Whittam, 2020);
- in Finland, the national court administration has provided guidelines, notably indicating that physical presence should be limited to urgent cases and that all other cases should be heard via videoconference or any available technological mean;
- in France, the government enacted a series of derogatory measures in the field of civil justice by way of orders, aiming at adapting the judicial system, the conduct

[1] [2020] EWHC 916 (Comm).

of the proceedings and the rulings of the court (Cadiet, 2020b). Between 17th March and 10th May 2020, courts have dealt only with urgent cases, namely hearings regarding civil freedom and custody in civil matters, child protection, family court cases, emergency interim proceedings. Order No. 2020-304, dated 25 March 2020, allowed hearings to be held by way of videoconference or by telephone, enabled the court to opt for a procedure without hearing when the parties were represented by a lawyer and provided that cases could be transferred to a different jurisdiction (Ord. n° 2020-304 du 25 mars 2020). This order was then amended to take into account the extension of the state of health emergency (Ord. n° 2020-595 du 20 mai 2020) and it remains to be seen how these measures will continue to apply in the future (Brochier & Brochier, 2020);

- in Germany, each court had large flexibility and could decide, on a case-by-case basis, which measures would be appropriate. More online hearings have been conducted and some hearings were postponed;
- in Italy, most civil hearings between 9th March and 11th May 2020 were postponed, except in the case of urgent matters. In case of an urgent matter, the hearing could take place via remote connection if only the lawyers' presence was required. In any other case, the hearing would be substituted with an online exchange of written submissions (Silvestri, 2020);
- in the Netherlands, between 17th March and 11th May 2020, all courts were closed, with the exception of extremely urgent cases. All other cases were dealt with by way of written procedure or via audio or videoconferencing.

In light of the urgency of the situation, the measures taken therefore differed from country to country and in some cases from court to court. The Council of Bars and Law Societies of Europe (CCBE) has highlighted that from a fundamental right perspective, this diversity of measures is problematic when it comes to equal treatment of citizens (CCBE, 2020a). In this respect, it would be important to establish objective criteria and guidelines to prioritise cases, in the context of a comprehensive national strategy, to be established in connection with all key actors of the justice chain, including the prosecution, law enforcement, lawyers, civil society groups and relevant social support services (UNODC, 2020). From a more general perspective, given these temporary restrictions to the judicial activity, the CCBE has also emphasised the risk of denying access to an independent and impartial judiciary (CCBE, 2020b) and of hindering fundamental rights such as access to justice and the right to due process (CCBE, 2020c).

The European Commission for the Efficiency of Justice (CEPEJ), on behalf of the Council of Europe, has drawn up an initial assessment of the measures taken by the national courts in their organisations, the priorities identified, the use of new technologies and the guarantees of a fair trial (CEPEJ, 2020). As highlighted in this assessment, the Covid-19 pandemic has provided an opportunity to reconsider some aspects of traditional court functioning, such as the recourse to alternative dispute resolution and the level of use of technology in court proceedings (ibidem).

2. The Development of Arbitration as an Alternative Dispute Resolution Mechanism

The limited availability of the national judicial systems has led to an increase in the number of arbitration proceedings as an alternative dispute resolution mechanism which does not

require the intervention of state courts (Haravon, 2020). A renewed interest was also found in mediation and collaborative law (Silvestri, 2020).

Due to their autonomy and flexibility, arbitration proceedings have been less affected by the Covid-19 crisis than state proceedings (Weiller, 2020). International arbitration has long been a pathbreaker in the use of electronic means for transmission of submissions and documents. Parties, arbitrators, witnesses and experts are often located in different countries, so most interactions already take place remotely and the Covid-19 has speeded up processes aimed at an increased efficiency that had already commenced prior to the Covid-19 outbreak (Wilske, 2020). Unlike most court litigation, the continuation of an arbitration proceedings does not require that the state courts are open and the relevant stakeholders can agree the necessary adjustments to procedures and timetables to deal with the difficulties arising from the Covid-19 pandemic (CRCICA et al., 2020).

Most major arbitral institutions, including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID) have remained fully operational and have issued a joined statement encouraging parties and arbitrators to mitigate the effects of any impediments, while ensuring the fairness and efficiency of arbitral proceedings.

The arbitration rules of some major arbitral institutions such as the ICC, LCIA, Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), and the United Nations Commission on International Trade (UNCITRAL) rules already expressly provide the possibility of virtual hearings. Moreover, several arbitral institutions have issued guidance as to possible measures to adopt to mitigate the effects of Covid-19 on arbitral proceedings. For instance, the ICC has issued a guidance note including, amongst other things, a checklist for a protocol on virtual hearings, suggested clauses for cyber-protocols and procedural tools available to mitigate delays occasioned by the pandemic (ICC, 2020). In April 2020, the African Arbitration Academy (AfAA) developed the Protocol on Virtual Hearings in Africa, which notably encourages African governments to make express reference to virtual hearings in arbitration rules and laws and sets out recommendations for the arbitral tribunals, including in relation to the technical standards that should be met (AfAA, 2020). The Seoul Protocol on Video Conferencing in International Arbitration also provides guidance, including as to some ground rules to preserve procedural fairness (KCAB, 2020). It is likely that such protocols will ultimately become a permanent feature of the institutional rules or guidelines, which could be used by the parties or the arbitral tribunal as a toolbox to determine that virtual proceedings should be put in place.

As a result of the Covid-19 pandemic, it is likely that virtual hearings will become a growing trend within the international arbitration community in the near future (Rodriguez Senior, 2020). Thanks to this framework, despite a relative slowdown during the beginning of the pandemic, arbitration cases have progressed with only a limited number of delays, suspensions or terminations (Abdel Wahab, 2020) thanks to the adoption of virtual hearings (Shope, 2020). The current crisis has thus proven the strength of the international arbitration model (Clay, 2020).

After several months of many national courts dealing only with emergency or essential matters, disputes brought before the courts are likely to face very substantial court backlogs and delays. As such, if the national judicial systems are not able to seize the opportunity to shift towards an increased utilisation of digital tools, many litigants may prefer to opt for arbitration as a mean to solve their dispute.

3. The Challenges and Opportunities of the New Era of Digital Justice

The Covid-19 crisis has shed light on the lack or delay in the digitalisation of justice systems (Coignac, 2020). The justice systems that were more advanced in the organization of remote working and dematerialized management mode appeared to be the ones which were best prepared for the crisis management (Jean, 2020b). For instance, Chinese courts were able to react promptly to the challenges raised by the pandemic (Sourdin, Li, & McNamara, 2020). This reactivity stems from the strategy put in place in China since 2016, aimed at creating a *smart court* system, i.e. a "form of organization, construction, operation and management of people's courts based on modern information technology that realizes online transaction of all businesses, publishing of all the procedures according to law as well as providing comprehensive smart service" (Xiaohui, 2020, p. 32). The main features of smart courts are the use of technologies including internet, cloud computing, big data and artificial intelligence (Sourdin, Li, & McNamara, 2020).

The Covid-19 pandemic has not only served as an indicator of the current level of use of new technologies in the judicial systems, but will act as an accelerator in their digital transformation (Cadiet, 2020a), that will shift the judicial systems towards an increased utilisation of digital tools (Jean, 2020a). The Covid-19 pandemic showed that new technologies can be successfully used to enable the justice systems to continue to operate. Moreover, it has been noted that remote hearings have the potential to increase access to justice and provide justice that is more accessible and affordable (Whittam, 2020).

At the European level as well, the European Commission acknowledged that the Covid-19 pandemic has given an extra impetus to the efforts made by Member States towards the digitalisation of justice (EC, 2020a). In a systematic review of remote courts conducted under the auspices of the Civil Justice Council in England and Wales, a survey of 1077 people, among which 871 lawyers, asked about their experience in relation to 480 civil hearings held in May 2020 (Byrom, Beardon, & Kendric, 2020). The report arising from this survey indicates that "broadly speaking, the lawyers who completed this survey were satisfied with their experience of remote hearings: 71.5% of respondents described their experience as positive or very positive" (p. 25).

However, the shift towards an increased digitalisation in the judicial systems has been an innovation under constraints (Susskind, 2020). Due to the time pressure and lack of preparation, it was not possible to analyse how digital justice could be rendered and how to address the challenges raised by remote hearings. It is critical that any future model builds upon an analysis of the strength and weaknesses of the current measures rather than directly replicate them.

As a first step, it is necessary to identify what kind of cases should be dealt with physically or remotely. It is generally agreed, for example, that cases involving serious crime, or family disputes that involve domestic abuse or custody issues should be heard in person (Susskind, 2020). On the other hand, evidentiary, interim or procedural hearings could be dealt remotely. However, it is necessary to gather and analyse data relating to cases that have been heard remotely and take into account the particularities of different cases, in order to identify best practices for the development of new protocols and procedures to ensure an effective functioning of the justice system in the longer term. In this respect, and from an European Union perspective, the CCBE highlighted that it is necessary to enact rules at the European level relating to the criteria to select which cases require the physical presence of parties and/or their lawyers and which other could be held remotely (CCBE, 2020c). Moreover, national authorities should be supported in developing capacities to

prioritize, manage and track cases, to establish functioning systems and to operate them remotely where possible (UNODC, 2020).

In addition, it is necessary to take into account the issue of digital exclusion that may affect different participants in the court process. Differences in the digital skills, technical aspects such as internet connection speed and software availabilities may result in inequality in the access to justice and therefore affect the abilities to participate in litigation. These differences may reflect factors such as location, income, age, physical and mental conditions of the litigants (McIntyre, Olijnyk, & Pender, 2020).

The Covid-19 could serve as an opportunity for the judicial systems to tend towards an increased digitalisation, with long-term impact that could last beyond the crisis period. However, it is necessary that all the stakeholders in the judicial system develop new skills that are necessary to take part in this opportunity in an active and conscious way. As indicated by the Organization for Security and Co-Operation in Europe (OSCE), "judicial stakeholders are facing a steep learning curve in a short period of time, including the use of new technology, but also in terms of the applicable legal framework and relevant international standards" (OSCE, 2020, p. 44). Two are therefore the main courses of action: on the one hand, the digitalisation, which has been an area of interest for a long time in the judicial field and which must receive a significant impetus. On the other hand, however, it is necessary to study and reconsider the norms and standards that are applicable or at least largely incorporated by national systems and that can guarantee both the efficiency and the respect of fundamental rights.

The CEPEJ has also recognised that there is a critical need for education for judges, prosecutors, lawyers and all other judicial stakeholders (CEPEJ, 2020). In this respect, "new curricula should be developed to support justice professionals during and after a health crisis" (ibidem, p. 6). In this way, all actors operating in the judicial systems will be able to develop the required skills to take part in the paradigm shift that justice is encountering. A significant role in this perspective will undoubtedly be played by the professional associations which, invested with a public service mission, represent the professionals operating in this sector and act as guarantors for citizens.

4. Conclusions

From a legal standpoint, the Covid-19 pandemic has created a "right of fear" (Denizot, 2020), prompted by texts enacted on an urgent basis and by the fear of seeing the fundamental rights and freedoms hindered by the health crisis. The role of the judiciary, as upholder of the rule of law, is crucial at this time (UNODC, 2020) and it is necessary that access to an impartial and independent court and to a judicial review is guaranteed (EC, 2020a).

As stated by Edgar Morin, we face the risk that what we have collectively experienced during the Covid-19 crisis is "oublié, chloroformé ou folklorisé"[2] (Morin, 2020). From a legal perspective, it is necessary to preserve and maintain the fundamental values, principles and freedoms notably enshrined in the European Convention on Human Rights, the Charter on Fundamental Rights and Freedoms or the Treaty on the Functioning of the

[2] "forgotten, chloroformed or folkorised" (translated by C. Cavicchioli).

European Union (ELI, 2020a). In particular, the right to a fair trail has to be protected at all times (CEPEJ, 2020).

However, it is also necessary to define a strategy aimed at transforming the judicial systems to take advantage of the measures put in place during the crisis and to reconsider the traditional functioning of the courts, by seizing the opportunity to tend towards an increased digitalisation. This evolution will require that a dialogue is established between all relevant stakeholders in the judicial sector (Fricero, 2020) and notably between judges, prosecutors, lawyers, bar associations and researchers in the judicial field, both at a national and at a European level. All stakeholders should actively and consciously take part in sharing and creating the best practices that can be implemented for the longer term, in order to ensure that technology supports open justice, procedural fairness and impartiality of the court (Legg, 2020).

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