

How has the COVID-19 pandemic affected the judiciary?

A multi-jurisdictional review looking at challenges to the independence of the judiciary throughout the COVID-19 pandemic

Prepared for the UN Special Rapporteur on the Independence of Judges and Lawyers



CYRUS R. **VANCE CENTER**
FOR INTERNATIONAL JUSTICE



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Foreword

The need to protect the independence of the judiciary is a key pillar for any country in upholding the rule of law. This is ever more important during times of crisis. The COVID-19 pandemic has created new and emerging challenges to the delivery of and access to justice all around the world. As this report illustrates, some countries have embraced new technologies and found innovative ways to rise to the challenge, while others have struggled to tackle a growing backlog of cases and have seen the justice system almost grind to a halt.

This report is a product of the generous pro bono efforts of both Mayer Brown colleagues and Mayer Brown's correspondent law firms. Such detailed and extensive analysis would not have been possible without the enthusiastic engagement of colleagues in 8 different jurisdictions and of our friends in 14 correspondent law firms.

In this report, we present the responses to the Cyrus R. Vance Center for International Justice's questionnaire on how the COVID-19 pandemic has affected the judiciary. This report includes findings and analysis across 18 countries and four US States. In many cases, the contributing lawyers have included a bibliography of helpful resources that supplement their submissions; in some cases, a separate summary or additional commentary has been provided to add further colour to the local judicial dynamic. We have also included the contact details of the contributing lawyers to credit each of them for their valuable input.

It has been an enormous privilege to contribute to this meaningful and important project for the Vance Center and to support the UN Special Rapporteur on the Independence of Judges and Lawyers. On behalf of all the participating law firms, I would like to express a collective thanks for the opportunity to participate in this project.



Sam Eastwood

Partner, Mayer Brown

seastwood@mayerbrown.com

LONDON

T: +44 20 3130 3087

F: +44 20 3130 3001

Contents

Brazil	4
Finland	11
Germany	24
India	33
Italy	38
Kenya	53
Morocco	61
Netherlands	67
Nigeria	77
Peru	83
Senegal	89
South Africa	93
South Korea	109
Spain	114
Sweden	120
United Arab Emirates	124
Uganda	128
United Kingdom	137
USA - California	156
USA - Illinois	162
USA - Maryland	170
USA - New York	182
USA - Virginia	188

Brazil

Ana Luiza Martins, Partner | amartins@mayerbrown.com

Mario Saadi, Partner | msaadi@mayerbrown.com

Julio Barboza, Associate | Jbarboza@mayerbrown.com

Maria Cristina Mendes de Oliveira, Associate | moliveira@mayerbrown.com

Lais Menegon Youssef, Legal Assistant | lyoussef@mayerbrown.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Brazil

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

Overall, COVID-19-related emergency powers or measures have not been used to undermine judicial independence or the Judiciary's efforts to safeguard independence in Brazil. Nonetheless, there are specific events that we believe should be mentioned.

(i) Congress had proposed an amendment to the Federal Constitution (the "Emergency Amendment Proposal" or "PEC Emergencial") to control public expenditure right before the COVID-19 crisis struck, and it has gained traction since the crisis aggravated Brazil's fiscal situation. Among the provisions of the Emergency Amendment Proposal is a clause that allows the organs of the Judiciary Branch (i.e., State Courts, Federal Courts and Higher Courts) to reduce judge's working hours up to 25% with a proportional reduction of payment. Even though the Judiciary would be the one to determine if and when such reduction would take place, some judges have voiced concerns over threats to judicial independence. According to them, since judges have assigned caseloads and are not subject to fixed working hours, the proposal would amount only to a reduction in payment and could be used as a mechanism to exert pressure. Judges' wages and subsidies are irreducible according to the Federal Constitution. The final text of Emergency Amendment Proposal has not been defined or put up for a vote yet.

(ii) The National Justice Council – an organ that controls the administrative and financial activities of the Judiciary, imposes disciplinary sanctions to judges – has issued several recommendations in connection with the COVID-19 crisis, one of which has been seen as encroaching on judicial autonomy: Recommendation No 63/2020 stated that bankruptcy courts should extend the automatic stay period (i.e., the period in which creditors are temporarily prevented from pursuing debtors for amounts owed) and allow debtors to propose changes to bankruptcy plans already approved. Recommendation No 63/2020 was seen as undermining judicial independence because it directed judges to decide in favour of debtors without consideration to the facts of the case. Some State Court judges (notably, from Sao Paulo State Court, which has a specialized bankruptcy court) have refused to apply Recommendation No. 63/2020 on constitutional grounds.

Additionally, it should be mentioned that Brazilian Judiciary (considering State Courts, Federal Courts and the Higher Courts – the Superior Court of Justice and the Supreme Court) has been under considerable political and social pressure arising from cases related to COVID-19 protective measures. For instance, the Supreme Court has been called into action to determine whether States and Municipalities could impose stricter sanitary

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

restrictions than the Federal Government and determine which services were considered essential (i.e., could remain open during quarantine/lockdown), and came under heat from the Federal Government when it decided States and Municipalities could do so. The Federal Government has since alleged that it was prevented from acting upon the pandemic because of the Supreme Court's decision, piling up on an already troubled relationship between Executive and Judiciary branches, which culminated in public manifestations calling for the Supreme Court to be closed and for the impeachment (and imprisonment) of Justices.

Other cases worth mentioning to illustrate social pressures are those of judges that granted injunctions imposing city-wide lockdowns and had their orders defied and rendered ineffective by the population, undermining judicial authority (e.g., State Court of Maranhão, which was the first State Court in Brazil to do so). On the other hand, there were also cases in which judges assessed the legality and constitutionality of protective measures adopted by the Executive branch and declared them illegal and unenforceable (e.g., State Court of Sao Paulo, which declared the blockage of highways in order to decrease the number of people entering and exiting the seaside cities illegal).

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

Please note that the provisions described below are the ones applicable the Judiciary in Brazil as a whole (both State and Federal Judiciary). Nonetheless, State Courts and Federal Regional Tribunals (i.e., subdivision of the Federal Judiciary) have the autonomy to implement specific measures, provided they are not contrary to the rules established by the National Justice Council – an organ that controls the administrative and financial activities of the Judiciary, imposes disciplinary sanctions to judges. Therefore, measures can and do vary among different courts, which creates challenges to law practitioners and citizens relying in the Judiciary in general.

Digital justice mechanisms

National Justice Council issued its Normative Resolution No. 313 on March 19th, 2020 which created and determined the implementation of remote work for all judges, clerks and administrative staff. Most courts - notably the Supreme Court, Superior Court of Justice, and courts of appeal -had already digital tools in place,

including electronic filing systems and virtual sessions. Before the pandemic, approximately 85% of the cases could already be filed online and decisions were made available in the digital case files. The main challenge, then, was how to deal with lawsuits that did not have electronic case files, mainly in district courts outside from the capitals and older cases. As we will reference below, those cases have endured the longest suspension of procedural deadlines.

Another relevant challenge was implementing remote work for clerks and administrative staff, due to the number of people who work at the courts: in São Paulo State Court, for example, there are over 40.000 (forty thousand) public servants, 3.000 (three thousand) judges and 15.000 (fifteen thousand) outsourced employees². Lastly, another frailty exposed during the COVID-19 crisis was the lack of cybersecurity mechanisms. The Superior Court of Justice was the target of a ransomware attack that encrypted all of its data on last November. It took 15 days for the Superior Court of Justice to regain access to its systems, meanwhile all sessions and procedural deadlines had to be suspended. Other courts, such as Rio Grande do Sul State Court and the Federal Tribunal of the 1st Region were also targets of hackers.

Suspension of procedural deadlines

Normative Resolution No. 313/2020 suspended all procedural deadlines, without prejudice of the realization of acts necessary to the preservation of rights and urgent measures, starting March, 19th, 2020. The suspension was in place until May 4th, 2020 for procedures with electronic casefiles. Procedures without electronic casefiles had their procedural deadlines suspended until June 16th, 2020. Some courts have extended their suspension further (e.g., the Superior Labor Court, which kept all deadlines suspended until August, 2nd, 2020). It should be noted that Federal Law No. 14.022/2020 expressly prevented the suspension of procedural deadlines related to cases of domestic violence against women, children, teenagers, elderly and people with disabilities.

Prioritization of cases/procedures

Normative Resolution No. 313/2020 established an “Extraordinary Shift”, to standardize the functioning of courts and guarantee access to justice during the COVID-19 crisis. It set forth that each court should determine the essential activities which would be rendered, but all courts must guarantee, at least: (i) the judicial and administrative assignment of cases, with priority to urgent proceedings; (ii) maintenance of services related to the dispatch and publishing of judicial and administrative acts; (iii) provide assistance to attorneys, public prosecutors and judicial police, primarily remotely; (iv) maintenance of payment, institutional security, communication, information technology and health services; and (v) judicial activities related to urgent proceedings.

Normative Resolution No. 313/2020 also determined that during the Extraordinary Shift, the review of some procedures/cases must be assured and prioritized, notably criminal cases, cases related to constitutional protections, and some family-law-related cases. The list comprises: (i) habeas corpus; (ii) writ of mandamus; (iii) injunctions; (iv) prisons in case of flagrante delicto, requests of provisional freedom, and pleas for cautionary measures other than imprisonment; (v) urgent requests for searches and seizures, telematics interceptions; (vi) requests for provisional care for children and teenagers; (vii) travel authorizations for children and teenagers; among others. Nonetheless, there was no interruption or scaling down of judicial services: all cases remained being assigned as the courts kept their work remotely.

Continuation of activities with preventive health measures

² Tribunal de Justiça do Estado de São Paulo. *A Pandemia e a Imaginária Lentidão da Justiça* (2020). Available at: <<https://www.tjsp.jus.br/Noticias/Noticia?codigoNoticia=60695&pagina=1>>

National Justice Council issued is Normative Resolution No. 322/2020 establishing that courts could gradually return to activities with preventive health measures, including the mandatory use of masks. Each court could determine whether there were conditions to return to activities or if they would continue to work remotely.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain:

Annually the National Justice Council releases a report with the number of cases filed, cases pending, decisions, which allows for a better understanding of the workload and backlog of cases. Historically, Brazil has an issue with backlog in the judiciary, with more than 77.1 million cases pending as per the last report. The 2020 Annual Report has not yet been published, so there is no official information available on the matter as of now.

Nonetheless, we have been able to find some information by State Courts reporting increases in the number of habeas corpus (in connection with domiciliary arrest requests) and bankruptcy and restructuring proceedings (e.g., in Rio de Janeiro, the reported increase is of 12,7% and 13,4%).

On the other hand, the Supreme Court reported it has been able to reduce its backlog during the pandemic, due to the higher number of virtual sessions held.

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

Brazilian Judiciary has mainly used technology to deal with the issue. At the beginning of the pandemic, already approximately 85% of the cases could already be filed online and decisions were made available in the digital case files. The systems already in place prevented interruption and scaling down of activities. Also, the pandemic has speed up the creation and implementation of digital justice mechanism as a way to increase the efficiency of state courts.

The use of new technology is listed as the main reason the efficiency has increased during COVID-19 times. The mechanisms used allow for quicker assignment of cases to judges, quicker access to the files, as well as provide statistics which can be useful for the administrative activities of the courts. The National Justice Council created a dashboard for monitoring the weekly productivity of courts, as a tool to control how the remote work regime

would affect state courts.³ As of February 25, 2021, district and appeal State Courts in Brazil had issued 64,794,677 rulings. The consensus appears to be that while the number of cases have increased, so has the productivity.

Lastly, state courts have been promoting the use of alternative methods of dispute resolution, such as mediation and conciliation, in order to decrease the number of cases brought forth.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

Yes. The most prominent case involved the State Government of Rio de Janeiro, which put in place a bribery scheme for emergency contracting and to release payments to social organizations that provided services to the government, especially in the areas of Health and Education. The discovery of the criminal scheme began with the investigation of irregularities in the contracting of field hospitals, respirators, and medicines to fight the pandemic. The Governor of the State of Rio de Janeiro was indicted for passive corruption and money laundering, and the Superior Court of Justice ousted him from office.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

The most pressing concern over due process or fair trial rights arose in connection with the right of flagrante delicto detainees to have a hearing within 24 hours of the detention, as provided in the American Convention on Human Rights and Brazilian Criminal Procedure Code, which under Brazilian Law is called "*audiência de*

³ The dashboard is available at: < <https://paineisanalytics.cnj.jus.br/single/?appid=ba21c495-77c8-48d4-85ec-ccd2f707b18c&sheet=b45a3a06-9fe1-48dc-97ca-52e929f89e69&lang=pt-BR&opt=currsel&select=clearall>>



custódia". In such hearing, the judge determines the legality and the necessity of imprisonment, with or without bail.

During the pandemic, the National Council of Justice suspended such hearings, alleging that its goals would not be met if held by videoconference. It was only in November, 2020 that the National Council of Justice allowed for hearings to be done online.

Finland

Bernt Juthström, Partner | bernt.juthstrom@ww.fi

Olli Kiuru, Partner | olli.kiuru@ww.fi

Ida Keranen, Associate | ida.keranen@ww.fi

Janiela Valtonen, Associate | janiela.valtonen@ww.fi



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Finland

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

N/A. The independence of judiciary in Finland has not generally been threatened by the Pandemic nor have any particular challenges to the independence been detected. The courts work independently, and the Finnish judiciary has remained independent even in the current state of emergency.

However, the courts are expected to face practical challenges such as congestion and a higher number of incoming cases in 2021 due to the Pandemic and the deterioration of the economic situation. Further, some proceedings and hearings have been suspended, and will be suspended, due to the Pandemic resulting backlog of cases and longer processing times.²

See Question 1 (a) of the Memorandum for more information on the judicial independence.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

There have not been any provisions or amendments to the existing legislation regarding court proceedings. However, the National Courts Administration of Finland has given several guidelines and recommendations on, *inter alia*, the prioritization of cases, the use of digital mechanisms as well as

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

² W&W: See up-to-date statistics of all unsentenced cases suspended at some stage due to the Pandemic in Finnish courts maintained by the National Courts Administration. (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/qwlgvymkm.html>)



suspension on non-urgent cases in courts during the Pandemic. Since the courts work independently, the courts make the ultimate policy decisions themselves, which may vary court by court.

Generally, the courts have introduced new process methods, such as remote connections in court hearings via video connection or phone to continue the proceedings. The use of remote connections is considered case by case and is ultimately the decision of the judge in each case.³

According to the general guidelines provided by the National Courts Administration of Finland, the courts should focus only on the most important and urgent matters. Such matters include, *inter alia*, coercive measures, detention of foreigners, disputes concerning the custody and visitation of children as well as enforcement of such decisions and bankruptcy and corporate restructuring matters. In principle, matters that may be suspended concern the enforcement of criminal liability, ordinary administrative matters, disputes and non-urgent applications and appeals. Hearings of such matters may also be rescheduled.⁴

See Question 1 (c) of the Memorandum for more information on the impact of judicial activities and Question 2 (a) on the measures taken to guarantee access to justice and prioritization of cases.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain:

The National Courts Administration of Finland monitors the number of unsentenced and suspended cases, which are still pending, due to the Pandemic. The statistics are maintained of criminal cases and civil cases in district courts, cases in the courts of appeal, cases in the administrative courts and cases in the special courts.⁵

There are currently no other statistics regarding the increased workload in Finnish courts.

See Question 1 (c) of the Memorandum for more information on the increasing backlog of cases and the statistics.

³ W&W: National Courts Administration, press release 15.4.2020. (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/thenationalcourtsadministrationgaveinstructionsonremotesessions-theaimistolowerthethreshold.html>)

⁴ W&W: National Courts Administration, Instructions to courts due to Covid-19, 13.3.2020. (<https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2020-AK-292556.pdf>)

⁵ W&W: National Courts Administration, Suspended cases, verdicts and decisions due to the coronavirus epidemic. (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/qwlgymkm.html>)



- b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

The courts have introduced special measures in response to the increasing workload and backlog of cases due to the Pandemic, such as the use of remote connections in court hearings, prioritization and suspension of cases, remote work in the courts and other safety measures. The Government has also proposed budgetary support for courts for the year 2021 in response to situation caused by the Pandemic.

See Question 2 (a) of the Memorandum for more information on the judiciary's response to the Pandemic.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

N/A. Corruption cases related to the measures taken due to the Pandemic have not been reported in Finland to this date.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

N/A. Special measures taken by the courts in response to the Pandemic have not been found to have a negative effect on the guarantee of one's procedural rights.

MEMORANDUM

To: Sam Eastwood
Mayer Brown International LLP

From: Bernt Juthström/Ida Keränen/Janiela Valtonen
Waselius & Wist

Re: **UN Special Rapporteur on the Independence of Judges and Lawyers -
Finland report**

Date: 26 February 2021

We refer to the e-mail of 4 February 2021 from Sam Eastwood and his team / Mayer Brown International LLP to Bernt Juthström and Olli Kiuru / Waselius & Wist regarding the pro bono project for the UN “**Special Rapporteur**” on the Independence of Judges and Lawyers (DR Diego Garcia–Sayan) supported by the Cyrus R Vance Center for International Justice. The purpose of this memorandum is to provide a brief legal review and answers to the questions regarding the impact of the Covid-19 pandemic (the “**Pandemic**”) on the work of the judiciary and judicial independence and the judiciary’s response to the Pandemic in Finland. This memorandum does not purport to be exhaustive but rather contains descriptions of relevant information regarding each question.

1. THE IMPACT OF THE COVID-19 PANDEMIC ON THE WORK OF THE JUDICIARY AND JUDICIAL INDEPENDENCE

a) the use of states of emergency as a tool to control the judiciary, affecting its independence;

The independence of judiciary in Finland is safeguarded in the Constitution of Finland (731/1999), according to which the judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances.¹ Further, the Courts Act (673/2016) states that courts are independent in their exercise of jurisdiction.²

On 16 March 2020, the government declared a state of emergency in Finland as a result of the Pandemic and the Emergency Powers Act (1552/2011) was implemented by the Parliament on 18 March 2020.³ This, however, did not directly affect the judiciary or its independence as the Emergency Powers Act does not contain any provisions with respect to the work of Finnish courts. Further, no amendments have been made to legislation concerning court proceedings, such as processing times, during the Pandemic. Consequently, the Finnish judiciary has, judicially, remained independent, as prescribed in the Constitution, even in state of emergency.

On 1 January 2020, the National Courts Administration of Finland began its operations. The Administration is an independent central agency that serves the Finnish court system and is responsible for ensuring that the courts are able to maintain a high level of quality in the exercise of their judicial powers and that the administration of the courts is organized in an efficient and appropriate manner.⁴ During the Pandemic, the National Courts Administration has provided the Finnish courts with recommendations with respect to the work of the courts. The Administration has, however, emphasized that the Finnish courts are independent, and its role is solely to support the courts' smooth operations. The courts independently decide which measures to take in response to the Pandemic. In practice, the decision of e.g. cancelling a hearing, lies with the judge of each case.⁵

¹ Section 3, subsection 3 of the Constitution of Finland.

² Section 3, subsection 2 of the Courts Act.

³ Government of Finland, press release 17.3.2020 (https://valtioneuvosto.fi/-/10616/valmiuslain-kayttoonottoasetus-eduskunnalle?languageId=en_US) and e.g. Yle, 18.3.2020 (<https://yle.fi/uutiset/3-11263280>). The use of powers under the Emergency Powers Act was abandoned on 16 June 2020 and has not been used since, see e.g. Government of Finland, press release 15.6.2020 (<https://valtioneuvosto.fi/en/-/10616/valmiuslain-mukaisten-toimivaltuuksien-kaytosta-luovutaan-poikkeusolot-paattyvat-tiistaina-16-kesakuuta>).

⁴ National Courts Administration (<https://tuomioistuinvirasto.fi/en/index/nbortgcbe.html>).

⁵ National Courts Administration in Lakimiesuutiset 11.4.2020 (<https://lakimiesuutiset.fi/tuomioistuimissa-korona-nakyy-istuntojen-siirtymisena-ja-lisaantyneina-etakasittelyina/>);

National Courts Administration, press release 6.5.2020 <https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/timeandsignificantresourcesneededtoclearbacklogofcourtcases.html>.

b) other attacks against judicial independence using the pandemic context;

N/A. Please see the answer above.

c) the impact of slowdown or paralysis of judicial activities (increasing backlog of cases, etc.);

The backlog of cases and long processing times have been typical issues in Finnish courts already in general before the Pandemic, but due to the Pandemic, these problems have only increased. Approximately 10 % of the cases in courts have been interrupted by suspension due to the Pandemic.⁶ The National Courts Administration maintains up-to-date statistics of all unsentenced cases suspended at some stage due to the Pandemic in Finnish courts.⁷ On 14 February 2021, the statistics were as follows:

- 1,748 criminal cases in the district courts
- 377 civil cases in the district courts
- 73 cases in the courts of appeal
- 161 cases in the administrative courts
- 16 cases in the special courts

According to the National Courts Administration, suspensions were inevitable, but the Administration has compiled several guides for the courts in order to safeguard the operations of the courts even in the exceptional circumstances.⁸ The National Courts Administration has published a guide on, for example, the use of remote connections in proceedings⁹ as well as given a recommendation on use of masks in courts¹⁰. Many processes have been moved from courtrooms to remote meetings at least for some parts (e.g. hearing of witnesses), as further explained below. Furthermore, the National Courts Administration has published a recovery plan from the Pandemic for the courts¹¹, which also is a mere recommendation.

⁶ National Courts Administration in Lakimiesuutiset 11.4.2020 (<https://lakimiesuutiset.fi/tuomioistuimissa-korona-nakyy-istuntojen-siirtymisena-ja-lisaantyneina-etakasittelyina/>).

⁷ National Courts Administration, Suspended cases, verdicts and decisions due to the coronavirus epidemic (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/qwlqgymkm.html>).

⁸ See all guidelines by National Courts Administration in <https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html>.

⁹ National Courts Administration: Guide to the courts on using remote connections in court sessions (Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä) (<https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html>).

¹⁰ National Courts Administration, press release 30.10.2020 (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/useofmasksincourts.html>).

¹¹ National Courts Administration: Recovery plan for courts (Palautumissuunnitelma) (<https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html>).

It is estimated that unloading the backlog of cases will take approximately two years and will require significant additional resources to the courts. The National Courts Administration has proposed additional appropriations in the supplementary budget for an upgrade of video conferencing equipment. It has also led the project for acquiring and installing more video conferencing equipment to the courts for remote hearings. This had been planned even before the Pandemic, but the Pandemic fast-tracked the procurement and installation process. The Administration also presumes that extra resources with respect to personnel of the courts will be needed during 2021.¹²

d) new sources of pressure on the judiciary from layoffs in the courts.

It has not been publicly reported that personnel of the Finnish courts would have been laid off in response to the Pandemic. On the contrary, according to the budget proposal by the Ministry of Justice for the year 2021, the Finnish courts employed 3,250 persons in 2020, which was 42 persons more than during the previous year of 2019.¹³ However, the National Courts Administration has presumed that extra resources with respect to personnel of the courts will be needed during 2021 in order to unload the backlog of cases.¹⁴

2. THE JUDICIARY'S RESPONSE TO THE COVID-19 PANDEMIC, SUCH AS MEASURES GUARANTEEING ACCESS TO JUSTICE, FAIR TRIALS, AND DUE PROCESS RIGHTS

a) their availability (access to internet in the country, institutional and budgetary support for digital mechanisms in the judiciary, etc);

In response to the Pandemic, Finnish courts have introduced remote connections to guarantee the continuance of the proceedings without undue delay. Such remote connections include, *inter alia*, hearing of a witness or a party by video connection or by phone. The courts seek to use remote connections in all proceedings to the extent possible to avoid the spread of Covid-19.¹⁵ Remote connections are aimed to be used in every stage

¹² National Courts Administration, press release 6.5.2020 (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/timeandsignificantresourcesneededtoclearbacklogofcourtcases.html>).

¹³ Budget proposal by the Ministry of Justice 2021, p. 17 (<https://oikeusministerio.fi/documents/1410853/4762335/Oikeusministeri%C3%B6n+ehdotus+hallinnonalan+vuoden+2021+talousarvioesityksekse.pdf/1180ab71-04c8-26f9-e140-96907216f810/Oikeusministeri%C3%B6n+ehdotus+hallinnonalan+vuoden+2021+talousarvioesityksekse.pdf?t=1597387723216>).

¹⁴ National Courts Administration, press release 6.5.2020 (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/timeandsignificantresourcesneededtoclearbacklogofcourtcases.html>).

¹⁵ The National Courts Administration, press release 15.4.2020. (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/thenationalcourtsadministrationgaveinstructions onremotesessions-theaimistolowerthethreshold.html>).

of the proceedings meaning preparatory sessions, court mediation sessions, main hearings as well as internal negotiations and training.

In accordance with the National Courts Administration's guidelines to the courts, the courts should prioritize cases and focus on the most important and urgent matters. Such matters include, *inter alia*, coercive measures, detention of foreigners, disputes concerning the custody and visitation of children as well as enforcement of such decisions and bankruptcy and corporate restructuring matters.¹⁶ In principle, matters that may be suspended concern the enforcement of criminal liability, ordinary administrative matters, disputes and non-urgent applications and appeals. Hearings of such matters may also be rescheduled. According to the National Courts Administration, it is recommended in non-urgent cases that the hearings are, to the extent possible, held either remotely or in court, in compliance with the safety measures, as described below. However, the courts are independent and may decide solely whether the proceedings are handled remotely or not or if the case at hand should be suspended. It is ultimately the decision of the judge in each case.

Since the nature of some proceedings, such as some criminal cases, require the presence of the parties, the courts have introduced special safety measures, such as the use of masks and safe distances in court. In addition to the use of masks, the courts also have other safety recommendations for preventing the spread of infections on adequate safe distances and hygiene.¹⁷

The Government has proposed budgetary support for the courts for the year 2021 in response to the situation caused by the Pandemic. To relieve congestion in court proceedings, a total of EUR 2,9 million is proposed for courts, legal aid offices and prosecution service in order to reduce the adverse effects of congestion caused by the Pandemic as well as to prevent unreasonable delays in processing times.¹⁸ The budgetary support is aimed to prevent and relieve the said congestion but not directly for any digital mechanisms.

The National Courts Administration has given the Finnish courts several instructions and recommendations on organizing the work in the courts during the Pandemic. According to the instructions, employees whose duties allow remote work should be assigned to work remotely to prevent the spread of Covid-19. Further, other work and meetings than court sessions where presence is required should be organized remotely. The courts should also arrange their workplaces to comply with the recommended safe distances, as well as other

¹⁶ National Courts Administration, Instructions to courts due to Covid-19, 13.3.2020, p. 1-2 (<https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2020-AK-292556.pdf>).

¹⁷ National Courts Administration, press release 30.10.2020 (<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/useofmasksincourts.html>).

¹⁸ Government of Finland, press release 19.11.2020 (<https://valtioneuvosto.fi/en/-/10616/government-decides-on-amendments-to-2021-budget-proposal>).

health measures, and not have their employees in close contact with each other.¹⁹ In addition, the courts should determine the employees whose presence is required in the workplace to guarantee the operation of the courts.²⁰ According to the instructions, the courts should aim to use remote connections, such as Skype and other internal tools, to the extent possible and minimize the work that requires physical presence of the employees.²¹

The use of remote connections has been found to cause extra work to the courts, such as advance planning of the court sessions, and lengthened the court proceedings due to technical reasons. However, the remote connections are expected to be introduced in the courts successfully and help relieve the workload.²²

b) due process guarantees.

N/A. No special measures taken by the courts in response to the Pandemic have been found to have a negative effect on the guarantee of one's procedural rights. However, the courts are expected to experience congestion as well as to receive a higher number of incoming cases in 2021 due to the Pandemic, which is why the special preventive measures have been taken.

The reported increase of corruption related to the extraordinary resources given to combat the pandemic.

N/A. An increase of corruption or suspected corruption cases in Finland regarding the extraordinary resources given in response to the Pandemic have not been reported to this date.

* * *

¹⁹ National Courts Administration, Instructions to courts due to Covid-19, 18.3.2020, p. 3. (<https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2020-AK-292555.pdf>).

²⁰ National Courts Administration, Instructions to courts due to Covid-19, 18.3.2020, p. 2. (<https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2020-AK-292555.pdf>).

²¹ National Courts Administration, Instructions to courts due to Covid-19, 18.3.2020, p. 4-5. (<https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2020-AK-292555.pdf>).

²² Lakimiesuutiset 16.6.2020, Remote connections in national courts (<https://lakimiesuutiset.fi/korona-toi-etaoikeudenkaynnit-ja-muuttuneen-tyonjaon/>).



How has the COVID-19 pandemic affected the judiciary?

Bibliography – Finland

A. Government / government agency publications	
1.	Government of Finland, press release 17.3.2020 (https://valtioneuvosto.fi/-/10616/valmiuslain-kayttoonottoasetus-eduskunnalle?languageId=en_US)
2.	Government of Finland, press release 15.6.2020 (https://valtioneuvosto.fi/en/-/10616/valmiuslain-mukaisten-toimivaltuuksien-kaytosta-luovutaan-poikkeusolot-paattuvat-tiistaina-16-kesakuuta)
3.	Budget proposal by the Ministry of Justice 2021 (https://oikeusministerio.fi/documents/1410853/4762335/Oikeusministeri%C3%B6n+ehdotus+hallinnonalan+vuoden+2021+talousarvioesitykseksi.pdf/1180ab71-04c8-26f9-e140-96907216f810/Oikeusministeri%C3%B6n+ehdotus+hallinnonalan+vuoden+2021+talousarvioesitykseksi.pdf?t=1597387723216)
4.	National Courts Administration (https://tuomioistuinvirasto.fi/en/index/nbortgcbe.html)
5.	National Courts Administration, Suspended cases, verdicts and decisions due to the coronavirus epidemic (https://tuomioistuinvirasto.fi/en/index/ajankohtaista/qwlggymkm.html)
6.	All guidelines by National Courts Administration (https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html)
7.	National Courts Administration, Guide to the courts on using remote connections in court sessions (<i>Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä</i>) (https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html)



8.	National Courts Administration, press release 30.10.2020 (https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/useofmasksincourts.html)
9.	National Courts Administration, Recovery plan for the courts (<i>Palautumissuunnitelma</i>): (https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html)
10.	National Courts Administration, press release 6.5.2020 (https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/timeandsignificantresourcesneededtoclearbacklogofcourtcases.html)
11.	National Courts Administration, press release 15.4.2020 (https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/thenationalcourtsadministrationgaveinstructionsonremotesessions-theaimistolowerthethreshold.html)
12.	National Courts Administration, Instructions to courts due to Covid-19, 13.3.2020 (https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2020-AK-292556.pdf)
13.	Government of Finland, press release 19.11.2020 (https://valtioneuvosto.fi/en/-/10616/government-decides-on-amendments-to-2021-budget-proposal)
14.	National Courts Administration, Instructions to courts due to Covid-19, 18.3.2020 (https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2020-AK-292555.pdf)
B. NGOs, Think Tank and Professional Body publications	
15.	N/A
C. Academic publications	
16.	N/A
D. Other resources	



17.	Yle, 18.3.2020 (https://yle.fi/uutiset/3-11263280)
18.	National Courts Administration in Lakimiesuutiset, 11.4.2020 (https://lakimiesuutiset.fi/tuomioistuimissa-korona-nakyy-istuntojen-siirtymisena-ja-lisaantyneina-etakasittelyina/ ;
19.	Remote connections in national courts in Lakimiesuutiset, 16.6.2020 (https://lakimiesuutiset.fi/korona-toi-etaoikeudenkaynnit-ja-muuttuneen-tyonjaon/)

Germany

Tina Hoffmann, Senior Associate | thoffmann@mayerbrown.com

Maximilian Kücking, Associate | mkuecking@mayerbrown.com

Dominique Kurtz, Associate | dkurtz@mayerbrown.com

Christian Gerhards, Legal Intern | cgerhards@mayerbrown.com





Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Germany

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

To our knowledge, there was no challenge to the judiciary's independence or any attempt to undermine the judicial independence due to or under the pretext of fighting the COVID-19 pandemic.

It was continuously emphasized that it is in the respective judge's sole discretion (within the existing as well as the new legal framework created in the context of the pandemic situation) whether or not to cancel or postpone hearings and other court sessions or whether to have them take place either in person or via video conference, etc.

In the course of the pandemic, several measures, in particular the Law to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law (Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht) were implemented to mitigate the consequences of the COVID-19 pandemic (see question 3b for further details).

To give just one example, the state of Schleswig-Holstein has published special rules for courts and prosecution offices. According to these rules, appointments in court or public prosecutors' offices shall only be restricted if and to the extent it seems necessary to prevent possible infections with COVID-19. To give the needed flexibility, the special rules provide for consideration of the local circumstances and other measures already taken and encourage the decision makers to weigh out the arguments for scheduling a face-to-face meeting against potential infection risks in each case.

Furthermore, the special rules strongly recommended to conduct court trials by way of video conference/video live stream, wherever possible. However, the decree clearly states that the aforementioned guidelines shall only apply to judges (and other judicial employees, insofar as applicable) to the extent they do not affect the judicial independence in any way.

In addition to the above, the Ministries of Justice of the federal states issued recommendations, the implementation of which is, however, within the judicial independence of the judges. The goal of these recommendations was to reduce personal contacts and, thus, the risk of infection of employees of the judiciary and the judges to a minimum. In particular, the guidelines provide for:

- *Prioritization of certain court proceedings that are particularly urgent, including criminal proceedings, detention and accommodation cases, proceedings in which the statute of*

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



limitations is threatened and deadlines have to be met, as well as long-running proceedings in which an interruption (also taking into account special regulations introduced in the context of the COVID-19 pandemic, as described in more detail under 2. and 3.) would lead to a restart of such proceedings. In civil proceedings and voluntary jurisdiction, it is further recommended for hearings only to be held in urgent and necessary cases, for example in family and guardianship cases, including cases involving protection against violence, threats to the welfare of children, or housing, as well as in the context of interim legal protection.

- *Reduction of public hearings to necessary cases only, i.e. restriction of access to courts and public prosecutor's offices to the bare minimum for persons who are not employees of the judiciary. Instead it should be made use of other procedural options, such as written procedure, video conferences etc., to the extent legally permissible and practically possible.*
- *Waiver of the main hearing in criminal proceedings and instead, if and to the extent legally permissible and practically possible, making use of the legal option to apply for penalty orders if possible (for more details, see 2.).*
- *Moving of hearings, which have to be held in person, to bigger rooms to ensure compliance with pandemic-related hygienic and distance regulations and to order for distance to be kept.*

However, as set out above, all of the above was explicitly designed as a recommendation in order not to compromise judicial independence.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other:

It is in the respective judges sole discretion to decide whether and which procedures are prioritized. The respective Court Presidium or Ministries of Justice only issued recommendations in this respect (see 1. above for more details), emphasizing that it is ultimately part of the judicial independence and therefore for the judge to decide if and which measures are deemed necessary and appropriate.

- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

In particular during the first lockdown in Germany in March and April 2020 which lasted for six weeks, many court proceedings were interrupted and court appointments that had already been scheduled were



anceled or postponed by the respective competent judges and/or judicial offices. However, as already described above, this was not because of an official order, but rather on the basis of recommendations/guidelines issued by the respective Ministries of Justice of the federal states.

The decision on whether and which appointments were or still are cancelled or postponed is to be made by the respective judge within the framework of the applicable statutory law and his/her judicial independence. In many cases, procedural deadlines have therefore and at the request of parties to the proceedings been generously extended by the competent judges in order to take into account the particularities of the pandemic, e.g. high infection risk and lockdown-related challenges such as home office and home schooling. In addition, judges and other judicial employees are encouraged to work from home and limit their presence in judicial buildings to the extent legally permissible and practically possible.

In civil and administrative cases, it is to be noted that the option of a decision by written procedure, which already existed prior to the COVID-19 pandemic, was used much more frequently than before. In addition, increased use was made of the possibility of having hearings held via video livestream which has already been regulated in the Code of Procedure since 2013. According to such regulation, spectators are allowed to be present in the hearing venue in order to ensure the publicity of the hearing, which is an important procedural principle, while the parties may join the proceedings via video from a location of their choice. To track any possible chains of infection, entrance controls at court buildings were tightened by recording visitors/spectators' personal data and storing it for a certain period of time. Moreover, the number of spectators allowed in the respective courtrooms was reduced to ensure the minimum distance of 1.5 to 2 m and spectators are obliged to wear medical masks inside court buildings.

With regard to criminal proceedings, judges were advised by the respective Ministries to suspend such proceedings unless they were highly urgent, such as detention and accommodations cases, proceedings in which statutes of limitations were threatened or other deadlines were to be met, and in long-running proceedings which have already reached an advanced stage and would otherwise have to be restarted.

Prosecutors were asked to, if and to the extent legally permissible and practically possible, apply for penalty orders (Strafbefehle) instead of the opening of main proceedings. The penalty order procedure serves to accelerate the completion of the proceedings by enabling a determination of guilt and legal consequences without a main hearing in a manner that is constitutionally unobjectionable and deviates from the orality principle that otherwise dominates criminal procedural law. However, the penalty order procedure is only permissible in cases of petty and medium crime. It also only permits fines of up to 360 daily rates or prison sentences of up to one year, provided they are suspended. The more frequent use of this procedure has reduced the number of main hearings and thus the risk of infection in this context. It has also enabled the competent judges to expedite criminal proceedings and any backlog in criminal proceedings cause by the lockdown(s) to be dealt with more quickly.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:
- a. In what matters?
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor



- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain:

Nationwide, since the start of the COVID-19 pandemic through the end of 2020, prosecutors have investigated about 20,000 (additional) cases of fraudulent applications for COVID-19 emergency aid or in relation to other pandemic related crimes, such as fake internet shops for counterfeit COVID-19 drugs or substandard masks. However, the focus of such additional workload due to increased criminal activity here has been and continues to be on law enforcement such as the police and prosecutors, rather than on the judiciary (i.e. the judges).

During the first lockdown in March and April 2020, a significant number of proceedings, especially in the field of civil and administrative law, have accumulated. For example, in connection with travel cancellations due to the COVID-19 pandemic alone, 45,000 cases were pending in German civil courts as of September 2020. This backlog has not yet been completely cleared, however, to our knowledge, no further delay of such scale has occurred in course of the second lockdown, which is currently still ongoing and started in November 2020.

In the field of administrative law, it was mainly claims against the government's measures to combat the pandemic which sometimes even affected constitutional rights (e.g. the assembly ban which was imposed in the very first phase of the pandemic) that have accumulated.

- b.** Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

After the first lockdown in March and April 2020, additional resources were provided to the courts to restore and maintain functionality. For example, Plexiglas screens were installed in the court rooms and face masks were distributed to judicial employees. Noteworthy is further that multipurpose halls and similar large venues were made available as additional courtrooms to allow adherence with the hygienic and distance regulations. In many courts, the number of courtrooms with full video telephony equipment has been significantly increased to enhance the possible amount of hearings conducted via video live stream. In addition, more licenses for video conferencing services were purchased to increase the number of simultaneous video hearings.

Furthermore, the German Parliament passed the Law to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law (Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht) which aims at mitigating the consequences of the COVID-19 pandemic in both private and business life, but also at relieving the courts.

One of the main points regulated therein was the general suspension of the obligation for companies to file for insolvency in cases where the reason to file for insolvency was caused by the consequences of the COVID-19 pandemic and there was at least a prospect of eliminating such ground to file for insolvency. While this provision was originally only intended to be in place until the end of September 2020, it had thereafter been partially prolonged. By now, the provision has only a very limited scope of application as the provision has only been prolonged until the end of April 2021 for such companies suffering from delays in payments of governmental aid schemes.



Accompanying this, the Law to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law introduced a limited moratorium for consumer and micro-enterprises on the fulfillment of contractual claims until 30 June 2020 arising from continuing obligations out of contracts which had been entered into prior to 8 March 2020. This was also combined with measures regarding the protection against termination of rental or lease agreements. A similar rule applied to consumer loans, whereas consumers were allowed to suspend payments on their loans for up to three months if they had a loss in income due to the pandemic.

One of the main goals of the Law to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law was to prevent insolvencies caused by the pandemic and to protect the economy. However, as a side effect, this also relieved the workload for the courts, as a multitude of insolvency and delinquency proceedings were not filed for, which would otherwise have additionally burdened the courts.

Further, under the Law to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law the maximum period of suspension allowed in criminal proceedings has been increased for as long as the main hearing cannot be held due to protective measures to prevent the spread of infection with the SARS-CoV-2 virus, but for no longer than two months.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

We are not aware of any relevant corruption cases related to COVID-19 response measures. Admittedly, Germany already has many anti-corruption measures in place to prevent corruption. Transparency International ranks Germany 9th out of 180 countries, with a CPI (Corruption Perceptions Index) of 80.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

To our knowledge, no significant concerns regarding the judiciary's functioning during the pandemic have arisen as to date. In particular the right of detainees to trial within reasonable time was complied with. As mentioned, detention and accommodations cases were explicitly excluded from the proposal by the Ministries of Justice to suspend proceedings.



How has the COVID-19 pandemic affected the judiciary?

Bibliography – Germany

A. Government / Government Agency publications	
1.	Landesregierung Schleswig Holstein, <i>Sonderregelungen für Gerichte und Staatsanwaltschaften für die Dauer der Pandemie des Coronavirus (SARS-CoV-2)</i> . Available at: https://www.schleswig-holstein.de/DE/Landesregierung/STA/Corona/Sonderregelung_Gerichte_und_StA.pdf;jsessionid=2C0B271D41B1E5C00E605C523652297B.delivery1-master?_blob=publicationFile&v=8
2.	Die Bundesregierung, <i>Mehr Rechtssicherheit in Krisenzeiten</i> . Available at: https://www.bundesregierung.de/breg-de/themen/coronavirus/insolvenzaussetzungsgesetz-1781394
3.	Bayerisches Staatsministerium der Justiz, <i>Corona-Virus: Maßnahmen der bayerischen Justiz – Fragen und Antworten</i> . Available at: https://www.walter-nussel.de/image/daten/anlage_massnahmen_der_bayerischen_justiz.pdf
4.	Arbeitsgericht Fulda, <i>Hausverfügung Az. 0649.1463/003-20 – V – 2020/5807</i> . Available at: https://arbeitsgerichtsbarkeit.hessen.de/sites/arbeitsgerichtsbarkeit.hessen.de/files/Hausverf%c3%bcgung%20Corona_01.12.2020_0.pdf
B. NGOs, Think Tank and Professional Body publications	
5.	Transparency International Deutschland e.V. <i>CPI 2020: Tabellarische Rangliste</i> . Available at: https://www.transparency.de/cpi/cpi-2020/cpi-2020-tabellarische-rangliste/
C. Academic publications	
6.	Dr. Reto Mantz and Jan Spoenle, <i>Corona-Pandemie: Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung in MDR 2020</i> , 637-644. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-videokonferenz.jsp



7.	Römermann, <i>Corona: Neue insolvenznahe Gesetze – lange erwartete und völlig überraschende</i> , in Mandanten-Rundschreiben Ausgabe 1/2021 der Stollfuß Medien GmbH & Co KG. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-insolvenz-SanInsFoG-StaRUG.jsp
8.	Viefhues, <i>Elektronischer Rechtsverkehr 3/2020: Corona als Herausforderung – Corona als Chance</i> , in Elektronischer Rechtsverkehr, 3/2020. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-als-chance.jsp
9.	Düwell, <i>Sozialschutz-Paket II ändert SGB III, ArbGG und SGG: Mündliche Gerichtsverhandlung bleibt, aber Videoschaltung zugelassen!</i> , in jurisPR-ArbR 21/2020 Anm. 1. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-sozialschutz-paket-ii.jsp
10.	Prof. Dr. Uwe Berlit, <i>Kollegialberatung und richterliche Entscheidungsfindung per Video? – ein Problemaufriss mit ersten Lösungsansätzen</i> , in juris – Die Monatszeitschrift jM 9/2020. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/kollegialberatung-per-video.jsp
11.	Thole, <i>Corona & Insolvenz: Die wichtigsten Fragen zum COVInsAG</i> , in juris Magazin. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-insolvenz-covinsag.jsp
12.	Furtwängler, <i>Wie trifft Corona die Anwälte? Interview mit der Strafverteidigerin Eva Furtwängler</i> , in juris Magazin. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-einzelanwaelte-interview.jsp
13.	Klasen, <i>Corona-Krise: Anhörung in Betreuungs- und Unterbringungssachen per Videoschalte? Ein amtsrichterliches Plädoyer</i> , in juris Magazin. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-anhoerung-betreuung-video.jsp
14.	Viefhus, <i>Elektronischer Rechtsverkehr 2/2020: ERV in Zeiten von Corona</i> , in Elektronischer Rechtsverkehr, 2/2020. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-elektronischer-rechtsverkehr.jsp
15.	Eschenhagen, <i>Öffentlichkeit in Online-Gerichtsverhandlungen</i> , in VerfBlog, 2020/4/26. Available at: https://verfassungsblog.de/oeffentlichkeit-in-online-gerichtsverhandlungen/
16.	Prof. Dr. Huber, <i>Das Gesetz zur Abmilderung der Folgen der Covid-19-Pandemie in Zivil-, Insolvenz- und Strafverfahrensrecht</i> , in JuS 2020, 519. Available at: https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Fjus%2F2020%2Fcont%2Fjus.2020.519.1.htm&pos=11&hlwords=on
D. Other resources	



17.	Denise Gerull, <i>Auswirkung der "Corona-Gesetzgebung" auf das Strafverfahren</i> in Juris Magazin 2020. Available at: https://www.juris.de/jportal/nav/juris_2015/aktuelles/magazin/corona-strafverfahren.jsp
18.	Südkurier, December 26 2020, <i>Welche Auswirkungen hat die Corona-Krise auf die Justiz? Wir haben bei Landgerichtspräsident Thomas Dörr nachgefragt</i> . Available at: https://www.suedkurier.de/region/bodenseekreis/bodenseekreis/welche-auswirkungen-hat-die-corona-krise-auf-die-justiz-wir-haben-bei-landgerichtspraesident-thomas-doerr-nachgefragt;art410936,10697182
19.	ZDF (Video), December 9 2020, <i>Internationaler Antikorruptionstag – Hat Deutschland ein Korruptionsproblem?</i> . Available at: https://www.zdf.de/nachrichten/video/panorama-korruption-deutschland-pandemie-100.html
20.	BR24, November 18 2020, <i>Korruption in Deutschland: Mehr Straftaten, weniger Schaden</i> . Available at: https://www.br.de/nachrichten/wirtschaft/korruption-in-deutschland-mehr-straftaten-weniger-schaden,SGho4Qm
21.	Legal Tribune Online, November 23 2020, <i>Deutscher Richterbund – Rund 20.000 Strafverfahren mit Corona-Bezug</i> . Available at: https://www.lto.de/recht/justiz/j/deutscher-richterbund-coronakrise-corona-straftaten-betrug-subventionsbetrug-20000-strafverfahren/
22.	Dr. Wilhelm, Dr. Binder, Hoffmann, <i>Law to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law passed by the German Parliament</i> . Available at: https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/ger-law-to-mitigate-the-consequences-of-the-covid-19-pandemic
23.	BR, September 19 2020, <i>Überlastung: Gerichte zählen 45.000 Reiseverfahren wegen Corona</i> . Available at: https://www.br.de/nachrichten/bayern/ueberlastung-gerichte-zaehlen-45-000-reiseverfahren-wegen-corona,SB1IL1D
24.	Loschelder Rechtsanwälte, <i>Corona-Krise und Zivilverfahren</i> . Available at: https://loschelder.de/de/corona-taskforce/prozessrecht/zivilverfahren.html

* * *

India

Faraz Alam Sagar, Partner | faraz.sagar@cyrilshroff.com

Pragati Sharma, Senior Associate | pragati.sharma@cyrilshroff.com

Priya Panchanathan, Consultant | priya.panchanathan@cyrilshroff.com





Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: **India**

1. Has the pandemic posed any particular challenge to the judiciary’s independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

The pandemic initially presented significant challenges to the process of dispensation of justice in India. Systemic factors such as shortage of judges, significant backlog of cases before the courts, and lack of robust access to internet and technological support across the country, access to justice was initially severely impacted. However, after the initial phase of disruption, the Courts in India made significant efforts to reopen and adopt technology to try and urgently provide access to the judicial system.

We find no attempts to undermine the judicial independence of the courts in India during Covid-19. No laws restricting or undermining judicial independence have been considered or enforced. In our view, the judiciary has stepped up to the challenge to ensure that the access to justice is not hindered. However, we do note that the technological and logistical challenges continue to exist for both the Judiciary and the general public, and this does cause significant disruption to the access of justice.

The e-committee of the Supreme Court and the Department of Justice in the law ministry have provided funds to the tune of INR 5.21 Crores (USD 711,700) in September 2020 to set up video conference cabins, another INR 28.886 crore (USD 3.9 million) were given in October to buy additional video conference equipment, including hardware, cables, and monitors; to boost the capability of the lower judiciary to hear cases online in 2,506 court complexes across India.

The government has also procured 1,500 additional video conferencing software and licenses at an approximate cost of INR 9 crore (USD 1.22 million) for providing the facility for high courts and district courts.²

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?
 - Interruption or scaling-down of judicial activity
 - Digital justice mechanisms
 - Suspension of procedural deadlines
 - Prioritization of cases/procedures. Please select the prioritized matters:

¹ For this project’s purposes, “judicial independence” is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social, or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

² See: <https://www.hindustantimes.com/india-news/covid-19-law-ministry-provided-courts-with-infrastructure-to-go-virtual/story-s2fNhaiGX20Pzaazlt6YYJ.html>



- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: Click here to enter text.
- Continuation of activities with preventive & health measures
- Other: Click here to enter text.

Please explain the selected options briefly, identifying any relevant challenge or innovation:

The Supreme Court of India has been regulating the functioning of Courts during the pandemic by way of regular Notifications. On 13 March 2020, the Supreme Court restricted functioning of the Court to “urgent matters” only. In April 2020, the Court notified that short category matters, death penalty matters and matters related to family law may be listed for hearing through video conferencing mode. The High Courts also restricted their functioning to urgent matters. In the normal course, a High Court hears north of 400 matters a day. These restrictions were subsequently relaxed.

As per data collected from Daily Cause Lists of various High Courts, the High Courts across the country are hearing anywhere between 10-100 matters a day.³ Over the course of 2020, the Supreme Court, High Courts and Tribunals moved to virtual court hearings through video conferencing. In July 2020, the Court commenced a system of electronic filing or e-filing of petitions, allowing the petitioners to make a choice between filing in-person at the Registrar’s filing counter and e-filing.⁴

Simultaneously, in March 2020, in the *Suo Motu Writ Petition (Civil) No(s) 3/2020* by Supreme Court of India in Cognizance for Extension of Limitation, the Supreme Court ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended with effect from 15 March 2020 till further order/s.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: Click here to enter text.

Please explain:

³ From the *Bubonic Plague to Covid-19: Impact of Pandemic on the Legal Profession in India, Bar and Bench*, available at: <https://www.barandbench.com/columns/from-the-bubonic-plague-to-covid-19-impact-on-the-legal-profession-in-india>.

⁴ The Supreme Court Observer, available at: <https://www.scobserver.in/the-desk/covid-coverage-court-s-functioning>.



Even during normal times, the Indian judicial system faces a staggering backlog of cases. This has been heightened due to the pandemic-induced lockdown and the transition of Courts to virtual courts. In 2020, the Supreme Court has seen a marginal increase in the number of pending cases. Between 2 January 2020 and 4 December 2020, pendency has increased by 4,567 cases, from 58,859 to 64,426 cases.⁵ However the increase in pendency is cases is most evident in subordinate Courts. At present, the total pendency of High Court cases stands at 4,786,192 cases.⁶ Scroll has comparative figures on case pendency till September 2020.⁷

- b.** Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

The courts have adapted to remote hearings, e-filing systems, and been able to carry out most of the legal proceedings virtually. However, they have faced substantial challenges due to the limitations of technological infrastructure in the country.

At present, the courts are in the process of resuming physical hearings across the country wherever the number of COVID-19 cases has gone down significantly.

- 4.** Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

N/A

- 5.** What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims, and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay.
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent, and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

⁵ The Supreme Court Observer, available at: https://www.scobserver.in/court-by-numbers?court_by_number_id=pendency-in-2020.

⁶ National Judicial Data Grid, available at: https://njdg.ecourts.gov.in/hcnjdg_public/main.php.

⁷ See: <https://scroll.in/article/971860/covid-impact-cases-disposed-by-high-courts-drop-by-half-district-courts-by-70>



Although there is no official data on the effect of the pandemic on due process and fair trial rights, due to the sudden imposition of lockdown in March 2020, the Courts had to heavily reduce their functioning only to “extremely urgent” matters. What constituted an “extremely urgent” matter has been left open to interpretation and the discretion of the High Courts which may have led to confusion and/or inconsistency on what constituted urgency. In terms of innovation, the judiciary has substantially gravitated towards facilitating remote working and carrying out necessary proceedings virtually. However, this has faced challenges due to infrastructural deficiencies and connectivity issues faced by litigators who reside far away from proper access to internet and lack requisite hardware to enable access to court systems.

Italy

Tomaso Cenci, Partner | TCenci@gop.it

Duilio Carlo Cirilli, Trainee | DCCirilli@gop.it



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Italy

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

1.1. General Overview on Judiciary's Independence

The pandemic and the related emergency measures do not seem to have challenged the judiciary's independence in Italy. In fact, it is largely agreed that the judiciary's independence – considered a founding principle of the Italian legal system – has been respected also during the COVID-19 emergency. Indeed, as stated by the European Commission in the annual Rule of Law Report, *"in Italy a robust legislative framework is in place to safeguard the independence of the judiciary, both for judges and prosecutors"*². This robust legislative framework is further strengthened by reforms under discussion³. In fact, as confirmed by the above-mentioned Report *"such reform guarantees judicial independence, while strengthening transparency and integrity"*⁴: a further demonstration of the effectiveness of the principle of judiciary's independence. There have not been signs of political aspirations to curtail the judicial independence during the emergency and no measure adopted by the Government has challenged the principle. Perhaps also because this principle appears to be unchallenged, we have no information about judiciary's independence health surveys at the time of COVID-19.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

² See the 2020 Rule of Law Report provided by the European Commission. See the full Report at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0311>.

³ See the comment on the reform project at <https://www.judicium.it/note-critiche-sul-disegno-di-legge-delega-di-riforma-del-processo-civile-approvato-dal-consiglio-dei-ministri-in-data-5-dicembre-2019/ò>.

⁴ See the Report in note n. 2.



- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

2.1. General Overview

In a general perspective, we note that all the different branches of the judicial system have been impacted by pandemic. As an immediate response to the emergency, it has been adopted the scaling-down and the suspension of the judicial activities. Secondly, the conduct of hearing with the presence of the parties in Court has been replaced with the online holding (so-called digital justice mechanism) and the suspension of procedural deadlines has been frequently enacted. In addition to the above-mentioned measures, some cases or kind of proceedings have been prioritized. For the purposes of this report, it seems appropriate to evaluate separately all the above-mentioned aspects.

2.2. Interruption and scaling-down of judicial activities

Civil Courts

On March 8, 2020, the Italian Government has adopted extraordinary and urgent measures to face the emergency and to contain the negative effects on the performance of the judicial activities caused by COVID-19⁵. Regarding civil proceedings, the Law Decree n. 11/2020 – as later amended – has postponed all the hearings after May 11 with an overall impact on all Italian Civil Courts (the “First Period”). After May 11, the emergency legislation has provided the possibility of holding hearings in person but with certain constraints (the “Second Period”)⁶. Finally, with the adoption of the Law Decree n. 28/2020 than converted into Law n. 70/2020, the Italian legislator has provided, from July 2020, the return to the normal civil hearing’s holdings, always with certain limitations (as will be discussed later in this Report)⁷.

⁵ See the complete text of the Law Decree n. 11/2020 at <https://www.questionegiustizia.it/data/doc/2370/gazzetta-ufficiale-8-marzo-2020-dl-n-11.pdf>. For the amendments see: <https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg>.

⁶ See the Report provide by the Council of Europe at <https://www.coe.int/en/web/cepej/compilation-comments#Italy>.

⁷See the complete text of the Law Decree n. 28/2020 as converted in Law n.70/2020 at <https://www.gazzettaufficiale.it/eli/id/2020/06/29/20G00088/sg>.

Criminal Courts

As in the case of civil litigation, during the First Period all criminal hearings have been suspended. After May 11, the holding of criminal hearings has been subjected to a certain number of limitations and prescriptions, as happened in the case of civil proceedings⁸. Lastly, criminal proceedings also resumed, from July 2020, in the ordinary way, though in compliance with certain requirements placed to avoid the progression of the pandemic⁹.

For the purposes of thoroughness, it should be noted that the above-mentioned measures have also concerned other forms of proceedings, such as administrative and tax proceedings, labor proceedings, *etc.*¹⁰.

2.3. Digital justice mechanism

Civil Courts

According to the emergency legislation, two new different ways of holding civil hearings have been provided. Firstly, the emergency legislation provided for the possibility of holding civil hearings in a so-called “documentary mode”¹¹. As alternative to this modality, Civil Courts had the opportunity to celebrate civil hearings remotely¹². With reference to this second possibility, Courts have been authorized to use different platforms, such as Microsoft Teams and Skype for Business¹³. Therefore, in contrast to other countries, no special online platform has been provided by the Government in civil proceedings.

If compared with what happened previously, the celebration of civil hearings in the online mode represents a real revolution for civil proceedings in Italy. In fact, never in the past had been such a massive use of technology in the civil process as happened during the emergency. However, such innovation has received criticism from some legal professionals¹⁴.

Criminal Courts

Similarly to civil litigation, the use of digital mechanism has increased during the pandemic also with reference to criminal proceedings. The above-mentioned Law Decree n. 11/2020 stated that criminal hearings should be held, where possible, using video tools already available to judicial offices and penitentiary institutions under Article 146-bis of Legislative Decree n. 271/1989 or, in alternative, using Microsoft Team /Skype Business. As opposed to civil

⁸ See the above-mentioned Decree n. 11/2020 in note number 5.

⁹ See the above-mentioned Decree n. 28/2020 on COVID-19 in note number 7.

¹⁰ See the above-mentioned Decree n. 11/2020 in note number 5.

¹¹ For further information on the so-called documentary mode see <https://www.unicost.eu/la-trattazione-scritta-del-processo-civile/>.

¹²For the negative impact on privacy issues see <https://www.agendadigitale.eu/documenti/giustizia-digitale/giustizia-digitale-gli-aspetti-privacy-delle-udienze-da-remoto-ecco-le-regole/>.

¹³ For details about computer and video conferencing systems and their use see https://www.consiglionazionaleforense.it/documents/20182/681053/provvedimento_organizzativo_dgsia+%2820-32020%29.pdf/7e1f5b06-5b64-42a1-91fa-7a1f2e7c0113

¹⁴For a critical view of conducting hearings remotely, see <https://www.judicium.it/le-udienze-remoto-la-smaterializzazione-della-giustizia/>.



proceedings, criminal proceedings already provided, under certain conditions, the possibility of holding hearings by videoconference¹⁵.

The use of technology in civil and criminal Courts and the prospect of being able to implement such systems in the future as well, has led the Government to provide appropriate projects and related economic resources for this purpose. According to the Report “*Strategy for technological innovation and the digitalization of the Country*”, drafted by the Ministry of Technology Innovation, justice proceedings will also be involved in digital implementation¹⁶.

Currently, the use of technology is particularly extensive, though there are still strong requirements for celebrating the processes in presence¹⁷. It is reasonable to say that only some of the technological innovations adopted as a result of COVID-19 will be used in the future.

2.4. Suspension of procedural deadlines

Civil Proceedings

To counteract the effects on the right’s protection due the postponement of the procedural activity, the Italian emergency legislation has ruled that the expiry of terms for all civil proceedings was suspended until May 2020. The suspension, then extended until June 2020, has been brought back to normality with the above-mentioned Decree n. 28/2020 than converted into Law n. 70/2020.

Criminal Proceedings

With reference to criminal proceedings, the impossibility of guaranteeing an ordinary holding of hearings led the Italian legislator to provide for special suspensions of procedural and prescription deadlines¹⁸.

The sensitivity of prescription in criminal proceedings, has conducted the Italian Constitutional Court to judge on this matter¹⁹. With judgment n. 278/2020, the Italian Constitutional Court ruled on the constitutional legitimacy of the suspension of the prescription in criminal proceedings, as set out in the emergency legislation²⁰. The Italian Constitutional Court confirmed the exceptions provided for by the legislator on this matter, basing its judgment on a delicate balancing of interests. In other words, the suspensions had been recognized as a lawful and useful measure in time of pandemic.

2.5. Prioritization of cases and procedure

¹⁵ See the above-mentioned Decree n.11/2020 in note number 5.

¹⁶ For the full Report see <https://assets.innovazione.gov.it/1610546390-midbook2025.pdf>.

¹⁷ See the above-mentioned Decree n.28/2020 in note number 7.

¹⁸ See the above-mentioned Decree n.11/2020 in note number 5.

¹⁹ For an overview on the suspension of term in criminal proceedings see <https://www.diritto.it/la-sospensione-della-prescrizione-ai-tempi-del-coronavirus/>.

²⁰ For the complete text of the Court’s decision see https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2020:278.



Civil Courts

According to the Italian legislation on COVID-19 emergency and with reference to the civil proceedings, the above-mentioned solutions implemented to address the health emergency did not involve certain civil suits. It is the case of proceedings to be celebrated in front of the Juvenile Courts, hearings regarding minors, family relationships, adoption, protection of fundamental rights, civil case of domestic violence, etc. This kind of proceedings were not impacted by the suspensions assessed above and by the scaling-down of hearings. In these cases, the emergency legislation has provided special procedures, with the direct engagement of Courts Presidents²¹. In this context, specific regulations have been adopted with reference to certain types of civil litigation, in order to immediately celebrate hearings, in presence or remotely²².

A further aspect to underline is the implementation of ADR systems. To address additional civil judgments, the Italian legislator extended the field of application of civil mediation²³. In view of the need to address the impossibility of non-fulfilment of contracts due to COVID-19, the use of ADR instruments to settle the conflict has been imposed before having protection in Courts²⁴.

Criminal Courts

As in civil proceedings, certain cases of criminal hearings have not been involved in suspension or in scaling-down. In fact, in criminal Courts, priority was given to hearings related to validation of arrests and detentions, proceedings against individuals under detention, application of precautionary measures, proceedings against juveniles and hearings in proceedings presenting characteristics of urgency, due to the need to take evidence that could not be postponed²⁵.

2.6. Continuation of activities with preventive & health measures

As previously stated, after the first of July 2020, Courts Presidents had the faculty, in accordance with the local Health Authority and the representatives of professional orders, to celebrate hearings in presence. Otherwise, hearing's holding is still subject to strict restrictions designed to prevent the spread of the virus²⁶.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:
 - a. In what matters?
 - Constitutional protections

²¹ See the above-mentioned Decree n.11/2020 in note number 5.

²² *Ibidem*

²³ *Ibidem*.

²⁴ See the comment at http://www.gop.it/doc_covid/127.pdf.

²⁵ See the above-mentioned Decree n.11/2020 in note number 5.

²⁶ See the above-mentioned Decree n.28/2020 in note number 7.



- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain:

It is fair to assume that the backlog of cases has increased in all matters, but no specific information is available yet. In Italy – as opposed to some other countries – there is no data showing the growth or decrease of civil, criminal and administrative trials. However, we could pinpoint a few reasons why we believe that an increase in judicial load has occurred.

First, it is reasonable to assume that the reason for the absence of specific data is due to a pre-existing judicial load, which does not permit estimation of pandemic effects as well.

It would be worth remembering that the load of the judicial offices requires long times for the definition of the judgment. As recently reported, the length of the processes in Italy is particularly high and judgments are rendered after a long time²⁷.

Regarding civil proceedings, the average duration of a trial is 514 days, compared with an average duration in the European Union countries of 192 days²⁸.

Data do not get better with respect to criminal trials. As recently reported²⁹, it is shown that the length is:

- 3 years for the first level of judgment compared with 233 days for the average of EU countries;
- 2 years for the second level of judgment compared with 244 days for the average for EU countries;
- 1 year for the Supreme Court, compared with 238 days for the last instance in the average of EU countries;
- 3 years and 9 months the average duration of criminal trials; 4 years and 4 months the duration of criminal trials from preliminary investigations to the Supreme Court.

²⁷For an overview on the duration of Italian proceedings see <https://www.truenumbers.it/durata-processo/>.

²⁸ *Ibidem*.

²⁹ For an overview on the duration of criminal proceeding see the opinion <https://www.das.it/durata-processo-e-misura-giustizia/>.



Faced with such a complex picture, we do not currently have complete data about the effects of the pandemic on the judicial load exactly because – as noted before – it is already difficult to estimate the pre-pandemic caseload.

Therefore, as a reasonable conclusion, we believe that in any case there have been an increase in the backlog due to the suspension and postponement of hearings. It can be assumed, in fact, that the suspension of judicial activities has certainly increased the backlog.

- b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

No specific measures to tackle the backlog effectively have been adopted yet.

Although no action has yet been taken, the need to face the backlog has been the subject of discussion³⁰. The awareness of delays in dispute management and the negative effects it can produce has placed the disposal of judicial loads to the forefront of the discussion, mainly in civil process. As also indicated in the Explanatory Memorandum to the Civil Proceedings Reform Project of 2019³¹, the problem of judicial backlog exists and needs to be addressed³². However, it is not yet clear how this reform will be implemented and what effects it might have in practice.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

To the best of our knowledge, we are not aware of any relevant corruption cases related to COVID-19 response measures. At this stage of the emergency, there has been news on the media regarding ongoing investigations, but, to our knowledge, none has reached the Courts yet.

Despite the absence of court decisions, it is appropriate to make some clarifications. To be more accurate, the COVID-19 emergency has not only brought to light new hypotheses of corruption but has also brought to light cases of pre-existing careless administration³³.

Regarding the issue under consideration here – possible corruption cases related to COVID-19 response measures – some of them can be quoted. For example, it was reported in September 2020 the *Guardia Di Finanza*³⁴ arrested a contractor for bid-rigging and breach of public contract for the supply of masks, devices and health equipment required by the Italian National Health

³⁰ Now we have no information about specific measures.

³¹ For the complete text of the Report see https://www.giustizia.it/resources/cms/documents/schedaRiforma_giustizia_civile.pdf.

³² For a critical assessment of the excessive duration of civil trials, see https://osservatoriocpi.unicatt.it/cpi/Nota_Giustizia_Civile.pdf.

³³ For the complete news see <https://www.ilpost.it/2020/11/15/calabria-coronavirus/>.

³⁴ *Guardia di Finanza* is the police department in charge of tax frauds. See https://it.wikipedia.org/wiki/Guardia_di_Finanza.



System³⁵. Furthermore, several criminal proceedings have been opened against different actors operating in some regions of Northern Italy related to health crisis management and COVID-19 response measures³⁶. In this case, many of the open investigations have not only involved the management of the medical emergency, but also the public management of the health care service before the emergency.

It should be noted that these proceedings are still pending and no judgment has been released yet. On the other hand, we can argue that the perception of corruption and mismanagement related to measures against COVID-19 has remained the same as before. Unfortunately, as already stated, we do not have available reports or surveys conducted by Government or by private associations on this topic.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

Initiating of legal actions

Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)

Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)

Security of parties, victims and witnesses

Right of detainees to trial within a reasonable time / right to be tried without undue delay

Right to an interpreter

Right to an effective and confidential communication between the accused and lawyer

Right to examine evidence

Right to trial by a competent, independent and impartial tribunal

Right to a public hearing

Right to be present at trial

Right to appeal

Right to tolerable detention

Please explain the selected options briefly, identifying any relevant challenge or innovation:

5.1. General Remarks

There is no doubt that the pandemic caused a delay and therefore a worsening of the judiciary's efficiency particularly in criminal cases. However, considering that

- a) criminal cases where detention was in play have been prioritized; and

³⁵ See the news at <https://ilpomeridiano.net/scandalo-mascherine-per-covid-19-impreditore-arrestato-per-turbativa-dasta-dalla-guardia-di-finanza/>.

³⁶ See the complete story at <https://www.ilfattoquotidiano.it/2020/04/21/coronavirus-il-famoso-modello-lombardia-si-e-scontrato-con-la-realta-e-a-rimetterci-e-tuttitalia/5776105/>.



- b) delay and consequent backlog have not been that relevant (taking into account also the standard long duration of proceedings in Italy),

we can say that no condition has challenged the functioning of the Italian judicial system. However, to make the above clearer, consider the following remarks.

5.2. Initiating of legal actions

The right to initiate legal action does not appear to have been subject to any limitation.

With specific regard to the civil process, through the so-called Telematic Civil Process (TCP) – a specific mode of operation of the civil process –, physical shutdown of judicial offices during the emergency period has not prevented the necessary steps to be taken to initiate legal proceedings. In fact, thanks to TCP all acts and activities necessary to initiate civil action can be performed online, rather than having to go in person to the judicial offices³⁷.

However, as anticipated in Q. 2.5, conditions of procedural feasibility have been introduced in relation to certain cases³⁸. Furthermore, such provisions do not appear to be qualified as real limitations to the right to start a legal action.

5.3. Security of parties, victims and witnesses

The security of parties, victims and witnesses does not appear to have been questioned during pandemic. With this regard, the Italian legal system provides a very heartfelt protection, especially in the case of criminal proceedings. We are referring to the whole set of rules allowing victims or witnesses to be protected, partly due to the use of technological means. These protective provisions do not appear to have been questioned during pandemic.

5.4. Right to an effective and confidential communication between the accused and lawyer

The right to legal assistance is a fundamental right enshrined in Article 6 of the European Convention on Human Rights and in Article 24 of the Italian Constitution³⁹. A corollary of this principle is the confidentiality of communications between the accused and the lawyer.

Within this regulatory framework, this principle does not seem to have been disattended during the COVID-19 emergency. However, for the sake of completeness of this Questionnaire, it should be noted that in the past there have been cases in which this principle had been questioned. We refer to the widespread practice of interception by the judiciary of private communications between the accused and the lawyer⁴⁰.

³⁷For the explanation of the telematic civil process see <https://legaldesk.it/blog/processo-civile-telematico-come-funziona>.

³⁸ See the comment to Q. 2.5.

³⁹ See the article and the linked comment at <https://www.brocardi.it/costituzione/parte-i/titolo-i/art24.html>.

⁴⁰ For the critique made by the lawyers see <https://www.camerepenali.it/public/file/Camere%20Penali/2014.03.26%20Libert%C3%A0%20del%20difensore>.



Apart from this issue, it should be reiterated that the COVID-19 emergency did not show practices or conducts which may be considered detrimental to the effective and confidential communication between the accused and the lawyer.

5.5. Right to a public hearing

With reference to criminal proceedings, the right of public hearings is stated in several national and international provisions. In particular, the right to hold criminal hearings in public is deemed a fundamental right of the individual by Article 10 of the Universal Declaration of Human Rights, Article 6(1) ECHR, Article 47(2) of the Charter of Fundamental Rights of the European Union and Article 14(1) of the International Covenant on Civil and Political Rights.

In our judgment, the online holding of some criminal hearings and the general increase in the use of video tools did not constitute a violation or weakening of that principle. In fact, it is our opinion that the publicity of criminal hearings has not been compromised by the fact that they are not held in the courtrooms.

It is however true that someone argued that *“the publicity of the criminal trial is the foundation of our procedural system and it is therefore obvious that a 'remote' trial held on platforms excluding the public and publicity would be the end of the trial and its guarantees, not to mention the 'telematic' distance between lawyer and defendant and the consequent impoverishment of communication”*⁴¹.

5.6. Right to tolerable detention

Art. 27, par. 3 of the Italian Constitution specifies that criminal sanctions may not consist of treatment contrary to the sense of humanity and must aim at the re-education of the convicted person⁴².

Fully aware of this framework, it appears appropriate to consider how the right to reasonable detention was addressed during the COVID-19 emergency period. The above-mentioned emergency legislation stated that *“until June 30, 2020, the sentence of imprisonment not exceeding 18 months, even if the remaining part of a greater judgment, shall be executed, upon request, at the domicile of the inmate”*⁴³. A type of measure aimed at reducing prison overcrowding, required by the need to reduce the risks of infection in places which, even under normal conditions, did not always guarantee acceptable sanitary conditions.

⁴¹ See this point of view at <https://www.filodiritto.com/il-covid-e-il-processo-penale-la-pubblicita-delludienza-garanzia-di-trasparenza-e-di-rispetto-dei-diritti>.

⁴² See the text of the article at https://www.senato.it/1025?sezione=120&articolo_numero_articolo=27.

⁴³ See the above-mentioned Decree In note number 5.



How has the COVID-19 pandemic affected the judiciary?

Bibliography – Italy

A. Government / government agency publications	
1.	Report on the Status of Rule of Law (2020), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0311 .
2.	Decree n. 11/2020, available at: at https://www.questionegiustizia.it/data/doc/2370/gazzetta-ufficiale-8-marzo-2020-dl-n-11.pdf .
3.	Report on the management of judiciary (2020), available at: https://www.coe.int/en/web/cepej/compilation-comments#Italy .
4.	Law Decree n.28/2020 than converted into Law n.70/2020, available at: https://www.gazzettaufficiale.it/eli/id/2020/06/29/20G00088/sg .
5.	Report on Innovation and Technology Plan, available at: https://assets.innovazione.gov.it/1610546390-midbook2025.pdf .
6.	Judgment n. 278/2020, Italian Constitutional Court, available at: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2020:278 .
7.	Executive Summary on the Reform of Civil Justice, available at: https://www.giustizia.it/resources/cms/documents/schedaRiforma_giustizia_civile.pdf .
8.	Article 27, Italian Constitution. Available at:



	https://www.senato.it/1025?sezione=120&articolo_numero_articolo=27 .
	B. NGOs, Think Tank and Professional Body publications
9.	Osservatorio sull'unità della Costituzione, Il funzionamento della trattazione scritta. Available at: https://www.unicost.eu/la-trattazione-scritta-del-processo-civile/ .
10.	Agenda Digitale, Giustizia digitale, gli aspetti privacy delle udienze da remoto: ecco le regole. Available at: https://www.agendadigitale.eu/documenti/giustizia-digitale/giustizia-digitale-gli-aspetti-privacy-delle-udienze-da-remoto-ecco-le-regole/ .
11.	Consiglio Nazionale Forense, Linee guida sul processo da remoto. Available at: https://www.consiglionazionaleforense.it/documents/20182/681053/provvedimento_organizzativo_dgsia+%2820-3%2020%29.pdf/7e1f5b06-5b64-42a1-91fa-7a1f2e7c0113 .
12.	GOP Legal Update, July 2020 available at: http://www.gop.it/doc_covid/127.pdf .
13.	TN, La durata dei processi civili in Italia. Available at: https://www.truenumbers.it/durata-processo/
14.	DAS: La durata dei processi penali in Italia. Available at: https://www.das.it/durata-processo-e-misura-giustizia/ .
15.	Osservatorio Cattolica, L'eccessiva durata dei processi civili. Available at: https://osservatoriocpi.unicatt.it/cpi_Nota_Giustizia_Civile.pdf .
16.	See more information about <i>Guardia di Finanza</i> at: https://it.wikipedia.org/wiki/Guardia_di_Finanza .



17.	Legal Desk, Come funzione il processo civile telematico. Available at: https://legaldesk.it/blog/processo-civile-telematico-come-funziona
18.	Camere Penali, Critiche al sistema della giustizia a distanza. Available at: https://www.camerepenali.it/public/file/Camere%20Penali/2014.03.26%20Libert%C3%A0%20del%20difensore.
C. Academic publications	
19.	G. Scarsarelli, <i>Note critiche sul disegno di legge delega di riforma del processo civile approvato dal Consiglio dei Ministri in data 5 dicembre 2019</i> , 2019. Available at: https://www.judicium.it/note-critiche-sul-disegno-di-legge-delega-di-riforma-del-processo-civile-approvato-dal-consiglio-dei-ministri-in-data-5-dicembre-2019/0.
20.	G. Scarselli, Contro le udienze da remoto e la smaterializzazione della giustizia. Available at: https://www.judicium.it/le-udienze-remoto-la-smaterializzazione-della-giustizia/.
21.	F. Maganunco, La sospensione della prescrizione ai tempi del corona virus. Available at: https://www.diritto.it/la-sospensione-della-prescrizione-ai-tempi-del-coronavirus/.
22.	Comment on the Article 24 of the Italian Constitution. Available at: https://www.brocardi.it/costituzione/parte-i/titolo-i/art24.html.
23.	R. Radi, Il Covid e il processo penale: la pubblicità dell'udienza garanzia di trasparenza e di rispetto dei diritti. Available at: https://www.filodiritto.com/il-covid-e-il-processo-penale-la-pubblicita-delludienza-garanzia-di-trasparenza-e-di-rispetto-dei-diritti.
D. Other resources	
24.	IL POST (2020), Da dove viene il disastro della sanità in Calabria. Available at: https://www.ilpost.it/2020/11/15/calabria-coronavirus/



25.	IL POMERIDIANO (2020), Scandalo mascherine. Available at: https://ilpomeridiano.net/scandalo-mascherine-per-covid-19-imprenditore-arrestato-per-turbativa-dasta-dalla-guardia-di-finanza/ .
26.	IL FQ, (2020) Il Famoso modello Lombardia. Available at: https://www.ilfattoquotidiano.it/2020/04/21/coronavirus-il-famoso-modello-lombardia-si-e-scontrato-con-la-realta-e-a-rimetterci-e-tuttitalia/5776105/ .

Kenya

Peter Gachuhi, Partner | PGachuhi@kapstrat.com

Elizabeth Onyango, Associate | EOnyango@kapstrat.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Kenya

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.
 - 1.1. Soon after Kenya announced its first COVID-19 case, the National Council for the Administration of Justice chaired by the Chief Justice of Kenya on 15th March 2020 issued various measures to be implemented to curb the spread of the novel Coronavirus, while also seeking to ensure the continuity of services by the Judiciary.
 - 1.2. Despite various measures imposed to ensure continuity of services during the Covid 19 Pandemic ('the pandemic'), the effects of the pandemic still posed some challenges to the Judiciary's independence.
 - 1.3. Granted, the Kenyan Judiciary has faced challenges with respect to its independence prior to the Pandemic, and most of the issues now threatening Judicial Independence can be said to be issues that were there prior to the Pandemic. However, the Pandemic imposes an added challenge to an already strained Judiciary that is underfunded, and seemingly lacks support from other arms of Government.
 - 1.4. The Judicial Service Commission recently recommended the appointment of 41 Judges to the High Court and to the Court of Appeal, a much-needed injection of human capital to the said Courts, which may have aided to clear the backlog of cases in the said Courts. Despite this, due to wrangles between the Judiciary and the Executive, the said Judges have presently not been sworn into office. This is also despite a Court order issued by the High Court declaring the refusal of the Executive to swear in the said Judges is a violation of the Constitution of Kenya and the Judicial Service Act.²
 - 1.5. The refusal of the Executive to swear into office the said Judges left the Judiciary in a precarious state in terms of backlog, which backlog is only worsened by the effects of the Pandemic.
 - 1.6. There have also been instances of blatant disregard of Court Orders by Government officials. For instance, on 4th May 2020, despite a Court Order having been issued barring the eviction of over 8,000 people from informal settlements in Kariobangi, Nairobi, the Government of Kenya ("the government") went ahead and evicted the said people from their homes after issuing a two (2) days verbal notice. This was done despite harsh economic realities faced by almost every Kenyan caused by the Pandemic, particularly the lower income earning Kenyans.
 - 1.7. Further, there has been an increase in use of excessive force by the Police and extra judicial killings throughout the Country, in the pretext of enforcing measures imposed by the government to curb the spread of the virus. The High Court issued an Order against the Inspector General of Police, to the effect that the

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

² Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR.



unreasonable use of force in enforcing measures imposed by the government to curb the spread of the virus in particular Public Order (State Curfew) Order, 2020 was unconstitutional³. Despite this, little was done in terms of enforcement of the Court Order and the instances of use of excessive force by the Police and extra-judicial killings continued.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: urgent matters.
- Continuation of activities with preventive & health measures
- Other: Financial Relief

Please explain the selected options briefly, identifying any relevant challenge or innovation:

2.1 Interruption or scaling-down of judicial activity

- 2.1.1 At the height of the Pandemic, nearly all Courts were temporarily closed in order to curb the spread of the virus. As time went on, the Judiciary slowly started up-scaling its operations by providing skeleton staff to attend to Court matters. In Nairobi, for example, the sessions were conducted on online platforms such as Microsoft Teams and Zoom.
- 2.1.2 Courts have however adopted different methods of conducting its sessions. While some Courts conducted online virtual sessions, other Courts suspended all Court attendances in general. This led to confusion and mayhem on the part of Advocates and litigants alike, particularly because the judiciary had not issued clear and standard guidelines for Court operations, in light of the Pandemic.
- 2.1.3 The obvious challenge with Open Court sessions is the rampant spread of the virus. Despite regular testing for the virus and compliance with the Ministry of Health guidelines, Open Court sessions pose a great risk to the health and safety of Kenyans. This is particularly so for the vulnerable in society who may choose to attend such proceedings in a bid to carry on with their cases.
- 2.1.4 In some cases, the scaling down of judicial activity due to the Pandemic has increased the backlog of cases. This is particularly so in areas of the Country where judicial activity had to come to a grinding halt due to the Pandemic. The reality is that save for the more technologically advanced cities such as Nairobi

³ Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties) [2020] eKLR.

and Mombasa, most Courts simply did not have and do not have the digital infrastructure to be able to conduct Court proceedings online.

2.1.5 For example, Advocates, having matters in the Courts where proceedings are not digitized had no choice but to travel to various Court stations to attend to their matters, posing a great health risk to themselves and needlessly putting others at risk. Despite Courts putting in place measures to contain the virus, there were still cases of staff member of the said Courts testing positive for the virus, leading to further interruptions of Court services as the Courts had to be temporarily closed down for fumigations and for testing of its staff members.

2.1.6 On the other hand, the decision by the Courts to go digital (in the Courts that did) assisted to move matters along more quickly. lawyers and litigants are easily and efficiently able to handle matters at the comfort of their home or office supported by digital means. This also assists the Court to save time, as it is better able to manage the Court sessions.

2.2 Digital justice mechanisms

2.2.1 The Judiciary recently launched an e-filing platform to enable litigants and Advocates to file documents and pleadings digitally. When the e-filing platform was rolled out on 1st July 2020, the system was mostly operational in Nairobi, with the goal to have it operational worldwide.

2.2.2 Many Courts are now also conducting proceedings *via* video conferencing applications such as Microsoft Teams and Zoom, where it is suitable for them to do so. The Civil Procedure Rules of Kenya have also been amended to allow Advocates and litigants alike to serve pleadings by way of e-mail, which was previously a method of service which required leave of Court.

2.2.3 These measures by the Judiciary and the Legislature of Kenya have helped to keep the wheels of justice turning, in what is a difficult time due to the effects of the Pandemic. Nevertheless, there are still challenges faced with the digital justice mechanisms, such as the e-filing platform.

2.2.3.1 The e-filing platform, where operational, has numerous technical hitches. Advocates and litigants are often required to call Court staff in order to deal with various issues and challenges that arise when using the platform. This defeats the very purpose of having the platform to begin with, and may make filing tedious and time-consuming.

2.2.3.2 The platform also poses a challenge to lawyers and litigants filing time-sensitive pleadings, as the technical hitches experienced often means that they may be caught up by deadlines imposed by the law or a Court. Although Judicial Officers have sometimes shown leniency to Advocates and Litigants with respect to out of time filings when the same are caused by the hitches in the e-filing system, a lot still needs to be done to improve the system, since it is envisaged to be the only method for Court filings in the future.

2.2.3.3 Many, if not most Kenyans, do not have the digital infrastructure and/or digital literacy to be able to participate in such proceedings. This therefore puts some litigants in a highly disadvantaged position when they cannot access Court. The Judiciary has not done enough, in our view, to address the issue of how it can be able to reach all Kenyans as it moves towards a digital platform of dispensation of services.

2.2.3.4 Further, many have questioned the integrity of the Court proceedings conducted online. For example, that Judicial Officers conducting the proceedings do not have any clear method or procedure of identification

of the people who appear before them, sometimes purporting to be Advocates or litigants. During normal Court procedures, it was easy to be able to demand identification from either Advocates or litigants; however, which does not seem to be the case in online proceedings.

2.2.3.5 Despite the concerns of Advocates and the general public regarding digital justice mechanisms, it is envisaged that the Judiciary will continue to incorporate such mechanisms into daily Court operations in a post-pandemic Kenya. The Judiciary, alongside its stakeholders, require to put in place measures to ensure that the current systems of digital justice mechanisms are improved, in order to provide seamless service of the same.

2.3 Suspension of procedural deadlines

2.3.1 The Judiciary has not *per se* suspended procedural deadlines. However, due to the scaling down of judicial activities and the lock-down measures imposed by the Government, Courts have showed leniency with respect to applications that seek extension of time to file or serve pleadings, because of the effects of the Pandemic.

2.4 Prioritization of cases/procedures

2.4.1 On 15th March 2020, the Chief Justice issued directives that urgent matters across all fields were to be prioritized. The Chief Justice also directed Court registries to operate with limited staff to attend to the urgent matters.

2.4.2 Despite this, the Chief Justice's directives were not clear on what entailed an urgent matter and how judicial officers may screen for the same. Further, it is unclear if matters affected by the Covid-19 pandemic were considered urgent and for that reason given priority. It seems therefore, that what may be considered urgent is left to judicial discretion.

2.5 Continuation of activities with preventive & health measures

2.5.1 Some Courts have resorted to having Open Court proceedings in strict compliance with the guidelines issued by the Ministry of Health regarding curbing the spread of the Covid-19 virus. Courts also restricted the number of people that may be admitted to any Court proceedings in order to reduce congestion.

2.5.2 Despite these measures, it is difficult to control people and litigants generally. There have been many instances where Courts have been packed beyond capacity, contrary to the Ministry of Health regulations, obviously posing a great health risk. Further, regardless of compliance with guidelines of the Ministry of Health with respect to Covid-19, there are still members of the society who are more susceptible to the virus and therefore would still be at high risk when participating in Open Court sessions.

2.5.3 The Judiciary then finds itself in a catch-22 in trying to balance between providing service to Kenyans and potentially exposing the very same citizens to the virus.

2.6 Financial Relief

2.6.1 The government has not provided any funds towards the Judiciary in order to mitigate the financial challenges brought on because of the Pandemic. However, there have been some measures put in place to mitigate the financial impact of the Pandemic. Legal Notice Number 59 with respect to the Public Finance Management Act issued a waiver of all Court fees with respect to commercial matters, where the value of



the matter does not exceed One Million Kenya Shillings. The waiver of Court fees took effect on 1st April 2021 and will last for two years i.e. until 1st April 2022.

2.6.2 The waiver of Court fees, as per Legal Notice Number 59 is a welcome relief for litigants who may not have otherwise afforded to file cases during the Pandemic. However, our view is that there should be more efforts by the Government to support the Judiciary during crisis periods, such as the Pandemic, perhaps by offering financial aid and/or support in order to ensure continuity of service provision.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other

Please explain:

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

3.1 There is increased used of digital mechanisms by the judiciary to help clear the workload and backlog of cases within the Judiciary and this may, in some instances, assist to reduce the backlog of cases. However, there is no uniformity on the use of digital mechanisms and some Courts especially in the rural areas, have reverted to normal Court operations, with regard to health and safety measures.

3.2 The lack of digital infrastructure and proper staff training frustrates the efforts of the judiciary to try to tame the backlog of cases. In any event, and even prior to the Pandemic, the Judiciary acknowledged the backlog of cases to be a serious problem that required to be dealt with. The Judiciary has attempted various methods to remedy the problem of the backlog. For instance, the Judiciary often has what is known as a “service week”, conducted in various stations across the Country. Service week is aimed to expedite the hearing of cases beyond a certain age. This has unfortunately been paused in light of the Pandemic. It is hoped that as Judiciary is able to improve and streamline its service provision, and provide effective measures to address the serious issue of backlog of cases, which was worsened by the effects of the Pandemic.

3.3 Further, the Judiciary has not implemented any mechanisms for effectively tracking backlog of cases, in order to be able to resolve the issue. As the Judiciary moves towards a digital platform, it may be a worthy consideration to provide a digital platform for tracking of cases, in order to increase awareness of the problem of backlog of cases, and possibly find feasible methods of dealing with the said issue.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

4.1 In a recent Petition pending before Court, some Kilifi County Government officials filed an application before the High Court at Malindi seeking conservatory orders restraining the Director of Public Prosecution from charging them in relation to allegations of irregular payment of legal fees as well as the construction



and equipping of the Kilifi County Covid-19 Medical Complex⁴. However, the Honourable judge dismissed the Application on the basis that investigations by the Ethics and Anti-Corruption Commission (EACC) were still ongoing and the outcome of it could not be pre-empted.

- 4.2 Recently, there was public outcry regarding mismanagement of funds within the Ministry of Health and Kenya Medical Supplies Authority (KEMSA). KEMSA is the government agency responsible for the purchase of medical supplies and equipment on behalf of the government.
- 4.3 Following numerous complaints from the public, the President directed that investigations be done by the EACC into the procurement of medical equipment and allegedly fraudulent payments out of the COVID-19 fund, which was said to be irregular and fraudulent. The President also directed any individuals found culpable to be charged within 21 days of such a finding.
- 4.4 On conclusions of their investigations, the EACC recommended the prosecutions of some of the public officers implicated in the scandal. However, the Director of Public Prosecutions (DPP) is yet to charge the said public officers in Court. Unfortunately, the Judiciary’s hands are tied and may not be able to carry out any action in this particular case until the DPP decides to file charges against the individuals.
5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:
 - Initiating of legal actions
 - Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
 - Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
 - Security of parties, victims and witnesses
 - Right of detainees to trial within a reasonable time / right to be tried without undue delay
 - Right to an interpreter
 - Right to an effective and confidential communication between the accused and lawyer
 - Right to examine evidence
 - Right to trial by a competent, independent and impartial tribunal
 - Right to a public hearing
 - Right to be present at trial
 - Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

5.1 Initiating of legal actions

Due to the scaling down of the judiciary’s operations, some matters are currently initiated through the e-filing portal or by emailing the documents to the respective court registry. This has created challenges in initiating legal actions as Court registries throughout the Country have been operating with a limited number of staff.

- 5.1.1 Further, hitches in the e-filing portal, or delays in obtaining a response where a document is filed by way of e-mail, may give rise to a situation where an Advocate or litigant may miss a deadline. Although it is possible for a Judicial Officer to show leniency with respect to a late filing where the delay, particularly where the delay is caused by a lapse on the e-filing systems, there are instances where judicial discretion

⁴ Michelle Bibi Fondo & 5 others v Ethics & Anti-Corruption Commission & 2 others [2020] eKLR



may not be permissible, and a litigant may find themselves time barred for failing to initiate its case on time.

5.2 Right of detainees to trial within a reasonable time/right to be tried without undue delay

5.2.1 As the effects of the Pandemic worsened, many Courts were closed and thus detained people faced delays in having their matters heard in what may be considered a reasonable time. This also caused quite a backlog, as the matters had to be put off either indefinitely or until a far off date.

5.2.2 As time went on, Courts were able to upscale operations and/or rely on digitized means of hearing cases in order to proceed with cases. In some cases, some Courts conducted open Court sessions, with compliance with the protocols as set out by the Ministry of Health regarding Covid-19.

5.3 Right to examine evidence

5.3.1 The right to examine evidence during trial has been one of the main concerns that has arisen as result of the Judiciary scaling down its operations and increasingly adopting video conferencing hearings.

5.3.2 The integrity of the process of examining evidence during videoconference has been challenged in various cases in Court. However, the Courts have acknowledged the benefits of using video conferencing in its administration of justice and have held that there is no impediment either to the court or to the Parties as a result of receiving evidence through video conferencing⁵.

5.3.3 Further, there have been concerns that the taking of evidence by way of video conferencing applications may pose challenges with respect to proper identification of witnesses, advocates and litigants, and may further pose challenges with potential coaching of witnesses, that may undermine the Court process.

5.4 Right to be Present at trial

5.4.1 The right to be present at trial has been undermined due to the limited functioning of the judiciary during the Pandemic. To curb the spread of the virus, the government had restricted the movement of inmates. Therefore, some inmates whose matters were heard in Open Court could only be represented by their advocates.

5.4.2 Further, as a result of the inter-country travelling lock down measures imposed by the government, parties were unable to travel to attend their matter in various courts across the country especially courts which were operating during the Pandemic period.

5.4.3 As time has gone on, it has become acceptable to conduct open Court hearings with strict compliance with the guidelines by the Ministry of Health to prevent the spread of the virus.

⁵ In re Estate of Roger Bryan Robson (Deceased) [2020] eKLR

Morocco

Laila Slassi, Partner | lslassi@afriqueadvisors.com

Hajar Benyachou, Senior Associate | hbenyachou@afriqueadvisors.com

Meryem Lahlou, Associate | mlahlouelouitassi@afriqueadvisors.com

Amélia Marques, Associate | amarques@afriqueadvisors.com

Ismail Bakkaoui, Associate | ibekkaoui@afriqueadvisors.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Morocco

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

We did not find any information or data that would indicate that the independence of the judiciary has been challenged.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: Emergency procedures, detainees' s cases, cases involving minors
- Continuation of activities with preventive & health measures
- Other: special measures have been implemented in order to address violence against girls and women.

Please explain the selected options briefly, identifying any relevant challenge or innovation:

Hearings in the various courts of the Kingdom of Morocco have been suspended as of March 16, 2020 until July 1st, 2020, with the exception of those related to detainees' s cases, emergency procedures, cases involving minors and investigative cases. During the month of April, remote processes through videoconferences were set up. 24,926 detainees were tried, 1,469 hearings were held remotely by the different courts of the Kingdom, 2,268 cases were scheduled and 9,035 judicial decisions were rendered. Also, the clerk's offices of the commercial courts have set up e-mail addresses so that all legal formalities can be done remotely. As regards violence against girls and women, 95 phone numbers and email addresses of the Courts of Appeal of Rabat, Kenitra, Casablanca, El Jadida, Settat, Marrakech, Ouarzazate, Errachidia, Beni Mellal, Safi, Khouribga, Meknes, Fez, Taza, Agadir, Laayoune, Tangier, Tetouan, Al Hoceima and Nador have been made available to women in situations of violence during confinement to file complaints. The account of the President of the Public Prosecutor's Office as well as the electronic accounts of the public prosecutor's offices of the different jurisdictions of the Kingdom have been made available on the official website of the President of the Public Prosecutor's Office. In

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



addition, some public prosecutor's offices have set up a special platform to support women in situations of violence.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain: There is only few information regarding an increased workload and backlog of cases in the judiciary. However, a number of press articles deal with the increasing number of cases relating to bankruptcy. The covid-19 health crisis led to a substantial drop in economic activity. According to the available sources, business bankruptcies registered up to the end of August 2020 amount to only 3,247 units, compared to 5,168 during the same period last year. But many believe that the figures for 2020 are not real due to the closure of commercial courts during containment. Professionals, on the other hand, expect the courts to become congested towards the end of the third quarter. For many, bankruptcies are expected to jump by 33% between 2019 and 2021 according to the latest forecasts.

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

Several justice services have been digitalized, such as applications to obtain a commercial register, applications relating to criminal records and the filing of financial statements. An electronic platform for exchange with the courts that allows lawyers to file their requests has also been set up.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

We were unable to find any data on corruption cases related to Covid-19. However, the president of the national institute of probity of the prevention and fight against corruption regretted in his Probity letter published on 06/01/2021, that "*the pandemic presents risks of amplification of corruption in its known forms, and generate new ones*", and he commissioned a study funded by the United Nations Development Programme (UNDP) on the evolution of corruption in times of health crisis in Morocco.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay



- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation: The implementation of hearings by videoconference has raised many concerns over fair trial rights, particularly in criminal cases. Indeed, oral proceedings in criminal cases are contradictory proceedings that require direct communication between counsel and the accused. Such direct communication is not possible in visioconference hearings. However, in order to consult with clients, a special request must be made by the lawyers to the public prosecutor's office at least three days before the hearing. Furthermore, the suspension of all the hearings in the various courts of the Kingdom of Morocco during the sanitary confinement affected the right of detainees to trial within a reasonable time and rendered more complicated the initiating of legal actions.

How has the COVID-19 pandemic affected the judiciary?

Bibliography – Morocco

A. Government / government agency publications	
1.	Superior council of the judiciary: Measures taken by the High Council of Power (CSPJ) of Morocco to fight against the Covid pandemic 19. Available at: https://www.ahjucaf.org/sites/default/files/Covid-19%20CCass%20Maroc.pdf
2.	Journal of the Presidency of the Public Prosecutor's Office - N ° 1, June 2020. Available at: http://www.pmp.ma/%d8%a5%d8%b5%d8%af%d8%a7%d8%b1%d8%a7%d8%aa/
B. NGOs, Think Tank and Professional Body publications	
3.	National Authority for Probity, 06/01/2021, Prevention and Fight against Corruption ; Probity letter. Available at : https://static.yabiladi.com/img/assets/Yassine/Yasssine/YAssssssssssINE/Lettre%20de%20la%20Probite%CC%81%20-%20VFF.pdf
4.	Bassamat Laraqui, 28/05/2020, Covid-19 & Judicial treatment of companies' difficulties - Emergency measures (Recommendations of Bassamat & Laraqui). Available at: https://bassamat-laraqui.com/covid-19-traitement-des-difficultes-des-entreprises-mesures-durgence/
5.	Morocco UN Women, Afrique Advisors, 11/2020, Violence against women and girls in times of crisis : the experience of confinement in Morocco. Available at : https://www2.unwomen.org/-/media/field%20office%20morocco/documents/others/violences%20faites%20aux%20femmes%20pendant%20le%20confinement%20au%20maroc%20-%20version%20intgrale%20fr%20(1).pdf?la=fr&vs=5454
D. Other resources	
6.	LesEco, 07/12/2020, <i>Supreme council of justice, what results?</i> , Leseco. Available at : https://leseco.ma/maroc/conseil-superieur-de-la-justice-quel-bilan.html



7.	MarocHebdo, 04/09/2020, <i>Serious bleeding in the national economic fabric</i> , MarocHebdo. Available at: https://www.maroc-hebdo.press.ma/saignement-economique-national
8.	Medias24, 23/04/2020, <i>Remote trial : what we know</i> , Medias24. Available at : https://www.medias24.com/covid-19-proces-a-distance-ce-que-l-on-sait-9751.html
9.	2M, 16/03/2020, <i>Coronavirus/Morocco: suspension of court hearings until further notice</i> , 2M. Available at: https://2m.ma/fr/news/coronavirus-suspension-des-audiences-des-tribunaux-jusqua-nouvel-ordre-20200316/
10.	Medias24, 03/06/2020, <i>Commercial Court of Casablanca: recovery under the sign of digitalization</i> , Medias 24. Available at: https://www.medias24.com/tribunal-de-commerce-de-casablanca-reprise-sous-le-signe-de-la-digitalisation-10828.html
11.	LesEco, 30/04/2020, <i>Remote trial : The Public Prosecutor's Office undertakes a series of measures</i> , LesEco. Available at: https://leseco.ma/business/proces-a-distance-le-ministere-public-engage-une-serie-de-mesures.html
12.	LesEco, 02/06/2020, <i>Justice: MPs want a report card on continuity of services</i> , LesEco. Available at: https://bassamat-laraqui.com/justice-les-deputes-veulent-un-bilan-sur-la-continuite-des-services/
13.	LesEco, 28/05/2020, <i>Containment: Part of judicial life saved by digitization</i> , LesEco. Available at: https://bassamat-laraqui.com/confinement-une-partie-de-la-vie-judiciaire-sauvee-par-la-digitalisation/

Netherlands

Tom Barkhuysen, Partner | Tom.Barkhuysen@Stibbe.com

Diederik de Groot, PSL | Diederik.deGroot@Stibbe.com



Stibbe

Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: **The Netherlands**

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

COVID-19 had and still has an effect on the judiciary in the Netherlands. However, the pandemic has not posed any particular challenge to the judiciary's independence or its efforts to safeguard independence. For example: the judiciary decided to close the courthouses on 17 March 2020; it was not a decision made by the government. Furthermore, the Dutch judiciary prioritized legal cases at the start of the COVID-19 pandemic. This is written by the judiciary in the "Tijdelijke algemene regeling zaaksbehandeling Rechtspraak", the government did not make the prioritization.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

Interruption or scaling down of judicial activity

The judiciary decided to close the courthouses on 17 March 2020. It is important to note that this was a decision made by the judiciary itself; it was not a consequence of a government decision or the issued emergency decrees. The decision of the judiciary to close the courthouses led to the adjournment of cases, except for very urgent ones. Very urgent cases are those in which a judgement could not be postponed because that would strongly affect the rights of the suspects or litigants (see also 'Prioritization of cases'). The very urgent cases took place via video conference or telephone

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



hearing, whenever possible.

From 7 April 2020, urgent cases were also handled online (video conference) or by telephone in addition to the very urgent cases. Many cases were also settled without a court hearing during this period.

From 11 May 2020 onwards, hearings proceed again with the physical presence of litigants. Criminal-, juvenile- and family cases have priority, but there are also more physical hearings in other cases. The number of which may differ per court. This partly depends on the layout of the courthouse and the availability of alternative court locations. In addition, many hearings are still online via video conference or by telephone.

Digital justice mechanisms

The use of digital justice tools has ensured that courts continued to function during the pandemic. As mentioned above, facilities for remote hearings have been introduced. The legal basis for hearings without the physical presence of litigants lies in the "Temporary COVID-19 Justice and Security Act" (in Dutch: "Tijdelijke wet COVID-19 Justitie en Veiligheid"). This Act entered into force on 24 April 2020, to a large extent with retroactive effect from 16 March 2020.

In addition to the introduction of remote hearings, the judiciary has also introduced a digital system for litigants to communicate with the judiciary. From 9 April 2020, procedural documents and messages that are normally sent by post or fax to the judiciary can be temporarily sent via a digital platform called "ZIVVER". The use of this facility is regulated by the "Temporary general regulation on case hearing of the judiciary" (in Dutch: "Tijdelijke algemene regeling zaaksbehandeling Rechtspraak"). The Netherlands seems relatively restrictive, with respect to the accessibility of courts and trials to the public and the media. In the first phase of the pandemic, access was almost entirely denied. Later on, per case, three journalists were allowed to enter the courtroom. Even after the general corona measures were less strict nationally, courts still seemed to allow members of the public only very limited admittance to the court building and the courtroom itself. In cases with a lot of media and/or public attention, live streams were used so that the media and the public could follow the trial.

Suspension of procedural deadlines

In the Netherlands, procedural deadlines are flexibly applied. Therefore, if a litigant is unable to perform a legal action on time due to the COVID-19 measures, it is likely that a postponement is granted. This is in line with the handling of procedural deadlines in the Netherlands before COVID-19. In general, postponement is granted if the postponement is reasonably substantiated.

An example is the decision of the Council for Criminal Justice and Youth Protection (in Dutch: Raad voor strafrechtstoepassing en jeugdbescherming) to extend the response time for written appeals in cases with only a written procedure. Generally, a response time of 10 days is applicable, but for the durations of the COVID-19 crisis, the response time is extended to 20 days.

With regard to deadlines to appeals, COVID-19 did not lead to suspension of these deadlines. The Supreme Court (in Dutch: Hoge Raad) explicitly drew attention to this, because these have an important security and finality function: If the term to institute a legal remedy has passed unused, the judgment becomes final. Furthermore, the deadlines of appeals are legal periods and can therefore only be adjusted through legislation. This legislation does exist: the Emergency Law on Justice (in Dutch: Noodwet rechtspleging). This law can be put into effect by Royal Decree (in Dutch: Koninklijk Besluit) on the recommendation of the Prime Minister. However, this Emergency Law on Justice has not been used.



With regard to the hearing of a case by the judge, all non-urgent matters were postponed or delayed from 17 March, because the courts closed their doors to prevent the spread of COVID-19. However, if the term within the judge had to make a decision would expire, the case was seen as urgent, and was therefore handled by the judge. COVID-19 therefore did not lead to suspension of these deadlines.

Prioritization of cases/procedures

The Dutch judiciary prioritized legal cases at the start of the COVID-19 pandemic. This prioritization has been written down by the Judiciary in the “Tijdelijke algemene regeling zaaksbehandeling Rechtspraak”. In summary, during the first phase of the pandemic (17 March – 6 April 2020), only ‘very urgent cases’ were handled. During the second phase (7 April – 10 May 2020), ‘urgent cases’ were also handled. From 11 May 2020 onwards, the judiciary is in phase 3. The general principle of phase 3 is that the courts will deal with as many cases as possible, with due observance of the prioritization of (very) urgent cases.

The cases of various areas of law, which have been designated as (very) urgent are described in the “Tijdelijke algemene regeling zaaksbehandeling Rechtspraak”. For example, immigration detention cases are listed as very urgent. Priority is also given to criminal cases involving deprivation of liberty, pre-trial detention and early release.

Continuation of activities with preventive & health measures

Health measures apply in the courthouses. In addition to general safety and prevention measures, everyone must keep a distance of 1.5 meters from other people and wearing facemasks is mandatory until seated in the courtroom.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: Administrative law

Please explain:

The pandemic has increased the workload and the backlog of cases in the judiciary. Backlogs in cases were already there before the COVID-19-crises and have now increased further. The Dutch government mainly reports on the backlog of criminal cases. However, 70% of the backlogs of criminal cases that had to be postponed in March, April and May, have now (12 February 2021) been settled. In addition, the judiciary has also indicated that backlogs have built up in other areas of law: in civil and administrative law, the backlogs have increased with 11% because of COVID-19. With regard to other matters, the numbers regarding an increased workload and backlog of cases in de judiciary are not clear.



- b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

In an attempt to reduce the backlogs, several measures have been taken. These include the following measures:

- In certain cases three-judge panels are being replaced with judges sitting alone.
- In criminal cases for single-judge panels that would normally be handled in court, the Public Prosecution is imposing more penal orders that replace such procedures.
- Extending the opening hours of courthouses (such as court hearings in the evening).
- Renting extra courtrooms.
- Deploy additional staff. In the Netherlands, retired judges are also being sworn in again. This provision is created by a temporary Act (“Tweede Verzamelspoedwet COVID-19”).
- More cases are settled in writing, without a court hearing.
- Public funds has also been made available to reduce the backlogs of cases.
- Cases are settled via video connection.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

In the Netherlands, there are no relevant corruption judgements in cases related to COVID-19 measures. However, because of the size of this COVID-19 crisis, there are people who try to take advantage of it. An example is laundering of money that has been obtained by deceiving others by stating, contrary to the truth, that facemasks could be supplied. Another example is a scam by people who are pretending to be an employee from a postal company, who switch your bankcard unseen when you are paying by card for a delivery.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:



Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)

Due to the COVID-19 measures, lawyers are not always allowed to visit the prisons in order to communicate with their clients in person. Video conference or telephone calls with penal institutions are used as a substitute. However, time limits have been set for their use, often dictated by the director of the penal institute where the defendant is being held. The use of digital substitutes also leads to a variety of technical regarding the communication between client and lawyer.

Right to an effective and confidential communication between the accused and lawyer

In addition to what is mentioned above, we note that lawyers also faced a dilemma in the situations where defendants were not allowed to go to court hearings. The lawyer then had to choose between taking a seat in the courtroom for the benefit of his plea and smooth communication with the judge, or join his client at the penal institution so that confidential consultation was possible.

Right to a public hearing

The COVID-19 measures inevitably affect several aspects of an open and accessible court system. As a consequence, the operation of the legal system becomes significantly less visible. The Dutch judiciary was restrictive with respect to the accessibility of courts and trials to the public and the media. During the first phase of the pandemic, access was almost entirely denied. Later on, three journalists were allowed to enter the courtroom per case. How these journalists were selected, and based on which criteria, remained unclear. Even after the general coronavirus measures were less strict nationally, many restrictions continue to apply. Courts still seem to allow members of the public only very limited admittance to the court building and the courtroom itself.

The presence of the public at physical hearings of a judgement is allowed since 17 August 2020. Interested parties must notify the court in advance by e-mail. This is possible up to 2 working days before the hearing of the judgment. The courts determine the maximum number of visitors per building. The number of visitors depends on the layout of the building. Furthermore, an e-mail confirmation must be showed before access to the building.

Nevertheless, the Judiciary is also looking for alternatives to ensure the right to a public hearing. The live streaming of court hearings for the general public is an example. In the beginning of the "second wave" of the pandemic, experiments were conducted giving direct admission to online digital court hearings. Such experiments can potentially increase the accessibility of the judiciary. After all, it enables hundreds of people to follow the live stream of a court hearing. The important question is how the privacy of those physically present at the court hearing can be safeguarded during a live stream. Another question is whether the knowledge that the whole world is watching influences the behavior of judges, suspects, witnesses or other litigants.

Right to be present at trial

Due to the closure of the courthouses and the corona measures, many suspects could not be physically present at their trial. Video conference or telephone calls with penal institutions were being used as a substitute. As mentioned above, the director of the penal institute where the defendant is being held often sets time limits for the use of a telephone/video conference call. In some cases, this meant that the suspect could not be present during the entire (digital) court hearing.

In addition, an administrative judge even ruled that if it is not possible for a judge to hear a foreign national in an immigration case, the judge may decide not to do so.



Limiting the right to be present at trial (physically, with time slots, or entirely) can also effect the equality of arms. This goes without saying if one of the litigants cannot be present, not even digital. In criminal cases where the public prosecutor and the judge are physically present in the courtroom but the suspect has to use video conference or a telephone, the equality of arms may also be at stake. It might happen that technology malfunctions, so that the suspect cannot be properly understood or seen by the judge.

Brief commentary pulling out the key themes that emerge from the COVID-19 and judiciary questionnaire

Country: the Netherlands

COVID-19 had and still has an effect on the judiciary in the Netherlands. However, the pandemic has not posed any particular challenge to the judiciary's independence or its efforts to safeguard independence.

The judiciary itself decided to close the courthouses on 17 March 2020. The decision of the judiciary to close the courthouses led to the adjournment of cases, except for very urgent ones. The very urgent cases took place via video conference or telephone hearing, whenever possible. In addition to the introduction of remote hearings, the judiciary also introduced a digital system for litigants to communicate with the judiciary.

From 11 May 2020 onwards, hearings proceed again with the physical presence of litigants. Criminal-, juvenile- and family cases have priority, but there are also more physical hearings in other cases. The number of which may differ per court.

The decision of the judiciary to close the courthouses led to the adjournment of cases, but with regard to deadlines to appeals, COVID-19 did not lead to suspension of these deadlines. The Supreme Court (in Dutch: Hoge Raad) explicitly drew attention to this, because these deadlines have an important security and finality function.

Nevertheless, the backlog of cases in the judiciary in the Netherlands did increase. The following measures took place to enable the judicial system to deal with this increased backlog of cases:

- In certain cases three-judge panels are being replaced with single-judge panels.
- In criminal cases for single-judge panels that would normally be handled in court, the Public Prosecution is imposing more penal orders that replace such procedures.
- Extending the opening hours of courthouses (such as court hearings in the evening).
- Renting extra courtrooms.
- Deploy additional staff. In the Netherlands, retired judges are also being sworn in again. This provision is created by a temporary Act ("Tweede Verzamelwet COVID-19").
- More cases are settled in writing, without a court hearing.
- Public funds has also been made available to reduce the backlogs of cases.
- Cases are settled via video connection.

During the pandemic, concerns have arisen regarding the judiciary's functioning over due process or fair trial rights. These concerns arise from the restrictions of the right to legal counsel before trial, the right to an effective and confidential communication between the accused and lawyer, the right to a public hearing, the right to be present at trial and the right to appeal. Lawyers were not always allowed to visit the prisons, the judiciary was restrictive with respect to the accessibility of courts and trials to the public and media and due to the closure of the courthouses, many suspects could not be physically present at their trial.



How has the COVID-19 pandemic affected the judiciary?

Bibliography – The Netherlands

A. Government / government agency publications	
1.	De Rechtspraak (2020), Rechtspraak en OM werken corona-achterstanden weg. Available at: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Rechtspraak-en-OM-werken-corona-achterstanden-weg.aspx .
2.	De Rechtspraak (2020), Ruim 40 procent corona-achterstanden strafrecht weggewerkt. Available at: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Ruim-40-procent-corona-achterstanden-strafrecht-weggewerkt.aspx .
3.	Brief van de regering (2020), Vervolg aanpak corona achterstanden strafrechtketen. Available at: https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2020Z16704&did=2020D36179 .
4.	Brief van de regering (2020), Vervolg op de brief over de doorlichting van de strafrechtketen van 26 juni jl. Available at: https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2020Z21836&did=2020D46521 .
5.	Raad voor de Rechtspraak, Overzicht Rechtspraak in Europa ten tijde van corona. Available at: https://www.njb.nl/blogs/rechtspraak-in-europa-ten-tijde-van-corona/ .
6.	De Rechtspraak (2021), Circa 70 procent corona-achterstanden strafrecht weggewerkt. Available at: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Circa-70-procent-corona-achterstanden-strafrecht-weggewerkt.aspx .
7.	Raad voor Strafrechttoepassing en Jeugdbescherming (2020), RSJ verruimt reactietermijn schriftelijke beroepszaken tijdens coronacrisis. Available at: https://www.rsj.nl/actueel/nieuws/2020/03/25/rsj-verruimt-reactietermijn-beroepschriften-tijdens-corona-crisis .
8.	Rijksoverheid (2020), DJI treft preventieve coronamaatregelen. Available at: https://www.rijksoverheid.nl/actueel/nieuws/2020/03/13/dji-treft-preventieve-corona-maatregelen .



9.	Rechtspraak (2020), Tijdelijke algemene regeling zaaksbehandeling Rechtspraak. Available at: https://www.rechtspraak.nl/coronavirus-%28COVID-19%29/Paginas/COVID-19-Tijdelijke-algemene-regeling-zaaksbehandeling-Rechtspraak.aspx
	B. NGOs, Think Tank and Professional Body publications
	C. Academic publications
10.	Loof, J. (2020), Mensenrechten en rechtsstaat kennen geen pauzestand: over bestuursrecht, bestuursrechtspraak en coronacrisis, <i>Jurisprudentie Bestuursrecht plus (JBplus 2020/3)</i> .
11.	Boogaard, G., Van Emmerik, M., Geertjes, G.J., Verhey, L. & Uzman, J. (2020), Kroniek van het constitutioneel recht. Constitutie in tijden van corona, <i>Nederlands Juristenblad (NJB 2020/2398)</i> .
12.	Droogleever Fortuyn, S. (2020), Zittingen in coronatijd, <i>Advocatenblad</i> .
13.	De Boer, M. & De Monchy, M. (2020), Kroniek van het burgerlijk procesrecht, <i>Nederlands Juristenblad (NJB 2020/2397)</i> .
14.	Van Der Wiel, B.T.M. & Van Gardingen, L.V. (2020), De Coronacrisis en termijnen in de civiele rechtspleging, <i>Ondernemingsrecht 2020/76</i> .
	D. Other resources
15.	Open Universiteit, Netherlands Institute for the Study of Crime and Law Enforcement: Research Note Coronavirus (COVID-19) pandemic and the visibility of justice. Available at: https://www.njb.nl/media/3954/research-note-coronavirus-and-open-justice.pdf
16.	Rb Overijssel 1 juli 2020, ECLI:NL:RBOVE:2020:2209. Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBOVE:2020:2209 .
17.	Rb Noord-Holland 29 oktober 2020, ECLI:NL:RBNHO:2020:8760. Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNHO:2020:8760 .
18.	Schovers Advocatenkantoor, Corona en de gevolgen voor uw rechtshulp/Overzicht urgente zaken die de rechtbank zal blijven behandelen. Available at: https://www.schoversadvocaten.nl/corona-en-de-gevolgen-voor-uw-rechtshulp-overzicht-urgente-zaken-die-de-rechtbank-zal-blijven-behandelen/ .

Nigeria

Femi Adeluola, Partner | Femi.Adeluola@uubo.org

Folake Adebowale, Partner | Folake.Adebowale@uubo.org

Olukayode Dada, Managing Associate | Olukayode.Dada@uubo.org

Maryam Salami, Associate | maryam.salami@uubo.org



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: NIGERIA

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

No, the pandemic has not posed any challenge to the Nigerian judiciary's independence. The emergency powers exercised by the Nigerian Government during this COVID-19 pandemic was not specifically targeted at the Nigerian Judiciary but was exercised to safeguard the public health of the citizens. Even with the exercise of these emergency powers, the Nigerian judiciary was still able to put in place certain measures (e.g., virtual court proceedings; restriction of the number of lawyers that can appear for a litigant in a case; etc.) to ensure the continuity of the dispensation of justice and these measures were not opposed to by any other arm of government.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: Most of the different levels of court in Nigeria prioritized matters that were urgent or time bound.
- Continuation of activities with preventive & health measures
- Other:

Please explain the selected options briefly, identifying any relevant challenge or innovation:

Interruption or scaling-down of judicial activity: The Chief Justice of Nigeria (CJN) (i.e., Honourable Justice Tanko Muhammad) who is also the Chairman of the National Judicial Council issued a Circular No. NJC/CIR/HOC/11/629 dated 20th March 2020 (the "First Circular"),² in which judges were directed to take all the necessary steps to ensure safety in their various courts. The judges were advised to ensure that the number of persons (lawyers, litigants, and members of the public) present during court

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

² <https://lawnigeria.com/2020/04/njc-preventive-measures-on-the-spread-of-corona-virus-covid-19-and-the-protection-of-justices-judges-and-staff-of-courts/> [accessed on 28th February 2021]

proceedings is reduced to conform with the social distancing guidelines issued by the Nigerian government. The CJN issued another circular NJC/CIR/HOC/II/631 dated 23rd March 2020 (the “Second Circular”), addressed to all Heads of Court and Federal and State Judiciaries, directing them to suspend judicial activities for an initial period of 2 weeks commencing from 24th March 2020, except matters that were urgent, essential or time bound.³ The Second Circular did not provide guidance as to matters that were deemed ‘urgent, essential or time bound’. After the expiration of the two weeks indicated in the Second Circular, the CJN issued Circular Ref No: NJC/CIR/HOC/II/656 dated 8th April 2020 (the “Third Circular”) to all Heads of Court and Federal and State Judiciaries, extending the suspension of court sittings until further notice. The various Circulars issued by the CJN scaled down judicial activity in Nigeria. Further to the CJN’s Circulars, the heads of the various levels of the court system in Nigeria, issued practice directions or guidelines in response to the Covid-19 pandemic. For example, the Court of Appeal, Lagos Judicial Division issued ‘Court of Appeal Lagos Division Covid-19 Standard Operating Procedure Guidelines for Conduct of Court Business’ dated 22nd day of May 2020 (the “Guidelines”)⁴, which provided that “not more than ten (10) cases shall be fixed on the cause list for hearing on any day.”

The Chief Judge of the Federal High Court (Honourable Justice John Terhamba Tsoho) issued the Federal High Court of Nigeria Practice Directions 2020 for the COVID-19 Period (the “FHC Practice Directions”) on 18th day of May 2020⁵. The FHC Practice Directions provided that “the number of cases on the cause list shall not exceed nine (9) per day”. Prior to COVID-19, judges of the Federal High Court were at liberty to determine the number of cases they could hear in a day, and it was common for a judge to list up to 20 cases in his cause list for a day. The Chief Judge of the High Court of the Federal Capital Territory Abuja (the “FCT High Court”) issued the High Court of the Federal Capital Territory, Abuja Covid-19 Practice Directions 2020 which commenced on 11th May, 2020 (the “FCT Directions”). Under the FCT Directions, all employees of the courts, litigants, lawyers, and other persons are required to comply with the mask mandate and the social distancing rules imposed by the Nigerian government, and a party may only be represented by one lawyer unless the Rules of Professional Conduct specifically requires representation by two lawyers. The FCT Directions suspended all criminal proceedings requiring the presence of defendants till further notice, except for the purpose of hearing bail applications, remand proceedings and overnight cases.

Digital justice mechanisms: The Nigerian judiciary has adopted digital justice mechanisms in response to the pandemic. This has been in the form of electronic filing of court processes and virtual court proceedings. With the ease of the lockdown measures imposed by the Nigerian government in response to the pandemic however, most Nigerian courts have now reverted to in-person court proceedings, while observing the mask mandate and the social distancing rules imposed by the government. The FHC Practice Direction and the Lagos State Judiciary Remote Hearing of Cases (Covid-19 Pandemic Period) Practice Direction (the “Lagos State Practice Direction”) provided for electronic filing of court processes, service of court processes electronically, and remote hearing of cases. The President of the National Industrial Court issued the Court of Nigeria Practice Directions and Guidelines for Court Sitting 2020 which commenced on 18th May 2020 (the “NIC Guidelines”). Under the NIC Guidelines, court documents were required to be filed electronically. Where court documents cannot be filed electronically, they may be filed at the court’s registry, but upon submitting them at the registry, the

³ <https://njc.gov.ng/25/news-details> [accessed on 28th February 2021]

⁴ <https://r6a8n4n6.stackpathcdn.com/wp-content/uploads/2020/06/COVID-19-SOP-COURT-OF-APPEAL-LAGOS-DIVISION.pdf> [accessed on 28th February 2021]

⁵ <https://thenigerialawyer.com/wp-content/uploads/2020/05/PRACTICE-DIRECTION-2020-FOR-COVID190001y.pdf> [accessed on 28th February 2021]

court documents must be sanitised and quarantined for a minimum period of 120 hours before being treated by registry officials. The NIC Guidelines also require that all matters that do not require taking of evidence should be conducted by remote hearing which may be by video conferencing and judgment or rulings may also be delivered through the same means.

Suspension of procedural deadlines: The FHC Practice Directions stipulated that for the purpose of computation of time for doing any act under the Civil Procedure Rules of the Federal High Court, the period beginning from Tuesday, 24th March 2020 to the 18th of May 2020 shall be excluded. This direction effectively suspended the procedural deadline for doing any act under the Rules of the Federal High Court within the stated period.

Prioritization of cases/procedures: In response to the Covid-19 pandemic and the restrictions imposed by the Nigerian government to combat the spread of the disease, the judiciary in Nigeria issued some measures to prioritise certain kinds of cases and procedures. As indicated above, under the FCT Directions, all criminal proceedings requiring the presence of defendants were suspended until further notice, while hearing bail applications, remand proceedings and overnight cases was prioritised. On 23rd March 2020, the Federal High Court issued a Circular on Preventive Measures on the Spread of COVID-19 and the Protection of Justices, Judges and Staff of Courts requiring the prioritisation of bail applications, ex parte and /rulings. Urgent civil applications, adoption of final written addresses, and judgments. In Lagos State, the Chief Judge of the State issued a Circular dated March 23 2020 to safeguard and limit the exposure of the magistrates to the COVID-19 infection and directed that all Administrative Chief Magistrates should take charge of incoming criminal overnight cases and restrict assignments to only Courts within the Main Districts.⁶

Continuation of activities with preventive & health measures: While most courts have now resumed in-person hearing of cases, the courts continue to implement Covid-19-related safety measures. Some of those safety measures include wearing of face masks, temperature checks, use of hand sanitizers, restriction of the number of persons in a courtroom relative to the size of the room, restriction of the number of lawyers that can appear for one party in a case etc.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain: While there is no official information on increased workload and backlog of cases in the judiciary due to the Covid-19 pandemic, it was reported⁷ that there was delay of 155,757 court cases in 2019/2020 legal year as a result of the lockdown measures imposed by the Nigerian government to combat the spread of the Covid-19 virus. Beside criminal cases, the category of cases constituting the

⁶ <https://www.uubo.org/media/1889/overview-of-the-guidelines-issued-by-nigerian-courts-for-the-conduct-of-court-proceedings-during-the-lockdown-period.pdf> [accessed on 28th February 2021]

⁷ <https://allafrica.com/stories/202004200271.html>



other part of the 155,757 court cases was not disclosed in the report. The Covid-19-related lockdowns affected the trial of 51,983 awaiting-trial inmates of Nigerian Correctional Service facilities, representing 70% of the total population of 73,756 inmates in such facilities nationwide. We should mention that litigation generally tends to be protracted in Nigeria, a situation, which is in part, due to the workload and backlog of cases in the judiciary. While there are no official data as to the impact of the pandemic on judges' workload and backlog of cases, it is appropriate to state that the Covid-19 related safety measures (e.g., closure of courts; restrictions on the number and type of cases a judge could hear; etc.) implemented by the judiciary has exacerbated the workload and backlog of cases in the judiciary.

- b.** Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

The Nigerian government announced presidential pardons for 2600 inmates on 9th April 2020 as part of the efforts to decongest the prisons to combat the spread of the Covid-19 virus. As indicated earlier, most of the courts in Nigeria have now resumed in-person court proceedings, or have eased the restrictions imposed in response to the pandemic. Judges are intensifying efforts to hear cases that were scheduled to be heard but could not be heard during the closure of the courts.

- 4.** Have there been any relevant corruption cases related to COVID-19 response measures? If so, please briefly describe any actions by the judiciary to address these cases.

While there has been widespread allegations of mismanagement and theft of Covid-19 allegations against government officials,⁸ we are only aware of one publicised court case regarding Covid-19-related corruption⁹. On 5th January 2021, the Nigeria police arranged two officials of the Oyo State¹⁰ Government before a magistrates' court for stealing and selling 40 bags of sugar worth N60,000.00 (about US\$158.10) from the State's Covid-19 palliatives meant for the public. The defendants pleaded not guilty and were admitted to bail by the court. The case is still ongoing before the court.

- 5.** What kind of concerns overdue process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims, and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent, and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

⁸ e.g. see the following online news reports: <https://www.ft.com/content/617187c2-ab0b-4cf9-bdca-0aa246548745>; <https://www.premiumtimesng.com/news/top-news/424190-pdp-demands-probe-of-n500-billion-covid-19-funds.html>

⁹ see <https://guardian.ng/news/2-oyo-government-officials-in-court-for-allegedly-stealing-selling-covid-19-palliatives/>

¹⁰ A state in the Southwestern part of Nigeria

Please explain the selected options briefly, identifying any relevant challenge or innovation:

Initiating of legal actions: Due to the closure of the courts for an extended period, it was largely impossible to file new suits in the courts. Although some of the courts instituted electronic filing of court processes, most would-be litigants were unable to take advantage of this innovation because quantum of internet/electronic services (e.g., scanning, etc.) that would be required to prepare court documents for electronic filing is not widespread in Nigeria. Most of the courts have now resumed in-person of filing of court documents while retaining electronic filing as an alternative means of filing of court documents.

Right of detainees to trial within a reasonable time / right to be tried without undue delay: Section 36(1) and (4) of the 1999 of the Constitution of the Federal Republic of Nigeria (as amended) (the "1999 Constitution") guarantees a party to suit and a person charged with a criminal offence the right to fair hearing within a reasonable time. Furthermore, section 396(3) of the Administration of Criminal Justice Act 2015 provides for criminal trial on a day-today basis. The closure of the courts and some of the restrictions enacted by the courts to combat the spread of the Covid-19 infection certainly delayed detainee's rights of access to court. For instance, under the FCT Directions, the High Court of the FCT suspended the hearing of all criminal matters except for bail applications, remand proceedings and overnight cases. Accordingly, criminal cases involving prison inmates could not proceed during that period. It was reported¹¹ that the Covid-19-related lockdowns affected the trial of 51,983 awaiting-trial inmates of Nigerian Correctional Service facilities, representing 70% of the total population of 73,756 inmates in such facilities nationwide. In order to decongest the prisons as part of the measures to combat the spread of the Covid-19 virus, the Nigerian government announced presidential pardons for 2600 inmates on 9th April 2020.

Right to public hearing: Sections 36(3) and (4) of the 1999 Constitution provide for the hearing of cases in public. Due to the Covid-19 pandemic, many courts in Nigeria adopted virtual proceedings to deal with urgent and pressing matters. This development led to the debate¹² on whether virtual court proceedings satisfy the public hearing provisions of the 1999 Constitution. Most lawyers agree that the virtual proceedings satisfy the constitutional provisions on public hearing because the parties and their attorneys are provided access to and participate in the proceedings, and the members of the public can also join to watch the proceedings if they wish to do so. We are not aware of any judicial pronouncement on the constitutionality of the virtual proceedings in Nigeria as of today. The two cases¹³ filed by Lagos and Ekiti States in the Supreme Court of Nigeria to interpret the constitutionality of remote and virtual sittings were withdrawn by the states and struck out by the Supreme Court on the ground that the cases were premature and speculative because efforts by the Nigerian National Assembly to amend the 1999 Constitution to specifically provide for virtual court proceedings are still ongoing. In striking out the suit, it was reported¹⁴ that one of the justices of the Supreme Court, Justice Olabode Rhodes-Vivour, stated that "as at now, virtual sitting is not unconstitutional."

¹¹ <https://allafrica.com/stories/202004200271.html>

¹² e.g see Timi Olagunju's article titled "Why remote, virtual proceedings are constitutional in Nigeria" 19th May 2020, published in Techpoint.africa, an online newspaper (<https://techpoint.africa/2020/05/19/virtual-court-hearings-constitutional/>); Callistus Ojukwu and Juliana Okeke's Virtual Court Hearings and the Constitution (<https://foundationchambers.com/wp-content/uploads/2020/06/VIRTUAL-COURT-HEARINGS-AND-THE-CONSTITUTION-1.pdf>); Kemi Pinheiro's The Constitutionality of Virtual or Remote Court Proceedings in Nigeria etc.

¹³ Suit No. SC/CV/260/2020- Attorney General of Lagos State v. Attorney General of the Federation & Anor; and Suit No. SC/CV/260/2020 - Attorney General of Ekiti State v. Attorney General of the Federation

¹⁴ See <https://lawcarenigeria.com/supreme-court-declares-virtual-court-sittings-constitutional-the-sun-nigeria/>;
<https://businessday.ng/news/article/supreme-court-dismisses-suits-against-virtual-hearing/>

Peru

Alberto Delgado, Partner | adelgado@mafirma.com.pe

Giovanni Priori, Partner | gpriori@mafirma.com.pe

Martin Sotero, Senior Associate | msotero@mafirma.com.pe

Rodrigo Molina, Senior Associate | rmolina@mafirma.com.pe

Annette Knell, Associate | aknell@mafirma.com.pe





Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Peru has been one of the most affected countries in Latin America by the COVID-19 pandemic.¹ On or before February 28th, 2021, according to public sources, it has had 1,329,805 cases in total and 46,494 deaths, having a mortality rate of 3.50%.² However, if excess mortality figures are considered, the death toll would be more than double the official figure.³

It should be noted that, when the pandemic started, Peru had 276 ICU beds in the whole country.⁴ Therefore, the country had to enforce rigid quarantine measures quickly and drastically with a total stay at home order for all citizens except for frontline workers. Also, Peru was one of the first countries to close its borders only after 6 days of the announcement of the first COVID-19 case in its territory.

Then, the government concentrated all its efforts in improving the health system, acquiring more ICU beds. To the date, there are 2,264 ICU beds. Nevertheless, during the second outbreak in Peru, hospitals all over the country reached their capacity,⁵ which led to a new 30-day stay at home order in major cities across the country in January and February 2021.

Country: Peru

1. Has the pandemic posed any particular challenge to the judiciary's Independence or its efforts to safeguard independence⁶? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

In general terms, our view is that the COVID-19 pandemic has not itself been used to undermine the judicial independence of the judiciary.

That is without prejudice to the fact that Peru does have significant issues concerning the judiciary's independence. Moreover, we would say that prior to the pandemic Peru was already in the midst of a grave crisis affecting the independence of the judiciary (corruption case involving Supreme Court Justices);⁷⁸ but we have no evidence that such crisis has been worsened by the pandemic.

¹ <http://revistaeconomia.unam.mx/index.php/ecu/article/view/552/585>

² https://covid19.minsa.gob.pe/sala_situacional.asp

³ <https://www.as-coa.org/articles/el-coronavirus-en-america-latina#per>

⁴ <https://www.ft.com/content/a2901ce8-5eb7-4633-b89c-cbdf5b386938>

⁵ <https://www.washingtonpost.com/es/post-opinion/2020/05/05/la-rapida-reaccion-de-peru-ante-la-pandemia-choco-con-un-sistema-de-salud-insuficiente/>

⁶ <https://opencovid-peru.com/reportes/uci-disponible/>

⁷ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

⁸ <https://www.reuters.com/article/us-peru-corruption-idUSKBN1KA051>

<https://www.washingtonpost.com/news/worldviews/wp/2018/07/20/leaked-calls-reveal-systemic-corruption-in-perus-judiciary-sparking-flurry-of-resignations/>

<https://nacla.org/news/2019/06/27/rings-corruption-peru>

<https://insightcrime.org/news/analysis/perus-judicial-corruption-scandal-explained/>

⁸ According to The Democracy and Human Rights Institute from the Pontificia Universidad Católica del Perú - IDEHPUCP, "The case "CNM audios (White Collars of the Port)" arose from a disclosure of audios -product of legal telephone interceptions that originated in a previous investigation linked to



For example: (i) there has been no reduction in salaries; and (ii) no proven corruption cases have been detected (or made public) that are based on the use of technology or virtual hearings due to the pandemic.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

Interruption and scaling-down happened, together with suspension of procedural deadlines. These were the initial measures undertaken in March 2020. The judiciary practically closed and very gradually admitted the restart of certain matters, with the priorities selected above. That is, the judiciary set up email addresses to receive writs on urgent constitutional recourses, criminal matters (those with detainees) and family-related matters. Then, after about three months, digital justice mechanisms were set up, such as a web page to file claims, counterclaims and other submissions virtually, personal identification through digital signatures, virtual hearings through Google Meet, a web page to request virtual appointments with justices, and another one to request an appointment to go to court and file any submission in person when necessary, and finally another web page to submit questions or inquiries about the case development and status. In addition, the judiciary implemented measures to allow the remote work of justices, clerks, and other personnel. Thus, the flow of cases started to pick-up. The course of the pandemic in Peru has never got to a point where activities returned to normal. The continuation of activities to this date remains mostly virtual (at a certain point in time in-person hearings were allowed, but quite exceptionally and with preventive & health measures in place). There are certain judiciary employees, including judges that work in-person, whose working days have been allocated into different days of the week and/or schedules to provide for social distancing.⁹

organized crime, for crimes such as drug trafficking, hitmen- that involved judges and prosecutors. Later, it was noticed that counselors of the defunct National Magistracy Council, a former Supreme Court magistrate and even businessmen were involved in a series of alleged acts of corruption, especially with influence peddling and other related crimes. This situation would mean that within the justice system - especially the highest authorities - a bank of favors guided by personal interests to the detriment of the public interest would have functioned”.

Source: <https://idehpucp.pucp.edu.pe/observatorio-de-casos-anticorrupcion-y-lavado-de-activos/casos-materia-corrupcion/cuellos-blancos/> [Visited on march 1st, 2021].

⁹ Source:

https://biblioteca.cejamericas.org/bitstream/handle/2015/5648/REPORTECEJA_EstadodelajusticiaenAlbajoelCOVID19_20mayo2020.pdf?sequence=5&isAllowed=y

<https://idehpucp.pucp.edu.pe/notas-informativas/una-transformacion-latente-y-otra-pendiente-el-poder-judicial-frente-al-covid19/>

To the best of our knowledge, the judiciary gave the judges and other workers PPE (masks and hand sanitizer). Justice operators have not been prioritized for COVID-19 testing.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain:

According to data made public by the judiciary,¹⁰ between January and September 2020, there was a 57% decrease in claims (527,080 new claims) in relation to the same period in 2019 (1,224,743 new claims).

Nevertheless, the reduction in the number of claims did not signify a reduction of the backlog of cases. Indeed, between January and September 2020, the number of cases solved was 631,903, this is 657,040 less than the cases solved in the same period in 2019 (-51%).

We could deduce that the reduced productivity is related to the quarantine period (199 days) and the difficulties provided by the remote work for the judiciary workers (not having proper electronics or internet at home, not being able to do their job from home, not having digital copies of the case files, among others).

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

No. In particular the government did not allocate additional funds to alleviate the difficulties caused by the pandemic.

To the best of our knowledge there is very limited data regarding the use of digital justice tools although we have found the following statement: *“During the months of compulsory social isolation, the “MPE” [the web page for filing documents for physical files] received more than a million documents, including submissions and claims; in addition to 100,000 documents filed in proceedings that have virtual files.”*¹¹

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

None involving the judiciary, at least to our knowledge or that have become public.

¹⁰ <https://www.pj.gob.pe/wps/wcm/connect/6a26120040716029b4b3b56976768c74/BOLETIN+N3-SETIEMBRE-2020F.pdf?MOD=AJPERES&CACHEID=6a26120040716029b4b3b56976768c74>

¹¹ <https://elperuano.pe/noticia/106414-lecaros-expediente-judicial-electronico-tramito-mas-de-166000-procesos>
https://www.pj.gob.pe/wps/wcm/connect/cortesuprema/s_cortes_suprema_home/as_inicio/as_enlaces_destacados/as_imagen_prensa/as_notas_noticias/2020/cs_n-en-menos-de-5-anos-eje-sera-implementado-en-todo-pj-23112020

However, recent news show that certain public officials (including then President Martín Vizcarra, the Minister of Health, the Minister of Foreign Affairs, the Director General of Medical Supplies and Drugs, among others)¹² allegedly used their posts to be vaccinated before the higher priority (first responders and elders) beneficiaries. Likewise, there have been allegations of corruption concerning public purchases of masks and other pandemic-related PPE in public institutions such as the police. Under Peruvian law the Public Prosecutors (*Ministerio Público*) are independent from the judiciary and they hold the competence to initiate criminal actions; therefore, the judiciary is not entitled to address these cases until they are brought before it by the Public Prosecutors (which is in course or at least would be forthcoming).¹³

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

During the suspension of activities at the judiciary, in the first months of the lockdown, except for urgent constitutional, criminal cases with detainees and family-related matters, all other legal actions could not be filed. Thus, creating a serious limitation on initiating legal actions.

Due to the pandemic, we have also witnessed delays across the board,¹⁴ including the time for which detainees were held in custody without the initiation of judicial process.¹⁵ According to the CEJA report,¹⁶ it was only in late April 2020 – a month and a half into the pandemic – that the judiciary ordered the judges to review the cases with detainees held in custody. Prior to this order, these cases were suspended together with the activities at the judiciary.

¹² <https://www.nytimes.com/2021/02/25/world/americas/covid-south-america-vaccine-corruption.html>
<https://www.cnn.com/2021/02/16/americas/peru-sinopharm-secret-vaccines-intl/index.html>
<https://www.cnn.com/2021/02/18/americas/peru-vaccine-scandal-analysis-latam-intl/index.html>
[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00508-0/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00508-0/fulltext)

¹³ <https://www.reuters.com/article/health-coronavirus-peru/courtesy-doses-peru-probes-early-use-of-sinopharm-vaccine-by-top-govt-officials-idUSL1N2KLOZF>
<https://cnnespanol.cnn.com/2021/02/15/vizcarra-fiscalia-investiga-peru-vacunacion-sinopharm/>

¹⁴ <https://gestion.pe/peru/poder-judicial-ha-acumulado-33-millones-de-expedientes-sin-resolver-durante-la-pandemia-nndc-noticia/?ref=gesr>

¹⁵ <https://www.defensoria.gob.pe/poder-judicial-debe-implementar-mejoras-en-la-atencion-de-casos-de-personas-detenidas-requisitorias-y-uso-de-audiencias-virtuales-en-todo-el-pais/>

¹⁶ https://biblioteca.cejamerica.org/bitstream/handle/2015/5648/REPORTECEJA_EstadodelajusticiaenAlbajoelCOVID19_20mayo2020.pdf?sequence=5&isAllowed=y



Even though in Peru judges always had a tendency to limit access to the public by ordering that only those directly involved in the defense appeared before court,¹⁷ this has continued during virtual hearings and we have experienced certain specific instances where the judge has not even allowed the client to be present at a virtual hearing, limiting attendance to only the defense lawyers.

Also, we have experienced certain specific instances where the use of technology (or misuse) has affected the defense. For instance, by the judiciary failing to appropriately notify of hearings (misspelling email addresses) and the like, which we cannot pin-point as being deliberate (corruption) or casual (negligence).

As stated by the president of the judiciary,¹⁸ digital justice tools will be implemented in all courts across the country in the next five years. The main concern about them is the restricted access to internet and, particularly, computers across the country, which could in turn, restrict access to justice to most of the population.¹⁹

According to the National Institute of Statistics and Informatic (INEI), in March 2020, only 52.9% of people in Lima had a computer with internet access in their home, and in other cities the access is much lower at 38.3%. In rural areas only 7.5% of people have access to a computer with internet.²⁰

It is worth noting that there have been certain efforts to investigate the impact of the pandemic on the legal system such as the following:

- Disaster Law: COVID-19 by the Law Faculty of the Pontificia Universidad del Perú.²¹
- COVID-19 and its impact on private law contracts by 'Gaceta Civil' Nr. 82 law review.²²
- 'Themis' law review from the Pontificia Universidad Católica del Perú has issued a call for papers on Law, Public Policy and COVID-19.²³

¹⁷ According to article 139.4 of the Peruvian constitution, trials are public unless legally stated otherwise. Nevertheless, given limited space in the Judges chamber and other logistical issues or personal preferences, it is customary that Judges deny entry to the hearing to any person who is not directly related to the case.

¹⁸

https://www.pi.gob.pe/wps/wcm/connect/cortesuprema/s_cortes_suprema_home/as_inicio/as_enlaces_destacados/as_imagen_prensa/as_notas_noticias/2020/cs_n-en-menos-de-5-anos-eje-sera-implementado-en-todo-pj-23112020

¹⁹ <https://laley.pe/art/9828/nuevas-normalidades-viejas-%20desigualdades>

²⁰ https://www.inei.gob.pe/media/MenuRecursivo/boletines/boletines_tics.pdf

²¹ <https://facultad.pucp.edu.pe/derecho/noticias/derecho-los-desastres-covid-19/>

²² <https://laley.pe/art/9636/gaceta-civil-82-covid-19-y-su-impacto-en-los-contratos-privados>

²³ <https://www.facebook.com/themis.pe/posts/3743943472330453>

Senegal

Mouhamed Kebe, Managing Partner | mhkebe@gsklaw.sn

Yankhoba Ndiaye, Attorney | y.ndiaye@gsklaw.sn





Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Senegal

1. Has the pandemic posed any particular challenge to the judiciary’s independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

Not especially. The Covid-19 pandemic has mainly affected the functioning of the judiciary, with the interruption and the scaling-down of judicial activity among others impacts. However, different accompanying measures have been taken by the Government to reduce the impact of such interruption on the population e.g., suspension of procedure deadlines or prescription period.

Only one measure might potentially be seen as a challenge to the judiciary’s independence, namely the suspension by the Government of the enforcement of judgments due to the pandemic. Indeed, this has led to a situation where Court decision which have become final decision could not be enforced because of the Government.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation: When it comes to the suspension of procedural deadlines, the two Orders were enacted after the state of emergency was announced and were given retroactive effect in order to include the period of suspension of judicial activity that was prior to the state of emergency declaration.

The scaling-down of judicial activity in criminal cases has allowed the Court to conclude its hearing by 17:00 each day in order to allow the population to reach home by curfew.

¹ For this project’s purposes, “judicial independence” is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



Digital justice mechanisms have been enhanced in the Commercial Tribunal: requests, pleadings and case materials can be sent through a digital platform.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain: No data, research or study has been published to our knowledge. However, as a practitioner of the Court, we can feel that some measures that have been taken and have resulted in an increased workload of cases. Indeed, in some Courts such as the District Court, it has been decided the suspension of civil and commercial procedure for a certain period of time (1 month during the second wave, for example). As a matter of consequence, no hearing has been held, and cases have accumulated. Otherwise in criminal procedure, because of the curfew, it has been decided to reduce the number of case to be ruled each time in order to conclude hearings at 17:00. Consequently, cases have accumulated as well.

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

As far as the District Court is concerned, we are waiting to see when the suspension will be lifted. Otherwise no special measure has been taken.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

No to our knowledge

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial

- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

5.1. Initiating of legal actions

Due to the interruption and scaling-down of judicial activity, some Courts in Senegal, for example the District Court of Dakar, have decided to suspend their activity for a period of time. During that period, no legal actions could be initiated.

Further, due to the implementation of rotation within the staff to respect barrier gestures in some Courts, delays in obtaining a response are noticed when a request is submitted that may lead to a situation where important deadline can be missed.

In the Commercial Courts, the implementation of digital mechanisms has taken some time to come to fruition. Consequently, additional time has been noticed in delivering and providing feedback on a request of a case initiated online. Furthermore, uncertainty on whether or not a request has been submitted and received by the Court has been noticed when the accompanying documentation is lengthy.

5.2 Security of parties, victims and witnesses

As far as the pandemic, we have noticed that the lack of strict barriers gestures between detainees especially have undermined their security. Indeed, they are seen clustered within the area provided to them in the Courtroom, most of the time without any face masks.

5.3 Right of detainees to trial within a reasonable time / right to be tried without undue delay

As a result of the pandemic, a curfew was implemented by the Government in Senegal. Consequently, especially in criminal cases, to allow the parties, victims and witness time to reach their home by the curfew, the daily caseload has been reduced. Then detained people faced delays in having their matters heard in what may be considered a reasonable time.

5.4 Right to a public hearing

The right to a public hearing has been undermined due to the implementation of barrier gestures within the Courtroom. Indeed, one of the ways to introduce barrier distance and gesture in the judicial was to prohibit the public from attending court sessions unless they are parties, victims, or witnesses, especially in criminal cases. As a consequence, it has been noticed sometimes that a very small number of people in the public attend hearings.

South Africa

Claire Tucker, Partner | claire.tucker@bowmanslaw.com

Lubumba Kamukwamba, Senior Associate |
lubumba.kamukwamba@bowmanslaw.com

Khazi Mashamaite, Associate | khazi.mashamaite@bowmanslaw.com





Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: SOUTH AFRICA

1. Has the pandemic posed any particular challenge to the judiciary’s independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

ANSWER TO QUESTION 1

*On 15 March 2020, the President of South Africa declared a national state of disaster in response to the Covid-19 pandemic and announced restrictive measures to contain the Covid-19 virus, such as a ban on mass gatherings, curfews, social distancing and the suspension of certain high risk economic activities. Over the course of the last year this has led to various levels of “lockdown” regulations (**Covid regulations**)² which over the period have been adjusted from “level one” to “level five”. The Minister of Justice and Correctional Services has pursuant to these Covid regulations issued directions “to address, prevent and combat the spread of Covid-19 in all courts and court precincts”. The Chief Justice and Heads of Court have also issued various directives to the judiciary from time to time which have been adjusted to suit the lockdown level. These measures are not considered in any way to have undermine judicial independence. These measures have impacted on the accessibility and effectiveness of the judiciary, particularly during periods of severe lockdown where the Court buildings were difficult to access.*

At the start of the pandemic (mid-March to mid-April 2020), the regulations provided that the only matters that could be heard in open court were urgent matters (including urgent matters arising from disaster management activities). All non-urgent and non-essential civil and criminal matters were postponed subject to narrow exceptions, for example, where this would lead to a substantial injustice. Legal practitioners could only attend court for urgent matters, and provided they had the requisite permits. This posed a challenge to the functioning of the judiciary but was not in any way relevant to independence.

In a bid to safeguard judicial functioning whilst protecting officers of the court and litigants from contracting Covid-19, the Supreme Court of Appeal directed that virtual hearings would be standard.³ Where a virtual hearing was not possible, and an in-person hearing would not be safe, the matter would need to be adjourned.⁴ Various divisions of the High Court, followed suit and issued directives that encouraged the use electronic means to reduce the need for physical court attendances and in-person hearings.⁵ An ongoing challenge posed by this shift is that not all courts, judges and court officials have the necessary technological

¹ For this project’s purposes, “judicial independence” is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

² Regulations relating to Covid-19 were first published in terms of section 27(2) of the Disaster Management Act 57 of 2002 in Government Gazette No. 43107, Government Notice No. R318 of 18 March 2020 and have been amended from time to time depending on the infection rates and other risk factors identified by government.

³ The practice direction in respect of ‘The Supreme Court of Appeal video or audio hearings during the Covid-19 pandemic’, issued on 24 April 2020.

⁴ Paragraph 3 of the practice direction in respect of ‘The Supreme Court of Appeal video or audio hearings during the Covid-19 pandemic’, issued on 24 April 2020.

⁵ Paragraph 3 of the Judge President’s directive in respect of ‘Special Arrangements to Address Covid-19 Implications for All Litigation in the Pretoria and Johannesburg High Courts’ dated 25 March 2020.



resources or know-how to manage virtual hearings and electronic filing systems. Occasionally matters were postponed or delayed due to technical issues.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: Urgent criminal and civil matters,
 - Continuation of activities with preventive & health measures
 - Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

ANSWER TO QUESTION 2

Interruption or scaling-down of judicial activity

The main interruption was the first interruption when South Africa initially went into a total lockdown from 15 March 2020 to 1 May 2020. At that point only very urgent cases were heard.

Following that judicial activities have been interrupted to varying degrees depending on the risk posed by the pandemic. The risk levels are expressed as “Covid-19 Alert Levels”: Alert level 1 refers to low virus spread and high health system readiness; Alert level 2 refers to moderate virus spread with high readiness; Alert level 3 refers to moderate virus spread, with moderate readiness; Alert level 4 refers to moderate to high virus spread, with moderate readiness; and Alert level 5 refers to high virus spread, and/or low health system readiness.

Criminal matters

During Alert Level 4 all criminal enrolled for trials were postponed to future dates save for prioritised cases.⁶ Accused persons arrested for a petty offence were released and warned to appear in court on a future date.⁷

During Alert Level 3 the courts only heard prioritized matters.⁸ Accused persons arrested for a petty offence were released and warned, only if the matter could not be finalized during first appearance.⁹

Civil matters

⁶ Para 12 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

⁷ Para 18 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

⁸ Para 12 of the Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3).

⁹ Para 15 of the Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3).



Under Alert Level 4, the Court directives prohibited all Small Claims Court matters, the services relating to the Small Claims Court were limited to email and telephonic enquiries.¹⁰ The hearing of Small Claims Court matters resumed in Alert Level 3.¹¹ Only matters classified as urgent were could be placed on the court roll during Alert Level 3.¹²

Under Alert Level 2 trials involving a witness from outside South Africa, where the testimony of such witness could not be obtained through an audiovisual link, could only be heard when international travels were permitted.¹³

Digital judicial mechanisms

The Minister of Justice and Chief Justice issued directions aimed at restricting physical appearances in court rooms. The use of audio-visual technologies as alternative means to facilitate court proceedings was encouraged. The directions went as far as defining “court” to include audiovisual links to a court hearing, or any other electronic mode linked to a court hearing.¹⁴

Civil matters

Under Alert Levels 2, 3 and 4,¹⁵ the court directives provided discretion to the Judicial Officers to authorise hearing of matters through teleconference, videoconference or any other electronic mode, which dispenses with the necessity to be physically present in a courtroom.¹⁶

Criminal matters

Teleconference, videoconference¹⁷ or audio-visual links, were used to postpone cases where the accused persons were in custody and for unopposed bail applications, this applied in Alert Levels 2, 3 and 4.¹⁸ However under Alert Levels 2 and 3, the judicial officers were afforded more discretion to use audio-visual links where the presiding officer deemed it appropriate.¹⁹ Where a foreign interpreter was not available within the province, alternative arrangements for audio-visual interpretation were made.²⁰

Different approaches were employed by various South African courts in implementing the digital judicial mechanisms. Some of these approaches are noted below:

Gauteng High Court – *On 10 January 2020 the Judge President, issued a practice directive for the full implementation of the CaseLines, a Court Online Evidence Management Application system. The system broadly functions by way of case creation, party/legal representative invitation, document filing and*

¹⁰ Para 17 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

¹¹ Part B of the Annexure to the Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3).

¹² Para 18 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

¹³ Part B of the Annexure to the Department of Justice and Constitutional Development Directions (11 September 2020) (Alert Level 2).

¹⁴ See for example Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4); Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3); Department of Justice and Constitutional Development Directions (11 September 2020) (Alert Level 2); Directives issued by Chief Justice Mogoeng Mogoeng (20 March 2020); and Directives issued by Chief Justice Mogoeng Mogoeng (2 May 2020).

¹⁵ Paras 18 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

¹⁶ Para 18 of the Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3); and para 8 of Department of Justice and Constitutional Development Directions (11 September 2020) (Alert Level 2).

¹⁷ Paras 8-10 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

¹⁸ Act 51 of 1977.

¹⁹ Para 6 of the Department of Justice and Constitutional Development Directions (11 September 2020) (Alert Level 2).

²⁰ Paras 22 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4); para 19 of the Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3); and para 9 of Department of Justice and Constitutional Development Directions (11 September 2020) (Alert Level 2).



uploading and case presentation. Matters now heard by the High Courts must be presented exclusively on CaseLines.²¹ This has been an important innovation.

Western Cape High Court – *Western Cape High Court Practice Directive provided that the Judicial Officer shall consider options to proceed with cases with minimal contact and virtual hearing options such as Zoom, Webex or Microsoft Teams should be considered.²²*

Constitutional Court – *The Constitutional Court issued directions pertaining to the use of video conferencing facilities for conducting hearings.²³ As an innovative step, the Constitutional Court started streaming judgment hand downs live on YouTube in lieu of public attendance at these hand downs.*

Supreme Court of Appeal – *Remote or virtual hearings by way of telephone or video-web conferencing solutions, if available are the default position of this Court until further direction. Where a virtual hearing is not possible, and an in-person hearing would not be safe or possible, the matter will need to be adjourned.²⁴*

Labour Court – *The directives issued in respect of access to the Labour Court provide for oral hearings to be dealt with by video conferencing.²⁵ The resolution of disputes through conciliation, mediation or arbitration are to take place telephonically or through a digital online platform.²⁶*

Continuation of activities with preventive & health measures

*The Minister of Justice issued directives which put in place various safety measures at courts, court houses and justice service points (collectively, **Court Buildings**). These together with various restrictions on access to Court Buildings has allowed for the continuation of litigation. Under Alert Level 4, for example:*

- *Access to a Court Building was restricted to persons with material interest in a case such as litigants, accused persons, legal practitioners, witnesses, or persons who may be needed to provide support to the litigant, accused persons and witnesses including family members and other listed persons.*
- *Person who were in contact or exposed to, another person who had tested positive for COVID-19 except a person who had tested positive but have recovered, were not be allowed to enter a Court Building during the state of national disaster.*
- *Court officials who manage a justice service point were to ensure that there was always an adequate supply of hand sanitisers and soap.²⁷*
- *Every person in a court room or court house, or justice service point had to comply with the Covid-19 protocols, wearing of masks and maintaining social distancing.²⁸*

²¹ See Amended Gauteng Consolidated Directive Gauteng Division, Johannesburg and Pretoria High Courts (18 September 2020) and LexisNexis “Covid-19 pushes courts to new era” (04 February 2021) available at: <https://www.lexisnexis.co.za/news-and-insights/virtual-working/covid-19-pushes-courts-to-new-era>

²² Para 6 of the Western Cape High Court Practice Directive (11 May 2020).

²³ Directions of the Constitutional Court (26 August 2020).

²⁴ Practice Directives of the Supreme Court of Appeal (24 and 29 April 2020).

²⁵ Section 5 of the Urgent Directive in respect of access to the Labour Court (28 April 2020); and section 6 of the Directive in respect of access to the Labour Court in light of the COVID-19 pandemic (1 July 2020).

²⁶ Section 5 of the Urgent Directive in respect of access to the CCMA

²⁷ Para 36 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

²⁸ Para 37 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).



Under Alert Level 3, the same safety measures and restrictions were to be followed as in Alert Level 4, save for: where a person previously tested positive, they could only enter a Court Building once they had tested negative;²⁹ and the Court Building had to be disinfected if any officer of the court or a member of the public tested positive for Covid 19 and had been in the Court Building.³⁰

Under Alert Level 2 most remained, we have recently moved to Alert Level 1 but many social distancing measures are likely to remain.³¹

Prioritization of cases/procedures

Arrangements were made to ensure that essential justice services could be rendered, such as bail hearings and applications, and applications for protection orders in Domestic Violence and Harassment cases. Furthermore there were a number of Constitutional challenges to the Covid regulations that were heard and decided on during the lockdown period.

Criminal

All criminal trials enrolled during Alert Level 4 were postponed to future dates, save for prioritised cases.³² Under Alert Levels 2, 3 and 4, all matters where children were detained in Child and Youth Care Centres and Correctional Centres were brought before court for consideration of continued detention, and trials involving awaiting-trial detainees who are being held in Correctional Centres must be prioritized.³³

Civil

Only urgent civil cases and certain permitted services may be placed on the court roll during Alert Level 4. These included but not limited to: (i) Civil matters dealt with online, telephonically or in writing; (ii) urgent motion applications; (iii) urgent civil trials including COVID 19 related cases.³⁴

Family

As explained above only certain cases and certain permitted services may be placed on the court roll during Alert Level 4, some of these matters were: child and spousal maintenance proceedings; protection orders in terms of the Domestic Violence Act No. 116 of 1998 or the Protection from Harassment Act No. 17 of 2011; and foster care applications and hearings.³⁵

The above family matters were extended under Alert Level 3 to also include Guardianship proceedings, and mediations and facilitation.³⁶

Prioritized services and procedures

Only certain services and execution procedures were permitted to be rendered during Alert Level 4,³⁷ subject to the person performing such service being issued a permit.³⁸

²⁹ Para 7 of the Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3).

³⁰ Para 29 of the Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3).

³¹ Para 5.4 of the Department of Justice and Constitutional Development Directions (11 September 2020) (Alert Level 2).

³² Para 12, read together with Annexure 1A, of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

³³ Paras 13-14 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

³⁴ Para 18, read together with Annexure 1B, of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4)

³⁵ Para 18, read together with Annexure 1C, of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

³⁶ Part C of the Annexure to the Department of Justice and Constitutional Development Directions (2 June 2020) (Alert Level 3).

³⁷ Paras 29 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).

³⁸ Paras 31-33 of the Department of Justice and Constitutional Development Directions (3 May 2020) (Alert Level 4).



Under Alert Level 4, service of processes and execution writs and warrants by sheriffs were limited to urgent cases or permitted services, for example: (i) service and execution of court orders relating to COVID-19; (ii) service of domestic violence protection orders.

Other prioritized services under Alert Levels 3 and 4 include only select services in respect of Legal Aid South Africa, offices of the Master of the High Court and others.³⁹

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:
- a. In what matters?
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: Click here to enter text.

Please explain: Click here to enter text.

ANSWER TO QUESTION 3a

*The latest Judiciary Annual Report 2019/2020 (**Judiciary Annual Report**)⁴⁰ and the Department of Justice and Constitutional Development Annual Report for the 2019/2020 year (**DoJ&CD Annual Report**),⁴¹ contain key performance indicators for the various courts in South Africa. However, the reports only provide performance indicators up to the end of 31 March 2020. As such, the reports are only indicative of the backlog existing at the beginning of the national lockdown and not reflective of the impact which the Covid-19 pandemic has had on the functioning of the judiciary. Although a report has yet to be compiled which provides the overall impact of Covid-19 on the functioning of the judiciary, there are clear statistical indications that the nationwide lockdown worsened South Africa’s already existing case backlog.*

During the release of the Judiciary Annual Report, the Chief Justice noted that the ripple effect of the national lockdown on the judicial system was yet to be assessed, and that the outcome is expected to be dismal.⁴² Further, the Chief Justice has stated that during the lockdown the courts “could not run as efficiently as they ought to” and this has had “undesirable consequences”.

The Minister of Justice has stated that the immediate disruption by the national lockdown in the optimal use of courts resulted in an increase of outstanding cases in the lower courts. At the end of May 2020 outstanding caseloads in Regional Courts, increased by 1%, and in District Courts, increased by 18%.⁴³ The backlog of cases in the Regional Courts, increased by 14%, and by 63%. in the district courts.⁴⁴

³⁹ For more information on these permitted services see the Annexures to the Department of Justice and Constitutional Development’s Directions dated 3 May 2020 for Alert Level 4 and dated 2 June 2020 for Alert Level 3.

⁴⁰ The latest Judiciary Annual Report 2019/2020 is accessible at: <https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports>

⁴¹ The DoJ&CD Annual Report 2019/2020 is available at: https://www.justice.gov.za/reportfiles/report_list.html,

⁴² A recording of the media briefing held on 11 December 2020 is available here: <https://www.enca.com/news/livestream-chief-justice-mogoeng-briefs-media>

⁴³ Minister of Justice in reply to questions posed, dated 11 August 2020 available at: <https://pmg.org.za/committee-question/14253/>

⁴⁴ Minister of Justice in reply to questions posed, dated 11 August 2020 available at: <https://pmg.org.za/committee-question/14253/>

*At a meeting of the Portfolio Committee on Justice and Correctional Services held on 24 June 2020 (**Committee meeting**),⁴⁵ the Minister of Justice and the Department of Justice and Correctional Services gave a briefing on, amongst other things, lockdown court case backlogs and overcrowding in correctional centres.*

At the time of the Committee meeting, South Africa was at Alert Level 3 and a total of 68 courts had been closed since the start of lockdown due to infections. The Committee members noted that as a result there had been a considerable spike in district and regional court case backlogs and the numbers were extremely concerning. The Committee Members noted that before the March 2020 lockdown, the case backlog at a district court level stood at 28,445 and in the regional courts the case backlog before lockdown was 27,976.

By the end of August 2020, there was a backlog of 68,171 cases at the high, regional and district courts - an increase of nearly 29,000 added to the already large backlog before lockdown. By the end of September 2020, the backlog had decreased slightly to 49,160.⁴⁶

Recently, the Johannesburg Attorneys' Association contacted the Johannesburg High Court after hearing from members that there are and have been delays in receiving court orders.

ANSWER TO QUESTION 3b

Digital/electronic measures

As explained in the answer to Question 2 above, the Minister of Justice and Chief Justice issued several directions which expressly mandate the use of audio-visual technologies as alternative means to facilitate court proceedings.

*The Department of Justice and Constitutional Development (**Department**) noted in its DoJ&CD Annual Report that efforts have been made in the Integrated Justice System structures to develop and implement digital/electronic measures which seek to modernise court processes and thereby limit and resolve blockages that may occur.⁴⁷*

The Department has noted that technology is easier to use for remand cases and civil trials but South Africa is not yet at the stage to conduct a fully-fledged criminal trial using technology.⁴⁸ The following are examples of digital/electric measures which several South African courts are currently adopting to curb against case backlogs, notwithstanding budgetary constraints:⁴⁹

Courts Online - *An advanced cloud-based collaboration solution encompassing a Digital Case Management and Evidence Management system which provides legal practitioners with the opportunity to file documentation electronically online anywhere and anytime without being physically present at court.*

⁴⁵ Meeting Summary and Meeting Report meeting of the Portfolio Committee on Justice and Correctional Services held on 24 June 2020 accessible at: <https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmatesMinistersbriefing>

⁴⁶ C Geach "Hospitals, courts face backlog headache" *Weekend Argus* (17 October 2020) accessible at: <https://www.iol.co.za/weekend-argus/news/hospitals-courts-face-backlog-headache-80319668-beef-49e4-a463-2ef70ed94337>

⁴⁷ Page 32 of the DoJ&CD Annual Report.

⁴⁸ Portfolio Committee on Justice and Correctional Services held on 24 June 2020 accessible at: <https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmatesMinistersbriefing>

⁴⁹ LexisNexis "Covid-19 pushes courts to new era" (04 February 2021) available at: <https://www.lexisnexis.co.za/news-and-insights/virtual-working/covid-19-pushes-courts-to-new-era>



CaseLines - A Court Online Evidence Management Application system. The system broadly functions by way of case creation, party/legal representative invitation, document filing and uploading and case presentation. Matters now heard by the High Courts must be presented exclusively on CaseLines.

Video conferencing technology – Adopted by South African courts to ensure that the legal system does not grind to a complete halt during the COVID-19 pandemic and national extended lockdown.

Alternative dispute resolution forums – Alternative dispute resolution forums have continued to run at full functionality during the lockdown. Arbitrations are now being held virtually.

Remote consultations are now accepted as fair – The Labour Court recently held that the Labour Relations Act (LRA) does not prescribe the form in which the consultation process is to take place.⁵⁰ Thus, consultation meetings via Zoom are fair against the backdrop of the COVID-19 pandemic and the “new normal”.

Sixteen courts across the country are benefitting from Wi-Fi connectivity – Wi-Fi connectivity has been made available by LexisNexis to give judges, magistrates and legal practitioners at South Africa’s pre-eminent courts easy access to legal information, saving time and aiding efficiency as they oversee some of the nation’s most important legal proceedings.

Criminal case backlog plans

The Department introduced the criminal case backlog reduction project as a plan for continuous improvement in the case management flow to eradicate case flow blockages, to achieve a reduction in criminal cases and for greater court efficiency and effectiveness.⁵¹ The National Prosecuting Authority has used plea and sentence agreements as a tool to finalise cases promptly.⁵²

Priority rolls

Most courts have developed priority rolls in conjunction with the National Prosecuting Authority, Legal Aid SA and the legal representative of the accused persons, which has enabled a number of courts to function. The roll aims to ensure that matters that were not heard due to the lockdown are prioritised for hearing.⁵³

It was noted at the Committee meeting that the creation of the priority roll, has improved the finalisation of cases.⁵⁴

Measures taken by the office of the Family Advocate

The office of Family advocate has capacity constraints, which has impacted on the office’s ability to deliver on the planned targets. Delays in the finalisation of cases have resulted in matters affecting children being finalised between 12-18 months. In response to these challenges, the offices have established Parental

⁵⁰ Food and Allied Workers Union (FAWU) v South African Breweries (Pty) Ltd (SAB) (2020) 41 ILJ 2652 (LC) (28 May 2020)

⁵¹ Page 58 of the DoJ&CD Annual Report.

⁵² Portfolio Committee on Justice and Correctional Services held on 24 June 2020 accessible at: <https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmatesMinistersbriefing>

⁵³ Portfolio Committee on Justice and Correctional Services held on 24 June 2020 accessible at: <https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmatesMinistersbriefing>

⁵⁴ Portfolio Committee on Justice and Correctional Services held on 24 June 2020 accessible at: <https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmatesMinistersbriefing>



Responsibilities and Rights Educational Workshops, this has resulted in parties settling their matters timeously.⁵⁵

Other strategies which are intended to be implemented include, among others: the creation of a Family Advice and Family Counsellor ad hoc system; creation of an ad hoc system for Maintenance Officers and the creation of an Automated Case Management System in terms of which SMS bundles will also be rolled out both in the maintenance area and Office of the Family Advocate.⁵⁶

Other measures

In addition to the abovementioned measures, a Covid-19 Court Optimisation Committee was set up to unpack the challenges and bottlenecks that courts are facing.⁵⁷ The Department has also engaged with all stakeholders to establish a Steering Committee to deal with not only the backlogs, using digital/online platforms, but also to fast-track the establishment of Special Commercial Crimes Courts.⁵⁸

4. *Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.*

ANSWER TO QUESTION 4

In a bid to provide relief to those who would be most adversely affected by the Covid-19 pandemic and resultant restrictive measures, Government announced the largest relief effort in the country's history, a stimulus package of R500 billion. The package was to provide for food parcels for the needy, a temporary social grant and a Temporary Employer/ Employee Relief Scheme (TERS) for those whose salaries were affected. The procurement of personal protective equipment (PPE) by government departments has however been marred by allegations of corruption.

Various law enforcement agencies are collaborating to prosecute those who are alleged to have committed corrupt activities. In a bid to curb the widespread corruption, the President signed a proclamation⁵⁹ authorising the Special Investigating Unit (the SIU), to investigate any unlawful or improper conduct in the procurement of goods, works and services or related to the national state of disaster in any state institution.

Upon finalising investigations, the SIU refers such findings to the Special Tribunal for prosecution. The Special Tribunal was established before the Covid-19 pandemic, as part of government's efforts to fast-track corruption cases. The SIU has made 38 referrals of corruption cases for prosecution and has to date recovered R127million in its efforts to pursue case of PPE corruption.

The Auditor General has similarly adopted special measures to safeguard funds committed to the fight against Covid-19 and undertook special audits in order to detect and prevent misuse of the funds and to identify risks in the system.

The President has indicated that government will be looking into establishing four new Special Commercial Crimes Courts to deal with cases of Covid-19 related corruption.⁶⁰

⁵⁵ Page 32 of the DoJ&CD Annual Report.

⁵⁶ Page 70 of the DoJ&CD Annual Report.

⁵⁷ Page 32 of the DoJ&CD Annual Report.

⁵⁸ Page 32 of the DoJ&CD Annual Report.

⁵⁹ Proclamation No. R23 of 2020. *Special Investigating Unites and Special Tribunals Act, 1996 (Act No. 74 of 1996): Referral of matters to existing special investigating unit*, Gazetted on 23 July 2020.

⁶⁰ The President indicated this during the National Council of Provinces meeting of 27 October 2020.



5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:
- Initiating of legal actions
 - Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
 - Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
 - Security of parties, victims and witnesses
 - Right of detainees to trial within a reasonable time / right to be tried without undue delay
 - Right to an interpreter
 - Right to an effective and confidential communication between the accused and lawyer
 - Right to examine evidence
 - Right to trial by a competent, independent and impartial tribunal
 - Right to a public hearing
 - Right to be present at trial
 - Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation: [Click here to enter text.](#)

ANSWER TO QUESTION 5

INTRODUCTION

*The court directives which have been issued from time to time (discussed in the answers to Questions 1, 2 and 3b above) limit the right of access to courts in section 34 and the right to a fair criminal trial in section 35 of the Constitution of the Republic of South Africa, 1996 (**Constitution**). Various elements of both rights are limited, including the 'open justice' requirement that proceedings be held in open court and be accessible to anyone; the requirement that proceedings be concluded without unreasonable delay, especially in criminal proceedings, and the right to have a matter decided at all. A particular difficulty has been in initiating new matters as many Court buildings remain closed but most accommodate specific opening times and have made good use of electronic platforms and so over time this problem has decreased.*

These restrictions have been debated both in public forums and in the Courts and it is fair to say there is a continuous process of refinement of the measures based on the stage of lockdown alert level and public sentiment.

Notable Case Law

During our lockdown period the KwaZulu-Natal High Court (Durban)⁶¹ considered an application in which the applicant, who is the plaintiff in the action, sought an order that a trial set down for a period of 10 days, commencing on 24 August 2020, be conducted remotely via Microsoft Teams. The defendants opposed the application primarily on the basis that they have a right to cross-examine witnesses in the 'atmosphere' of a court and that the presiding judge would have difficulty assessing an individual's reactions whilst he or she is giving evidence, thereby infringing the audi alteram partem principle (duty of the court to hear both sides).⁶²

⁶¹ *Union-Swiss (Pty) Ltd v Govender & others* 2021 (1) SA 578 (KZD) (**Union Swiss**).

⁶² *Union Swiss* at para 11.



The court found that the starting point in considering this application was section 34 of the Constitution. The court then considered the various regulations issued under the DMA and the directives of the courts.⁶³

Although the Judge was aware of matters being conducted via electronic means, he was not aware of any instance, absent any overriding consideration of urgency or public interest, of a virtual trial being ordered at the discretion of a judicial officer, in the face of opposition. The Judge expressed concern over a court ordering a litigant to conduct its legal ‘warfare’ in a manner that departed from the traditional rules of court. The Judge held that while the plaintiff may be comfortable with the use of electronic media in carrying out its litigation, the court must be satisfied that both parties are placed on an equal footing in respect of the matter before it. It would be unfair to label any of the defendants as being opportunistic for refusing to submit to a trial by electronic means. The situation would have been entirely different if both parties consented to a virtual trial and if the court was satisfied that the matter was sufficiently urgent to warrant it being heard.⁶⁴

Defendants’ argued against a virtual trial due to issues of internet connectivity or the difficulty in assessing a witness’s demeanour on a video screen but the case was not decided on this basis. The critical issue which Court took into account was that the plaintiff could not demonstrate why the trial is of such urgency that the practice directive of the Judge President of 1 May 2020 should recognise it as sufficiently urgent to warrant it going ahead, albeit by electronic means. The Judge remarked as follows: ‘I do not suggest for a moment that it is inconceivable for civil trials to take place during the pandemic. It is entirely dependent on the nature of the action and the potential prejudice that would be suffered if the matter had to wait for the allocation of a new date, several months or years ahead. Urgency will be the determining factor in all cases.’⁶⁵

The Judge also expressed the view that, ‘where a decision is made by a judge to proceed with a matter by way of videoconference through the internet, this must always be done independently of any assistance by the litigants in the form of either hardware, such as computers or routers, or in the form of data for the purpose of accessing the internet. This would not be affected by directions for the conduct of the trial which require, for example, that the plaintiff as dominus litis and the party proposing that the proceedings take place by electronic means, take the necessary steps of issuing the electronic invitations to the hearing or to record the on-going proceedings. These are part and parcel of the standard requirements for holding of on-line hearings.’⁶⁶

⁶³ *Union Swiss* at para 14.

⁶⁴ *Union Swiss* at para 31.

⁶⁵ *Union Swiss* at para 32.

⁶⁶ *Union Swiss* at para 18.



How has the COVID-19 pandemic affected the judiciary?

Bibliography – South Africa

A. Government / government agency publications	
1.	Meeting Summary and Meeting Report meeting of the Portfolio Committee on Justice and Correctional Services (2020). Accessible at: https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmatesMinistersbriefing
2.	Minister of Justice in reply to questions posed (2020). Available at: https://pmg.org.za/committee-question/14253/
3.	Portfolio Committee on Justice and Correctional Services (2020) Minister’s Briefing. Accessible at: https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmatesMinistersbriefing
4.	South African Government: Fighting corruption during Covid-19 (2020). Available at: https://www.gov.za/anti-corruption/fighting-corruption-during-covid-19#
5.	The DoJ&CD Annual Report (2019/2020). Available at: https://www.justice.gov.za/reportfiles/report_list.html
6.	The latest Judiciary Annual Report (2019/2020). Available at: https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports
B. NGOs, Think Tank and Professional Body publications	
7.	Centre for Human Rights, University of Pretoria (2020) 10-Day Campaign on Covid-19. Available at: https://www.chr.up.ac.za/latest-news/2018-agewithrights-10-day-campaign-on-covid-19
8.	Corruption Watch (2020) In South Africa, Covid-19 has exposed greed and spurred long-needed action against corruption. Available at: https://www.transparency.org/en/blog/in-south-africa-covid-19-has-exposed-greed-and-spurred-long-needed-action-against-corruption
9.	D Bluris (2020) Three principal ways Covid-19 will affect South African jurisprudence in bail proceedings. <i>De Rebus</i> . Available at: http://www.derebus.org.za/three-principal-ways-covid-19-will-affect-south-african-jurisprudence-in-bail-proceedings/



10.	G Pienaar (2020) Democratic oversight in the time of the Covid-19 lockdown. <i>Human Sciences Research Council</i> . Available at: http://www.hsrc.ac.za/en/news/general/surveillance-covid-19
11.	Konrad Adenauer Stiftung (2020) Assessing the current situation of the independence of the Judiciary in sub-Saharan Africa. Available at: https://www.kas.de/documents/275350/0/REPORT++ASSESSING+THE+CURRENT+SITUATION+OF+THE+INDEPENDENCE+OF+THE+JUDICIARY+IN+SU+B-SAHARAN+AFRICA.pdf/3daa33e5-8e59-8611-5af6-03fa9e641e64?version=1.0&t=1605520228554
12.	Lexis Nexis (2021) Covid-19 pushes courts to new era. Available at. https://www.lexisnexis.co.za/news-and-insights/virtual-working/covid-19-pushes-courts-to-new-era
C. Academic publications	
13.	N Whitear-Nel 'Remote justice and Covid-19: South Africa lags behind' <i>University of KwaZulu-Natal</i> . Available at: https://clms.ukzn.ac.za/remote-justice-covid-19-south-africa-lags-behind/
14.	T Broodryk (2020) Covid-19, The courts and access to justice issue 9 <i>JUTA</i> . Available at: https://juta.co.za/press-room/2020/05/22/covid-19-courts-and-access-justice/
E. Other resources	
15.	C Geach (2020) "Hospitals, courts face backlog headache" <i>Weekend Argus</i> Accessible at: https://www.iol.co.za/weekend-argus/news/hospitals-courts-face-backlog-headache-80319668-beef-49e4-a463-2ef70ed94337
16.	E Mabuza (2021) 'SIU recovers R127m from dodgy PPE procurement tenders' <i>Timeslive</i> . Available at: https://www.timeslive.co.za/news/south-africa/2021-02-05-siu-recovers-r127m-from-dodgy-ppe-procurement-tenders/
17.	G Pienaar, M Cosser and N Bohler-Muller (2020): 'Covid-10 and the role of the judiciary Contradictions and confusion'. <i>Daily Maverick</i> Available at https://www.dailymaverick.co.za/article/2020-07-15-covid-19-and-the-role-of-the-judiciary-contradictions-and-confusion/
18.	J Chabalala (2020) 'Judgement reserved in matter between SIU and 'corrupt' Gauteng-based PPE contractors' <i>News24</i> . Available at: https://www.news24.com/news24/southafrica/news/judgment-reserved-in-matter-between-siu-and-corrupt-gauteng-based-ppe-contractors-20201120



19.	J Gerber (2020) 'Ramaphosa announces establishment of 4 new courts to deal with Covid-19 corruption' <i>News24</i> . Available at: https://www.news24.com/news24/southafrica/news/ramaphosa-announces-establishment-of-4-new-courts-to-deal-with-covid-19-corruption-20201028
20.	L Bhengu (2020) 'Pretoria businessman charged with allegedly defrauding UIF Covid-19 TERS of R150m' <i>News24</i> . Available at: https://www.news24.com/news24/southafrica/news/pretoria-businessman-charged-with-allegedly-defrauding-uif-covid-19-ters-of-r15m-20201116
21.	L Chutel (2020) 'South Africa's Big Coronavirus Aid Effort tainted by Corruption' <i>New York Times</i> . Available at: https://www.nytimes.com/2020/08/19/world/africa/coronavirus-south-africa-aid-corruption.html
22.	N Njilo (2021) 'There's been progress but corruption remains 'great impediment' to growth- Cyril Ramaphosa during Sona' <i>Timeslive</i> . Available at: https://www.timeslive.co.za/politics/2021-02-11-theres-been-progress-but-corruption-remains-great-impediment-to-growth-cyril-ramaphosa-during-sona/
23.	SA News (2020) 'Government looking to establish additional commercial crimes courts'. Available at: https://www.sanews.gov.za/south-africa/government-looking-establish-additional-commercial-crimes-courts
24.	S Sibanda (2020) Transparency International's 2020 Corruption Perceptions Index lists fraud and corruption linked to emergency Covid-19 funds among the main challenges that face South Africa. But if you think these are the only challenges, think again <i>Daily Maverick</i> . Available at: https://www.dailymaverick.co.za/opinionista/2021-01-28-corruption-perceptions-index-covid-19-ppe-procurement-scandals-cement-south-africas-global-ranking-below-50/
25.	Timeslive (2020) Covid-19 Wrap/ Australia's Covid-19 hotspot state records two days without new cases for the first time in seven months. Available at: https://www.timeslive.co.za/news/south-africa/2020-10-27-covid-19-live-updates-australias-covid-19-hotspot-state-records-two-days-without-new-cases-for-first-time-in-seven-months/
26.	T Mahlakoana (2020) Covid -19 Lockdown had a major impact on proper functioning of courts-Mogoeng. <i>Eye Witness News</i> Available at: https://ewn.co.za/2020/12/11/covid-19-lockdown-had-a-major-impact-on-proper-functioning-of-courts-mogoeng
27.	T Moche (2020) Timeline: Covid-19 food parcels, PPE corruption timeline <i>SABC News</i> . Available at: https://www.sabcnews.com/sabcnews/timeline-covid-19-food-parcels-ppe-corruption-timeline/



28.	T Ngcukaitobi (2020) The rule of law in times of crisis: Covid-19 and the state of disaster <i>Mail & Guardian</i> . Available at: https://mg.co.za/coronavirus-essentials/2020-03-29-the-rule-of-law-in-times-of-crisis-covid-19-and-the-state-of-disaster/
29.	V Ngalwana SC (2020) 'Do Covid-19 regulations pass the constitutionality test in SA?' <i>Sunday Independent</i> . Available at: https://www.iol.co.za/sundayindependent/analysis/do-covid-19-regulations-pass-the-constitutionality-test-in-sa-47474336

South Korea

BC Yoon, Partner | bcyoon@KimChang.com

Ji Hyun Park, Attorney | jihyun.park@KimChang.com



KIM & CHANG

Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Republic of Korea

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

There weren't any challenges to the independence due to COVID-19 pandemic.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: Provisional measures, suspension of enforcement etc.
- Continuation of activities with preventive & health measures
- Other: Click here to enter text.

Please explain the selected options briefly, identifying any relevant challenge or innovation: apart from cases that are considered urgent (determination of imprisonment, provisional measures, suspension of enforcement etc), the hearings were postponed during the high number of COVID cases (for approximately 2-3 weeks). Nowadays, the hearings are conducted with preventive measures and have limited the size of audience and utilize virtual examination or isolated examination (in a tent).

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:
- a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: Click here to enter text.

Please explain: the relevant information was not available.

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



- b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

n/a

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

n/a

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation: Due to the pandemic, the right to interview with the counsel has been limited in correctional facilities. Also, due to the restriction in travel, some important witnesses were unable to attend the hearing, and thus the cross examinations were conducted virtually.

Brief commentary pulling out key themes that emerge from their review

In South Korea, the impact of COVID-19 on the judiciary was not immense. The National Court Administration of Korea recommended the courts nationwide to postpone the hearings except for the cases that were considered urgent. According to such recommendation, whether to postpone the hearings or not was up to the each judge who reviews the specific case. Per the recommendation, most courts had postponed the hearings for approximately three to four weeks during the times when there was high number of COVID-19 cases. This occurred three times during the pandemic (February 2020; August 2020; late December 2020 and early January 2021). During these times, emergency cases that were considered urgent, which include cases in relation to imprisonment, provisional measures, suspension of enforcement etc., were still proceeded. Also, a new basis to allow virtual hearing was included in the Rules of Civil Procedure Act, and thus some cases were conducted virtually.

Nowadays, the hearings are conducted with preventive measures, which include compulsory wear of mask, limiting the size of audience, summoning at different times, utilizing virtual examination or isolated examination (in a tent), securing ventilation of court, installing clear blockades in court etc.

The only limitations that affected due process or fair trial rights were in relation to (1) interview rights with counsel by the accused, (2) examination of overseas witnesses. Due to the pandemic, the right to interview with the counsel has been limited in correctional facilities. Nowadays, use of smart devices, tablet PCs are used in the correctional facilities. Also, due to the restriction in travel, some important witnesses were unable to attend the hearing, and thus the cross examinations were conducted virtually.

How has the COVID-19 pandemic affected the judiciary?

Bibliography - Korea

"[1 year of COVID-19] Changes in court due to COVID-19... reduced size of audience and virtual hearing", E-daily (2021. 1. 20.)

<https://www.edaily.co.kr/news/read?newsId=01482566628919688&mediaCodeNo=257>

"Court decides not to extend recommendation of 'COVID-19 suspension'... ordinary operation complying with preventive guidelines", Today News (2021. 1. 11)

<http://www.ntoday.co.kr/news/articleView.html?idxno=76752>

"[2020 evaluation of legal industry – court] 'shut down' of court due to COVID-19 ... commencement of virtual hearings", Law Times (2020. 12. 21)

<https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=166648>

"'COVID-19' Office of Court Administration recommended 'postponement of hearings' to first line courts", Money Today (2020. 2. 24)

<https://news.mt.co.kr/mtview.php?no=2020022415494048381>

"Correction facilities, 'limit on interview with counsel' until 13 January", Law Times (2020. 12. 31)

<https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=166970>

"Tablet in all correction facilities interview rooms... expansion of virtual and smart interviews", Law Times (2020. 5. 21)

<https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=161676>

Spain

Helena Prieto, Partner | helena.prieto@garrigues.com



GARRIGUES

Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: SPAIN

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

The pandemic and the COVID-19 related emergency powers and measures have not posed any particular challenge to the judiciary's independence in Spain. Neither the measures taken nor the declaration of a state of alert had a direct impact on the judiciary's independence, since it has not been used as a tool to control the judiciary. Indeed, as most of the measures implemented by the national and regional governments in response to the pandemic affected fundamental rights, the judicial branch has had the final say on such measures. In some cases, very similar or identical governmental actions received different judicial treatment depending on the tribunal and region (*i.e.* some tribunals upheld the measures, while others overruled them).

Regardless of the above and independently of the pandemic, there is currently a debate in Spain about the extent to which the power of the Parliament –Spain's legislative assembly, comprising two chambers, the Congress of Deputies and the Senate– to appoint some of the members of the governing body of the judiciary – General Council of the Judiciary– may affect to the judiciary's independence, without calling into question the professional integrity, impartiality and individual independence of each of the judges serving in our country, but in terms of structural independence.

On the other hand, it is obvious that the pandemic has had an impact on judicial activity. At the beginning of the pandemic, there was a wide scale paralysis in the judicial activity of our country, as ordinary activity was suspended and courts and tribunals handled only 'urgent cases'. Once the judicial activity was reactivated after three months of general isolation –except for essential workers–, there was a period of general slowdown, in which judicial activity needed to adapt to new circumstances –preventive & health measures at courts, practice of procedural acts by means of telematic media, etc.–. Currently, judicial activity has returned, roughly, to the point it was before the pandemic began –although implementing the creation of new courts and procedures that allow a more agile management of the legal problems arising from the pandemic or the measures adopted by the authorities to control it–, while it seems that the judiciary is adapting its operation to digital justice mechanisms, which allows avoiding face-to-face trips to the courts and tribunals on many occasions. The unique exception to the above are labor judicial cases, since labor courts are struggling to manage peak workloads regarding labor disputes caused by the pandemic and no-related-to-covid issues are expected to be resolved no sooner than 2022, in general terms. Apart from this exception, case assignment systems have continued to function normally.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation: Provisions and measures taken by the judiciary for the continuity of its activities have changed over the course of the pandemic.

At first, there was a general interruption of judicial activity when, in March 14, 2020, Spain adopted the first state of alarm declaration and started the lockdown. Only ‘urgent cases’ were maintained to be handled –such as *habeas corpus* proceeding, criminal cases involving pre-trial detention, constitutional based actions to protect human rights, labor collective disputes, child protection procedures and non-voluntary confinement due to mental disorder proceedings, among others–. Accordingly, there was also a suspension of procedural deadlines –which would restart once the state of alarm expired–.

Following the reactivation of judicial activity in June 2020, further steps were taken to ensure that interrupted cases were resolved without prejudice to the rights of those concerned, as well as to ensure that cases arising from the pandemic were given due attention:

1. Firstly, all procedural deadlines were restarted and began to run again.
2. Secondly, the law prescribed new working days in August for courts and justice operators –which in normal conditions would be the month of judicial vacation, as procedural deadlines are in most of cases suspended–.
3. Furthermore, some family law proceedings –such as revision of maintenance orders or reestablishment of the balance in the visitation or shared custody regimes–, civil and company procedures (*e.g.* related-to bankruptcy or payment of rent for residential and commercial property) and some labor cases –termination of employment and related-to teleworking or on-site working, among others– were also prioritized. This prioritization focused on issues that had been foreseen to be numerous after the lockdown.
4. In connection with the above, new courts have been created in certain jurisdictional areas –labor and, within the civil area, in the corporate area– to absorb and minimize the impact of the increase in the number of proceedings due to the pandemic. Therefore, thirty-three new judicial units have been created and some or all of them may be dedicated exclusively to the handling of COVID-19-related proceedings.
5. Additionally, digital justice mechanisms were promoted. In Spanish judiciary system, digital mechanisms were exceptional until the pandemic (*e.g.* it was used in some cases for witnesses depositions), but some courts did have some digital tools. Currently, the general rule is that courts and tribunals should use digital justice mechanisms as a first choice for holding procedural acts,



when they have appropriate tools to do so, until –at least– June 20, 2021, without this being detrimental to the right of defense of the parties.

Nevertheless, there are still some exceptions to this general rule: in criminal cases, defendants can request not to use these digital mechanisms, which also are directly forbidden by law in criminal cases involving serious offenses, which would require the defendant’s physical presence at the trial, in order to preserve his rights at this trial.

However, courts had to and still are using the same systems and digital tools that they had before the pandemic, still being deficiently equipped with the latest technology, this often resulting in the impossibility of carrying out the judicial activity by means of digital mechanisms, despite the mandate given by law. The foregoing is due to the lack of additional funding from the public authorities to improve the digitalization of the justice administration. In spite of all this, some autonomous regions and courts are more prone to use these digital tools than others are. At any rate, judges and courts have the discretion whether to hold hearings virtually or not. Notably, criminal courts may be more reluctant to use these tools because of the interests at stake and the lack of immediacy.

6. Finally, when judicial acts are not celebrated by digital mechanisms, Spanish courts continue its activities with the general preventive and health measures –mandatory use of masks, physical distancing, ventilation, no obligation to wear a gown during judicial acts in order to prevent its shared use, judicial acts closed to the public, etc.–. In this context, although hearings still take place in the mornings as a general rule, work flexibility was granted to judicial public servants: courts and tribunals may distribute working hours between mornings and afternoons to facilitate keeping physical distancing within courts.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If

so: There is still not official information available regarding the increased workload and backlog of cases in the judiciary on 2020 nor 2021.

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain: [Click here to enter text.](#)

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

As mentioned above, in order to enable the judicial system to deal with the increased workload and backlog of cases, the Royal Decree-Law 16/2020, of April 28, on procedural and organizational measures to address COVID-19 in the area of the Administration of Justice enabled courts and Tribunals to hold judicial acts from August 11 to 31, 2020, , when normally on August procedural deadlines are in suspension. Additionally, whereas digital activity was an exception before the pandemic, it seems now that it is gaining a foothold on judicial acts. Finally, there has been established a prioritization of certain cases and new courts were created in order to minimize the impact of the increase in the number of proceedings due to the pandemic.



However, even prior to the COVID-19 pandemic, the Spanish administration of justice suffered from a heavy workload and extensive backlogs on a general basis. The pandemic has only served to exacerbate such backlogs, but this was preexistent.

The measures taken and explained in previous sections may have had an effective impact on the increased workload during the pandemic, but there is no evidence to suggest that it had not solved the general backlog of cases in the judiciary.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

We are not aware of any specific corruption cases relating to judges or the judicial system in connection with COVID-19 measures, however, to date, some complaints have been filed for alleged corruption offenses related to the contracts for goods and services for the management of the health crisis caused by COVID-19.

These complaints were based on the non-compliance with the legally established procedures for the formalization of public contracts for the procurement of these goods and services, although all the legal proceedings opened because of these complaints were finally filed.

As of this date, it is possible that some complaints are still being analysed by the Public Prosecutor's Office, without any judicial proceedings having been opened for this purpose, and it cannot be ruled out that new complaints may be filed in the future for similar cases.

In addition, there are currently some cases of non-compliance with the established vaccination protocols, related to politicians and public officials who have received the vaccine despite not belonging to priority risk groups, but these cases are not being analysed by the courts as they do not involve non-compliance with any regulations.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal



Please explain the selected options briefly, identifying any relevant challenge or innovation:

Due to the health situation caused by the COVID-19 pandemic, the daily activity of the courts has been modified on some levels, which has had a certain impact on the normal course of judicial proceedings.

During the months in which total confinement of the population was decreed in Spain, the courts greatly limited their activity, resulting in delays both in the initiation of new proceedings and in the course of ongoing proceedings. In addition, the sanitary measures adopted after the confinement have resulted in many of the court hearings taking place without an audience, although they are recorded and broadcasted by different channels.

These health measures have also led to court hearings being held, in many cases, by telematic methods, which, although it does not affect the rights of the parties, may interfere with the correct development of the judicial proceedings.

Sweden

Malin Helgesen, Specialist Counsel | malin.helgesen@msa.se



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: Sweden

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

No. Generally, Swedish law provides very few emergency powers to the Government outside times of armed conflict; including restrictions to judicial independence.

What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- x (1) Interruption or scaling-down of judicial activity
- x (2) Digital justice mechanisms
- x (3) Suspension of procedural deadlines
- x (4) Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - x Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - x Other: [Click here to enter text.](#)
- x (5) Continuation of activities with preventive & health measures
- Other:

Please explain the selected options briefly, identifying any relevant challenge or innovation:

- (1) National annual average of cancelled court hearings increased by 1.6% between 2017-19 and Oct 2020. First weeks in January 2021 have seen a higher increase in cancelled hearings. Data available here. <https://www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/statistik/2021/210202-installda-forhandlingar.pdf>. There are discussions of a larger back-log that has not yet materialised in public statistics.
An example of down-scaled police activity is reduced drunk driving controls by the Police.
- (2) Essentially all judicial authorities have been digitalised, especially as regards internal case handling. General feedback has been that the digital transformation has worked beyond expectations and has not caused productivity decrease as such. Examples include (i) increased court proceedings where at least one party has participated by video (data available here: <https://www.domstol.se/contentassets/14233ca8481b456da3b1debffae73aea/diagram-veckovis-videokonferenssamtal-salar-2018-v1---2021-v4.pdf>); and (ii) increased ability by the

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



Swedish Economic Crime Authority to remotely hold interrogations and serve criminal injunctions.

There have been discussions around the increased IT security vulnerability due to increased use of home office and rapid scale-up of remote IT solutions.

- (3) Seemingly very few; the only found example is a deferral by the National Board of Medicine of certain forensic psychiatric examinations of non-detained persons during periods of travel restrictions.
- (4) Courts have prioritised cases with case handling time limited established by law. Authorities have increased their efforts in detecting fraud connected to increased pandemic related financial support programs. As a consequence, it is expected that courts will have a back-log of non-prioritised cases going forward.
- (5) To limit risks for jurymen older than 70 years (a high-risk group) and the risk that proceedings are cancelled due to jurymen’s illness, some court districts have substantially increased the number of available jurymen.

2. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other:

Please explain:

Numbers reported above.

Relevant judicial authorities have reported difficulties in conducting site visits and such during periods of travel restrictions - which has affected rental disputes, environmental- and property disputes and the like.

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

See above under (2). According to a public enquiry made on behalf of the Government, several judicial authorities noted the potential longer-term risks relating to decreased competence within their authorities caused by delayed and/or cancellations of professional training and education programs.

3. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

There has been a small number of media reports of local public officials allegedly having used their positions to obtain vaccines for non-eligible family members. These are too recent to have led to any known investigations.



4. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

Generally, it is difficult to find reports of such challenges in Sweden.

According to the annual report by the Swedish National Council of Crime Prevention (Brå), Swedish courts have instead continued a trend of increased trust among the Swedish population during 2020. <https://www.domstol.se/en/nyheter/2020/10/fortroendet-for-sveriges-domstolar-fortsatter-oka/>

There have been a few cases where Appeals Courts have compensated convicted persons for the increased isolation that pandemic restrictions have caused them.

United Arab Emirates

Jad Taha, Partner | jtaha@mayerbrown.com

Nanda Al Qazaz, Associate | nalqazaz@mayerbrown.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: **United Arab Emirates ("UAE")**

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

The UAE judicial system is generally considered fair and impartial. Judges cannot decide cases if they have a personal or economic interest in the outcome of the case. The judiciary is independent of the other branches of government. Courts are obligated to decide cases on the basis of the governing law and the applicable facts. We have not seen any material deviation from this during the COVID-19 pandemic. The judiciary is generally deemed to have maintained its independence. Courts have taken steps to ensure access to systems and processes by litigants for the continued adjudication of cases in accordance with standard procedures across cases and judgments, including with respect to the use of emergency powers and interim measures. This includes periods when the UAE was observing in-country movement restrictions, and at times lockdowns, in various degrees.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

As a precautionary measure against the COVID-19 pandemic, the majority of UAE Courts (including Dubai Courts, Abu Dhabi Courts, DIFC Courts, and ADGM Courts) have shifted to electronic and virtual means for the filing of cases since March 2020. Most court hearings are being conducted through various video conferencing means. Physical appearance has been limited since March 2020. Generally speaking, working remotely has been going smoothly in the UAE's judiciary departments and has allowed for cases to be addressed and heard efficiently with minimal disruption to timetabling (i.e. delays, etc.). Starting

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



2021, judicial services are slightly/partially accepting in-person appearances (i.e. specific notary public and court services on a case-by-case basis). However, the majority of judicial services are still being conducted remotely in the UAE at this time.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain:

At the beginning of the COVID-19 pandemic, the applicable civil procedure requirements to serve a claim on a defendant were initially put on hold (i.e. defendants were not notified of a claim or an application filed against them). All ongoing civil proceedings were adjourned to a later date. Similarly, courts temporarily suspended the issuance of certificates and personal status documents (i.e. marriage and divorce certificates, etc.). Urgent matter hearings, appeals and criminal cases continued remotely through different video conferencing means.

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

In our experience, the electronic transition of the UAE judicial system and its processes has been working relatively smoothly.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

We are not aware of corruption cases related to COVID-19 response measures.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing



- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

Under UAE law, litigants in an adversarial proceeding are entitled to notice and an opportunity to be heard, including by retaining counsel to represent them, raising legal arguments, presenting evidence to support their arguments or to challenge another party's arguments, and appeal as of right after judgment within the time prescribed by law. This has generally continued to function well during the COVID-19 pandemic. In addition, a number of global indices on the rule of law and the ease of conducting business have recognized the integrity, due process and fairness that the UAE legal system provides to parties. As an example, the UAE ranked 9th out of 190 countries on the World Bank Group's "Enforcing Contracts" measure according to its latest data (through 2019). There is no indication that this ranking will be adversely affected in a material respect by inefficiencies resulting from the COVID-19 pandemic.

Uganda

Charles Odere, Partner | codere@landwellalliance.com

Allan Jonathan Luwagga, Associate | ajluwagga@landwellalliance.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the Judiciary?

Country: Uganda

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.
 - 1.1. The COVID-19 pandemic affected the Judiciary's financial independence as the budget of the Judiciary was reduced. This meant that the Judiciary couldn't hold as many sessions as they used to, which also meant that the Judiciary would only be able to dispense fewer cases on their limited budget. This also came as a limitation to the number of people who could access justice in a timely manner².
 - 1.2. When the COVID-19 was declared a pandemic by the World Health Organization in March 2020, the government of Uganda through the Executive Arm, immediately implemented measures to fight the spread of COVID-19 within the country³. The Minister of Health exercising powers conferred upon her under the Public Health Act⁴ made the Public Health (Control of COVID-19) Rules⁵, and also issued Standard Operating Procedures (SOPs) to prevent the spread of the disease.⁶
 - 1.3. The SOPs were implemented countrywide and in all arms of government, including the Judiciary. This was done without involving the Judiciary in the process of deciding the appropriate measures of combating the spread of COVID-19 while enabling them to effectively continue their practice. This subjected the Judiciary to the SOPs set by the Executive without any consideration of their effect on the judicial processes, which had ultimately been put on a standstill. Furthermore, these procedures invariably affected the general day to day functioning of the Courts' activities and thus negatively impacted the right to access to justice⁷ and, in the long run, the independence of the Judiciary.
 - 1.4. Thereafter, the partial and total lockdown were announced⁸. This undermined the judicial processes because it prevented various lawyers from representing their clients⁹ at the different stages of trial. For instance, in criminal

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the Judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

² As stated by Timothy Lumunye, A Magistrate Grade One, Courts of Judicature of Uganda in an interview with Allan Luwagga.

³ WHO Director-General's opening remarks at the media briefing on COVID-19-11 March 2020, <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-onCOVID-19-11-march-2020>> Accessed 18th June 2020.

⁴ Sections 11 and 27 of the Public Health Act Cap 281

⁵ Public Health (Control of COVID-19) Rules S-I 52 OF 2020

⁶ Ministry of Health guidelines on avoiding the corona virus <<https://www.health.go.ug/covid/document/guidelines-on-avoiding-the-corona-virus/>> Accessed 20th June 2020.

⁷ <<https://www.ug.undp.org/content/uganda/en/home/presscenter/pressreleases/2020/stakeholders-call-for-use-of-e-justice-during-COVID-19-and-beyon.html>> posted on June 2, 2020

⁸ Address by the President of Uganda, H.E. Yoweri Tibuhabwe Kaguta Museveni, 20th September 2020

⁹ See: Pheona Nabasa Wall- President Uganda Law Society <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUnid=46ea57e0-6a2b-43a1-8194-1c0868aef0>>

trials, lawyers and their clients were denied contact of any kind starting from the time when the suspects were in police custody, prison and even during trial¹⁰. This was a direct attack on the Judiciary, while the Executive and the Legislature (Parliament) continued working, the Judiciary was practically closed.

- 1.5. When the lockdown was instituted, only "essential"¹¹ services were permitted to continue their operations. These were basic services that were deemed indispensable to the extent that without them the country would collapse.¹² Legal services were not considered essential services,¹³ so lawyers were not allowed to continue their work or to travel to Court¹⁴.
- 1.6. Following this, there were complaints by Uganda Law Society (an association of Ugandan Lawyers) and suits filed by Ugandan lawyers against the government and the Minister of Health (see Geoffrey Turyamusiiima versus Attorney General of Uganda and Minister of Health) seeking orders to include lawyers on the list of essential workers. The High Court Civil Division directed the government to provide detailed mechanisms to ensure that lawyers can access their clients¹⁵. In May 2020, the government decided to add legal services to the list of essential services, but allowed only 30 lawyers countrywide to provide urgent legal services to businesses and to handle urgent criminal matters¹⁶. This did not sit well with the legal fraternity as was expressed by their submission of a full list of over 3000 lawyers instead of the 30 as directed by the President¹⁷.
- 1.7. The COVID-19 pandemic also affected the Judiciary's performance as per the Chief Justice's directions no Judicial Officer was and is currently permitted to hear more than 5 cases in a day be it civil or criminal unlike before the pandemic where there was no limit on the number of cases to be heard per day. This meant that very few cases were heard making the number of people accessing timely justice even fewer than before.

Clearly, COVID-19 was used to undermine the independence of the Judiciary as it was forced to work in accordance with what the Executive decided.

2. What kind of provisions has the Judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family

¹⁰ <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUnid=46ea57e0-6a2b-43a1-8194-1c0868aef0>>

¹¹ Action point number 29 of the Address by the President of Uganda, H.E. Yoweri Tibuhabwe Kaguta Museveni, 20th September 2020 <the medical, agriculture and veterinary, telecommunication, door-to-door delivery, financial institutions, all media, Private Security companies, cleaning services, garbage collection, fire-brigade, fuel stations, water departments, funeral services and some KCCA staff, (Action point number 29 of the Address by the President of Uganda, H.E. Yoweri Tibuhabwe Kaguta Museveni, 20th September 2020>

¹² Luke Anami, "Ugandan takes govt to EACJ over lockdown, says lockdown against the law" (*The East African*, 2020) <

<https://www.theeastafrican.co.ke/tea/news/east-africa/Ugandan-takes-govt-to-eacj-says-lockdown-against-the-law/1439834?view=htmlamp> > posted April 11, 2020.

¹³ < <https://www.ug.undp.org/content/uganda/en/home/presscenter/pressreleases/2020/stakeholders-call-for-use-of-e-justice-during-COVID-19-and-beyon.html> > posted on June 2, 2020

¹⁴ Advocates were not included on the list of exempted services in Rule 8 of S.I NO. 55 of 2020, the Public Health (control of COVID- 19) (NO.2) Rules

¹⁵ "Man petitions Court to list lawyers as essential staff" < <https://www.monitor.co.ug/uganda/news/national/man-petitions-Court-to-list-lawyers-as-essential-staff-1886608?view=htmlamp> > April 23, 2020

¹⁶ The Presidential guideline no. 7, issued on 4th May 2020

¹⁷ George Okello "Drama as law society submits full list of over 3000 lawyers to offer services during lockdown instead of 30" < <https://www.pmldaily.com/news/2020/05/COVID-19-crisis-drama-as-law-society-submits-full-list-of-over-3000-lawyers-to-offer-services-during-lockdown-instead-of-30.html> > May 7, 2020

- Civil
- Labour
- Bankruptcy
- Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: Encouraging Alternative Dispute Resolution

Please explain the selected options briefly, identifying any relevant challenge or innovation:

2.1. Innovations

2.1.1. Interruption or scaling-down of judicial activities.

The Chief Justice, by the powers conferred upon him by the Constitution of the Republic of Uganda,¹⁸ issued guidelines for the conduct of Court sessions, including a limitation on the number of cases heard per day to five (5). Furthermore, only the parties to the case, their legal representatives and their witnesses were permitted to be present in Court during the Court session.

2.1.2. Digital justice mechanisms¹⁹.

2.1.2.1. In 2016, the Judiciary had started a launch of its 'e-justice for all' initiative that eventually led to the passing of The Judicature (Visual-Audio Link) Rules, SI no. 26 of 2016. They later started to put in place an electronic case management system that was intended to reduce contact between litigants and Court staff²⁰. Now with the arrival of COVID-19, these preparations are serving a better purpose. For instance, in criminal trials, the Judiciary has since the start of the lockdown period made use of the Audio-visual conferencing facilities between different Courts and prisons to ensure that the trials are conducted while at the same time the Standard Operating Procedures are observed. To this end, they installed Video Conferencing Facility in Courts and prisons (Buganda Road Court and Luzira Maximum Prison (Male and Female Wings), Kigo Government prison and Kitalya Government prison). This has enabled the Judicial Officers to handle matters like plea taking, bail applications and mentions in a timely manner.

2.1.2.2. The Chief Justice issued the "Guidelines for online hearings in the Judiciary of Uganda"²¹ which were to be used for, *inter alia*, hearing of bail applications, mentions and interlocutory applications as well as delivering of judgments and rulings. Furthermore, attendance/participation was by invitation through a link provided by the Judiciary. The Judiciary also started circulating cause lists and Court decisions via email. This has reduced the number of people at the Court premises to only those that have sessions with the Court on that specific day. The electronic case management is now saving Court users from wasting time on the road to and from Court to file and receive Court documents, it has created a more transparent system that eliminates opportunistic corruption and reduces the logistical burden of transferring prisoners to and from Court.²²

2.1.2.3. The Judiciary is currently in the final stages of developing an Electronic Court Case Management Information System (ECMIS) that will not only be a fully featured system that automates and tracks all aspects of a case life cycle from initial filing through disposition, appeal but will also be able to facilitate the efficient and reliable collection, organization, distribution and retrieval of significant amounts of case specific data as well as the processing of payment of

¹⁸ Under Article 133

¹⁹ DERRICK KIYONGA, < <https://www.unwantedwitness.org/ugandas-judicial-system-virtual-Courts-are-here-butno-laws-to-regulate-them/> > accessed 19th June 2020

²⁰ Arthur Arnold Wadero, 'Judiciary unveils Shs9b digital system to track' < <https://www.monitor.co.ug/News/National/Judiciary-unveils-Shs9b-digital-system-to-track-cases/6883345275982-15ggha2z/index.html#cases> > Accessed 21st June 2020

²¹ Office Instructions No 2 of 2020

²² DERRICK KIYONGA, < <https://www.unwantedwitness.org/ugandas-judicial-system-virtual-Courts-are-here-but-no-laws-to-regulate-them/> > accessed 19th June 2020

relevant Court fees and fines by the Citizens. The system will ease filing of matters and all documents, reducing the need for physical contact in the Court registries²³.

2.1.3. Prioritization of cases/procedures.

Once the Judiciary was listed as an essential service, the Chief Justice set up guidelines to be followed in the Court. The Court prioritized criminal proceedings as well as civil matters as shown by the guidelines which were to the effect that the Courts would only hear remands, urgent mentions, bail and other very pressing interlocutory applications²⁴.

2.1.4. Continuation of activities with preventive & health measures

As soon as the lockdown measures on public transport were eased (3 months after lockdown was declared), the Judiciary, in its bid to prevent the continuous spread of COVID-19 while continuing with their work, decided that Court registries were to stay open although this was only for purposes of filing new suits²⁵. The Courts further decided to continue with Court process but only permitted parties to cases, their lawyers and the witnesses to attend Court sessions.

2.1.5. Encouraging use of Alternative Dispute Resolution

The Judiciary has encouraged the litigants to make more use of the Alternative Dispute Resolution mechanisms. In civil matters this includes the use of mediation, conciliation, negotiations and reconciliations. In criminal matters, there has been an increase in the number of cases concluded through Plea Bargaining. The courts have also taken to granting of bail as an automatic grant to the accused persons than having them on remand indefinitely. This is on the basis that with the decrease in the number of cases being heard per day, it becomes difficult for the Court to gauge when the accused persons may be able to be heard.

2.2. Challenges

2.2.1. Although the Courts instituted the audio-visual conferencing facilities, this was only instituted in very few Courts and mostly those located in the city leaving out majority of the Courts in remote and rural areas which ideally, also needed to be facilitated to make use of the technological advancement for ease of their work and to the benefit of their Court users²⁶. Rural and remote facilities have further access challenges as they are only being used in criminal matters and those who want to use video conferencing services are required to book the facility at least one week before the due date.

2.2.2. During the lockdown both private and public transport were prohibited with the exception of the “essential workers and service providers” and those who could access special movement car stickers from the Ministry of Works and Transport²⁷. To make matters worse, since most of the Courts are located far from the residential places, this made transport difficult even for some Judicial Officers.

2.2.3. The reduction in the number of cases heard per day has further delayed courts’ work and has become a hinderance in terms of access to justice especially in criminal cases. That is to say that once an accused person appears in court for mention and is thereafter remanded, it has become difficult for them to come to court for

²³“COVID-19 And the Administration of Justice in Uganda” By Timothy Lumunye A Magistrate Grade One, Courts of Judicature of Uganda

²⁴ Chief Justice’s Circular, Administrative and Contingency Measures to Prevent and Mitigate the Spread of Corona Virus (Covid----19)

²⁵ Chief Justice’s Circular, Administrative and Contingency Measures to Prevent and Mitigate the Spread of Corona Virus (Covid----19)

²⁶ Justice in The Era of a Pandemic; An Analysis of The Impact of the COVID-19 Pandemic on Uganda’s Court Operations by Doreen Ainembabazi A Lecturer, Department of Law and Continuing Legal Education, Law Development Centre

²⁷ Action point No. 1 of the Page 11 of the Address by the President of Uganda, H.E. Yoweri Tibuhabwe Kaguta MMuseveni on the 30th day of March 2020 at nakasero.

trial in a timely manner as was the case before the COVID 19 Pandemic. This is mainly because the Judicial Officers are limited on the number of cases handled per day and yet there is an ever-increasing number of criminal cases coming up on a daily basis.

3. Is there information available regarding an increased workload and backlog of cases in the Judiciary? If so:
- a. In what matters?
- Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labour
 - Bankruptcy
 - Other: [Click here to enter text.](#)

Please explain:

3.1. Criminal & Family

3.1.1. Domestic violence.

Per the Presidential Directive²⁸ all educational institutions were suspended requiring all pupils and students to return to their homes. This was later followed by additional measures among which was stoppage of all public transport on the 21st day of March 2020. This had the result of having both parents, guardians and the children at home at the same time. As a result, this increased reports of child abuse, domestic and gender-based violence²⁹. It has been shown by various studies that extreme social distancing protocols and isolation usually affect individuals' mental health and may easily be contributing to the violence³⁰. To make matters worse, those who fell prey to domestic violence were unable to obtain quick redresses and justice as both private and public transport had been prohibited with the exception of the "essential workers and service providers" and those who could get special car stickers from the Ministry of Works and Transport³¹.

3.2. Civil Matters

3.2.1. Breach of contract

There has been an increase in breach of contract cases. In respect to these proceedings, a majority of the defendants have largely invoked the force majeure clause for their failure to fulfill their contractual obligations since their failures are largely due to the COVID 19 pandemic and the enforcement of the Standard Operating Procedures.

3.2.2. Debt recovery cases

Due to the current economic slump, many people were unable to service their debt obligations as earlier agreed, forcing their creditors to file cases for recovery of their money. Majority of these have been loans

²⁸ Action point number 1 of the Address by the President of Uganda, H.E. Yoweri Tibuhaburwa Kaguta Museveni on the 18th day of March 2020

²⁹ The Independent, "Police Records 328 Cases of Domestic Violence During COVID---19 Lockdown" (*The Independent Uganda*: 2020) <<https://www.independent.co.ug/police-records-328-cases-of-domestic-violence-during-covid-19-lockdown/>> accessed 11 May 2020.

³⁰ Jamie Bartosch, "Violence Linked to Isolation and Chronic Health Problems - Uchicago Medicine" (*University of Chicago Medicine*, 2019) <<https://www.uchicagomedicine.org/forefront/community-articles/violence-linked-to-social-isolation-hypervigilance-and-chronic-health-problems>> accessed 12 May 2020.

³¹ Action point No. 1 of the Page 11 of the Address by the President of Uganda, H.E. Yoweri Tibuhaburwa Kaguta MMuseveni on the 30th day of March 2020 at nakasero.

gone bad. This is evidently seen from the weekly cause lists which show a great increase in the cases of financial institutions trying to recover from their debtors who have breached their obligations under those contracts.

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

3.3.1. The Judicial Service Commission (JSC)³² appointed 15 more Judicial Officers in acting capacity as Chief Magistrates to try and handle the backlog, to boost service delivery in the Courts of law as well as to operationalize more magisterial areas ahead of the then anticipated election petitions³³.

3.3.2. Members of Parliament advocated for the passing of the “Administration of the Judiciary Bill” which was assented to by the President on the 19th day of June 2020 and soon thereafter the same was passed as law³⁴. The Administration of the Judiciary Act was enacted in 2020 and it created a Judicial fund which is financed directly from the consolidated fund under the Constitution. The Administration of the Judiciary Act was aimed at Judiciary’s independence in budgeting. It was to enable the Judiciary make its own budgets and perform its own accounting. This would enable the Judiciary to prioritize it’s need for an increase in the number of Judicial Officers and their pay without the requirement of the Executive deciding what their priorities should be³⁵.

3.3.3. There is still a lot left to be desired in terms of putting in place and enforcing more measures to deal with the increased workload and backlog. There is need to appoint more Judicial Officers to level out the ratio of Judicial Officers to cases.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the Judiciary to address these cases.

4.1. Covid 19 Task Force funds missing.

When the lockdown was declared and enforced, the government created a Covid-19 food task force that ran a program to provide food relief for the most vulnerable amid the coronavirus pandemic. It was alleged that Christine Guwatudde Kintu (Permanent Secretary and Administrative Head of Ministry), Joel Wanjala (Accounting Officer), Fred Lutimba (Assistant Procurement Commissioner) and Martin Owor (Head of Covid-19 Relief Management) each from the office of the Prime Minister had inflated the Covid -19 relief food prices³⁶. To date, the Permanent Secretary and her co-defendants are facing trial on allegations of corruption.

5. What kind of concerns over due process or fair trial rights have arisen regarding the Judiciary's functioning during the pandemic, such as restrictions over?

Initiating of legal actions

Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)

³² Statutory body responsible for the appointment of Judicial officers

³³ “15 acting chief magistrates appointed ahead of election petitions” < <https://www.monitor.co.ug/uganda/news/national/15-acting-chief-magistrates-appointed-ahead-of-election-petitions-3274872?view=htmlamp> > February 1, 2021

³⁴ “house passes Administration of Judiciary Bill” < <https://www.parliament.go.ug/news/4637/house-passes-administration-of-judiciary-bill> > posted on June 4, 2020

³⁵ As stated by Timothy Lumunye, A Magistrate Grade One, Courts of Judicature of Uganda in an interview with Allan Luwagga.

³⁶ Halima Athumani “top Ugandan officials arrested in COVID-19 purchasing scandal” < <https://www.voanews.com/science-health/coronavirus-outbreak/top-ugandan-officials-arrested-COVID-19-purchasing-scandal?amp> > posted on April 9, 2020

- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

5.1. Initiating of legal actions.

Uganda's trial system and process are largely non-computerized that is, from the time of filing a case to the time of closing that case, all the way through to the execution process, everything must be done in person both at the Judiciary's administrative offices as well as the Courthouse. Therefore, when the lockdown was enforced, all persons were stopped from making any movements including reporting cases and filing cases. Considering that Uganda does not have an operational online filing system, it interfered with the people's right to initiate any form of legal action.

5.2. Right of people in custody to information.

Suspects/ accused persons and their lawyers were not allowed to have face to face interactions and consultations before their trials. They hardly had proper instructions and information as they were denied contact with their lawyers³⁷.

5.3. Right to legal counsel before trial.

"The rights of accused persons to access lawyers, Court representation and bail applications were all undermined" says Sylvia Namubiru Mukasa, the Executive Director of Legal Aid Service Providers Network³⁸. Once a suspect was arrested and incarcerated, their right to access their legal counsel was done away with as well as the right to communicate in confidence and since the proceedings have mostly been virtual, attaining this right was made even harder.

5.4. Right of detainees to trial within a reasonable time / right to be tried without undue delay.

It is a well-established principle that justice shall not be denied or delayed as enshrined under **Article 126(2) (b)**.³⁹ However, as the lockdown continued, justice was definitely delayed as with the enforcement of the Standard Operating Procedures came a reduction in the number of cases heard per day, thus causing a reduction in the number of suspects arraigned for trial per day, thus causing delay in being brought to trial within the legal 48 hours. This was a direct contravention of the Constitution⁴⁰.

5.5. Right to an effective and confidential communication between the accused and lawyer.

Considering that most trials are being conducted virtually, accused persons hardly access their lawyers physically and communication in confidence becomes impossible as even with communication via phone, required the presence of a prisons officer. This was in direct violation of the (IASC).⁴¹ To ensure that measures that are put in place to prevent outbreaks of COVID-19 respect of human rights and more specifically, 'ability to meet with legal counsel must be

³⁷ See: words of Sylvia Namubiru Mukasa < <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUnid=46ea57e0-6a2b-43a1-8194-1c0868aef0> >

³⁸ See: Pheona Nabasa Wall the President Uganda Law Society < <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUnid=46ea57e0-6a2b-43a1-8194-1c0868aef0> >

³⁹ The Constitution of the Republic of Uganda as amended 1995

⁴⁰ Articles 28 and 44 of the Constitution of the Republic of Uganda cover fair and expeditious hearings which rights are non derogable.

⁴¹ United Nation's Inter-Agency Standing Committee (IASC) interim guidance on COVID-19; Focus on Persons deprived of their liberty which enjoin member states of the United Nations



maintained, and prison or detention authorities should ensure that lawyers can speak with their clients confidentially.⁴² To this end, the High Court has held that prisons' authorities violated the rights of accused persons by denying them access to their legal counsel and thereby violating their right to liberty guaranteed under article 23(5) of the 1995 Constitution of the Republic of Uganda.⁴³

⁴² United Nation's Inter-Agency Standing Committee referring to the Human Rights Committee General Comment No. 29 High Court Msc Cause No. 81 of 2020

⁴³ Human Rights Awareness and Promotion Forum (HRAPF) vs Attorney General and the Commissioner General of Prisons

United Kingdom

Sam Eastwood, Partner | SEastwood@mayerbrown.com

Raid Abu-Manneh, Partner | RAbu-Manneh@mayerbrown.com

James Ford, Senior Associate | JFord@mayerbrown.com

Thomas Ataii, Senior Associate | TAtaii@mayerbrown.com

Alexandra Aninoiu, Senior Associate | AAinoiu@mayerbrown.com

Daniel Leveson, Associate | DLeveson@mayerbrown.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: United Kingdom

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

Neither the pandemic nor any COVID-19-related emergency powers or measures appear to have presented any specific challenges to the judiciary's independence in the UK. Indeed, the importance of the principle of judicial independence is well established. The Commonwealth Latimer House Guidelines state that "an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice... best democratic principles require that the actions of governments are open to scrutiny by the courts."² In a speech on judicial independence in September 2007, Lord Phillips, then Lord Chief Justice of England and Wales, stated that "a judge should value his independence above gold."³ In this speech, Lord Phillips acknowledged that dialogue between the judiciary and government may be desirable or appropriate on occasions, but he was clear that this "in no circumstances should [this] compromise judicial independence".

Two high profile cases concerning the scope of royal prerogative power in 2017 and 2019 have placed the judiciary and the executive branch on a direct collision course in recent years. In *Miller (No 1) [2017] UKSC 5*, the Supreme Court ruled in the context of Brexit that the UK Government could not rely on royal prerogative power to trigger Article 50 and, subsequently, the UK's exit from the European Union; in that case, the Supreme Court ruled in a majority judgment that an explicit Act of Parliament was necessary to authorize the invocation of Article 50. In *Miller (No 2) [2019] UKSC 41*, the Supreme Court found not only that the use of royal prerogative power was open to judicial review, but also – significantly – that the extended prorogation of Parliament in the lead up to the United Kingdom's then scheduled departure from the European Union ordered upon the advice of Prime Minister Boris Johnson was unlawful.

Against this backdrop – independent of the pandemic – there have been signs of political aspirations to curtail judicial independence. In particular, in early 2020 the Attorney General for England and Wales stated that Parliament needed to "take back control... from the judiciary"⁴. Furthermore, following a Conservative party manifesto pledge to end the "abuse" of judicial review, an independent review into the judicial review

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

² The Commonwealth Latimer House Principles, Practioner's Handbook, 2017 available at: <https://thecommonwealth.org/sites/default/files/news-items/documents/LatimerHousePrinciplesPH7Jul17.pdf>

³ Judicial Independence, Commonwealth Law Conference 2007, Nairobi, Kenya, 12 September 2007, available at: https://www.judiciary.uk/wp-content/uploads/2020/08/lcj_kenya_clc_120907.pdf

⁴ Suella Braverman: People we elect must take back control from people we don't. Who include the judges, 27 January 2020, available at: <https://www.conservativehome.com/platform/2020/01/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges.html>

⁵ New attorney general wants to 'take back control' from courts, the Guardian, 13 February 2020, available at: <https://www.theguardian.com/politics/2020/feb/13/new-attorney-general-wanted-to-take-back-control-from-courts>

process in England and Wales was launched in July 2020. When the review was announced, Lord Edward Faulks QC, who chaired the independent review panel, spoke of the need to “strike a balance between the right of citizens to challenge government through the courts and the elected government’s right to govern.”⁶ The findings from this review were submitted to the government at the end of January 2021. It is not clear, as yet, whether the findings will be released to the public.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

As a general point, we note that the criminal, Magistrates’ and family courts appear to have been particularly impacted by the COVID-19 pandemic. In contrast, we have observed that the commercial courts have more readily adapted to the pandemic environment, moving swiftly to virtual trials and enabling cases “involving international parties and witnesses from several countries to take place notwithstanding the impediments of caused by the outbreak of coronavirus.”⁷

On 17 March 2020, the Lord Chief Justice - the Head of the Judiciary of England and Wales – issued a message on the Coronavirus pandemic⁸, which emphasized the need to “*make every effort to maintain a functioning court system in support of the administration of justice and rule of law*”. The Judiciary’s response to the pandemic was split into two phases:

1. Phase 1: emergency response in March and April 2020 which involved putting in a place a range of measures to protect court users, judges and staff, and to ensure essential work was carried out.
2. Phase 2: the recovery of the judiciary’s operations.

Interruption or scaling-down of judicial activity

There was interruption and/or scaling back of judicial activity, as follows:

⁶ Former Tory justice minister to chair independent JR review, Law Gazette, 31 July 2020, available at: <https://www.lawgazette.co.uk/news/former-tory-justice-minister-to-chair-independent-jr-review/5105251.article>

⁷ Keeping justice going: the UK Commercial Court’s swift move to virtual trials, The Law Society, 23 October 2020, available at: <https://www.lawsociety.org.uk/en/topics/coronavirus/keeping-justice-going-the-uk-commercial-courts-swift-move-to-virtual-trials>

⁸ <https://www.judiciary.uk/announcements/coronavirus-jury-trials-message-from-the-lord-chief-justice/>

- On 23 March 2020, the Lord Chief Justice announced that Jury trials in England and Wales, and all physical hearings in the Crown Court, were to be temporarily suspended⁹. Trials already underway as at that date were able to continue, but were adjourned, if necessary, to put social distancing safety measures in place. The Lord Chief Justice stated that Magistrates' Courts would need to continue to deal with urgent work, in accordance with guidance given by the Judiciary to judges and staff.
- In the Civil and Family Courts, from 19 March 2020, the default position was that hearings should be conducted with one, more than one or all participants attending remotely¹⁰. The Lord Chief Justice in his message to Judges in the Civil and Family Courts, "*urge[d] all before agreeing to adjourn any hearing to use available time to explore with the parties the possibility for compromise*".
- From Monday 23 March 2020, all in-person hearings for Employment Tribunals in England & Wales and in Scotland were converted to case management hearings by telephone or other electronic means.
- Possession proceedings were stayed for a period of 90 days.
- A large number of Court and tribunal hearings were adjourned although the Majesty's Court and Tribunal Service do not keep data on the precise number of adjournments.
- Court buildings, including the Supreme Court, were closed and the work of the courts and tribunals were consolidated into fewer buildings. At the end of March 2020, 157 priority court and tribunal buildings were selected to be kept open for essential face-to-face hearings¹¹. The other 124 court and tribunal buildings were closed to the public although some were kept open for judges, staff and representatives of agencies to support video and telephone hearings and progress cases without hearings¹².
- The Judiciary focused on prioritizing cases and case-types to make sure the most urgent and important cases could be heard.
- From May 2020, jury trials restarted and there was a phased re-opening of Courts and Tribunals.

Digital justice mechanisms

Criminal Courts

In accordance with the message of the Lord Chief Justice dated 23 March 2020, it was directed that all hearings in the Crown Court and the Magistrates Court that could lawfully take place remotely should proceed remotely¹³.

The Coronavirus Act 2020 (the "**Act**"), an act of the Parliament of the United Kingdom, granted the government emergency powers to handle the COVID-19 pandemic. The Act, amongst other things, amended existing legislation so as to enable the use of technology either in video/audio-enabled hearings in which one or more participants appear before the court using a live video or audio link, or by a wholly video/audio hearing where there was no physical courtroom and all participants take part in the hearing using telephone or video conferencing facilities.

Prior to the COVID-19 pandemic, audio and video technology had played a relatively limited role in the criminal courts in England and Wales. The use of audio and video technology in court hearings rapidly increased in response to the COVID-19 pandemic. HMCTS also introduced a new video platform to enable all parties in a criminal hearing to take part remotely – allowing all Magistrate Courts and Crown Courts in England and Wales

⁹ <https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/>

¹⁰ <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-Overview_of_HMCTS_response_A4L_v3.pdf

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-Overview_of_HMCTS_response_A4L_v3.pdf

¹³ <https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/>

to hold secure hearings. The Cloud Video Platform (“CVP”) was initially rolled out to 60 magistrates’ courts and 48 crown courts¹⁴. On 1 September 2020, it was announced that CVP had been made available in all magistrates and Crown courts.¹⁵ The public are able to attend remotely public audio and video hearings (in all Courts and Tribunals) and the Court or Tribunal will also make a recording of the hearing.

Civil and Family Courts

On 19 March 2020, the Lord Chief Justice issued a message to the Judges in the Civil and Family Courts which directed that the default position in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely¹⁶. The President of the Family Court issued separate guidance, on 19th March 2020, confirming that the default position should be that all Family Court hearings should be undertaken remotely either via email, telephone, video or Skype, but that where the requirements of fairness and justice require a court-based hearing, and it is safe to conduct one, then a court-based hearing should take place¹⁷.

The Civil Procedure Rules (CPR) (the rules of civil procedure used by the Court of Appeal, High Court of Justice, and County Courts in civil cases in England and Wales) introduced three new Practice Directions in response to the COVID-19 pandemic, including PD 51Y which provides for hearings to be conducted remotely (whether by video or audio)¹⁸.

Online services have continued throughout the pandemic, including Social Security and Child Support (“SSCS”), Immigration and Asylum Chamber (IAC), Probate, Divorce and Online Civil Money Claims service, for claims of up to £10,000. The Courts have accelerated IAC reform so that more steps can be concluded online¹⁹.

On 1 September 2020, it was announced that CVP had been made available in all Civil and Family courts.²⁰

Employment tribunals

On 18 March 2020²¹ and 19 March 2020²², the presidents of the Employment Tribunals in England & Wales and in Scotland directed that from Monday 23 March 2020 all in-person hearings would be converted to case management hearings by telephone or other electronic means. CVP has also been rolled out to Employment Tribunals in England & Wales.

Statistics

According to a HM Courts and Tribunals Service update on the response for to the COVID-19 pandemic for criminal courts in England and Wales, by September 2020, more than 30,000 hearings had taken place using CVP

¹⁴ <https://www.gov.uk/government/news/new-tech-will-help-keep-the-criminal-justice-system-moving-during-covid-19-pandemic>

¹⁵ <https://insidehmcts.blog.gov.uk/2020/09/01/building-confidence-in-using-the-cloud-video-platform-for-hearings/>

¹⁶ <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>

¹⁷ <https://www.judiciary.uk/announcements/covid-19-national-guidance-for-the-family-court-message-from-president-of-the-family-divison/>

¹⁸ <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>

¹⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-Overview_of_HMCTS_response_A4L_v3.pdf

²⁰ <https://insidehmcts.blog.gov.uk/2020/09/01/building-confidence-in-using-the-cloud-video-platform-for-hearings/>

²¹ <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-presidents-of-the-employment-tribunals-in-england-wales-and-in-scotland/presidential-guidance-et-covid19-3/>

²² <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-presidents-of-the-employment-tribunals-in-england-wales-and-in-scotland/>

technology.²³ Statistics also show that from 21 to 24 April 2020, 90% of Court and tribunal hearings were undertaken using audio or video technology²⁴.

The digital divide and post-COVID-19 digital justice measures

While the expedited roll out of CVP is to be welcomed and has facilitated the safe reopening of courts, there are key questions to be considered going forwards, particularly as the UK looks to life post-pandemic. First, the UK Government has published research on the digital divide during the COVID-19 pandemic, that is to say the gap between people in society who have full access to digital technologies (such as the internet and computers) and those who do not.²⁵ The COVID-19 pandemic has exacerbated the digital divide and CVP measures should not necessarily be considered a silver bullet to resolve access to justice challenges. On the one hand, those involved in the judicial process may lack access to the requisite technologies; on the other, the questioning of a witness, victim or defendant may be less effective in a remote setting – which may give rise to questions over due process guarantees. This is a concern that has also been raised in the context of challenges to the judiciary in Latin America and the Caribbean.²⁶

Second, there is a question as to which digital justice measures such as CVP should be maintained post-pandemic. We would welcome a wholesale review examining to what extent some or all of the digital justice measures introduced during COVID-19 should be maintained post-pandemic. While a cash strapped government may find any measure which cuts costs attractive in the aftermath of the pandemic, the cost of justice should be weighed in the balance.

Prioritization of cases/procedures

Across the Courts and Tribunals in England and Wales there was a prioritization of cases and case-types to make sure the most urgent and important cases could be heard.

In the criminal courts, priority was given to hearings related to custody, detention and bail, and urgent applications for matters such as terrorism and domestic violence.

In the civil, family and tribunals jurisdictions, urgent work included applications to suspend warrants of possession, injunctions and orders dealing with issues of care, abduction, emergency protection and debt, and also work on mental health, immigration bail and SCS cases.

Continuation of activities with preventive & health measures

Court and Tribunal buildings have been modified to comply with Public Health England guidance, including by installing protective screens. In addition, all frontline HMCTS staff and contractors were deemed “essential workers”. Laptops have been provided to HMCTS staff to enable them to work from home where possible. Rota working has been implemented across sites so that staff can socially distance while at work.

²³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf

²⁴ <https://www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak>

²⁵ COVID-19 and the digital divide, UK Parliament, 17 December 2020, available at: <https://post.parliament.uk/covid-19-and-the-digital-divide/>

²⁶ ILAC Report, Justice in the time of COVID-19, Challenges to the Judiciary in Latin America & the Caribbean, International Legal Assistance Consortium and Cyrus R. Vance Centre, December 2020, available at: <https://www.vancecenter.org/wp-content/uploads/2020/11/COVID-19-in-the-time-of-COVID-19-English-.pdf>

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain:

Even prior to the COVID-19 pandemic, cuts in the legal system had caused, in the words of former president of the Supreme Court Baroness Hale, “serious difficulty” to the justice system.²⁷ Indeed, in the UK, cuts to the legal aid system, court closures and cuts to support services can be traced back to 2010.²⁸ The COVID-19 pandemic has only served to exacerbate backlogs in cases in the judiciary.

The UK Government publishes quarterly National Statistics on the volume of cases dealt with in the county, family, Magistrates’ and Crown Courts of England and Wales, with statistics also broken down for the main types of case involved²⁹. A backlog in cases across England and Wales has been widely reported.³⁰ We have found specific statistics around this backlog in the following areas.

Criminal Courts

The total criminal courts backlog was, in December 2020, more than 457,000 – approximately 100,000 more than prior to the COVID-19 pandemic³¹.

As at the end of September 2020, criminal case receipts (the number of cases where the case has been entered on the court administrative system) and disposals (the number of cases only when all the offences have been completed) at the Magistrates’ Courts remained around a third below levels seen in the previous year. There were 412,093 outstanding cases at the magistrates’ court in the third quarter of 2020. This represents an increase of 43% compared to the previous year (288,600 in the third quarter of 2019)³².

As at the end of September 2020, the volume of case receipts into the Crown Court was 7% higher than the previous year. Case disposals were 20% lower than the previous year, with annual falls seen across all case

²⁷ Legal aid: UK's top judge says cuts caused 'serious difficulty', BBC website, 27 December 2019, available at: <https://www.bbc.co.uk/news/uk-50923289>

²⁸ England's criminal justice system was on its knees long before coronavirus, The Guardian, 6 September 2020, available at: <https://www.theguardian.com/commentisfree/2020/sep/06/england-criminal-justice-system-coronavirus-covid-19-cuts-2010>

²⁹ <https://www.gov.uk/government/collections/court-statistics-quarterly>

³⁰ For example, Court cases resume but backlog persists in England and Wales, The Financial Times, 18 May 2020, available at: <https://www.ft.com/content/09d63a9f-feed-43ca-9f7e-02bb1939bd17>

³¹ <https://www.bbc.co.uk/news/uk-55712106>

³² <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-july-to-september-2020--2/criminal-court-statistics-quarterly-july-to-september-2020#statisticians-comment>

types. At the end of the third quarter of 2020 there were 50,918 outstanding cases at the Crown Courts, an increase of 44% on the third quarter of 2019 (35,478 cases)³³.

Family Courts

The Law Society reported, in September 2020, that backlogs in the Family Courts were up 23% on pre-COVID-19 levels (to 52,391). Between July and September 2020, 68,805 new cases started in family courts, similar to the equivalent quarter in 2019. This was a combination of decreases in adoption (12%) and matrimonial (10%) case starts and an increase in domestic violence (26%), private law (8%) and financial remedy (5%) case starts. There were 55,942 case disposals in July to September 2020, down 10% on the equivalent quarter of 2019.

- b.** Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

Measures have been taken – and continue to be taken - to enable the judicial system to deal with the increased workload and backlog of cases. This includes the setting up of temporary “Nightingale Courts” to deal with civil, family and tribunals work as well as non-custodial crime cases³⁴. It is expected that there will be 60 such Nightingale Courts by the end of March 2021.

The UK government has pledged a £113m investment to alleviate pressures on courts and tribunals, which includes – in addition to the Nightingale Courts - recruiting 1,600 extra staff, investing in technology, and on-site safety precautions such as plexiglass screens.

There is evidence to suggest that the measures that have been taken have been effective in dealing with the increased workload and reducing backlogs of cases.

- 4.** Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

We are not aware of any specific corruption cases relating to judges or the judicial system in connection with COVID-19 measures in England and Wales. However, allegations of corruption, fraud and other misconduct have been widely reported in other areas since the start of the pandemic. For example, it was reported in September 2020 that PR company Hanbury Strategy, co-founded by an ally of Dominic Cummings, former chief advisor to PM Boris Johnson, had been awarded contracts worth up to £900,000 without a formal competitive tender under COVID-19 emergency measures.³⁵ Furthermore, Public First, a political consultancy owned by long-term associates of Cummings and Michael Gove, Cabinet Office secretary, has been awarded contracts worth almost £1,000,000 throughout the pandemic, again without following an open tender process.³⁶ Media reports also suggest that as much as £3.9 billion of public funds could be lost due to furlough fraud under the UK’s Job Retention Scheme.³⁷

³³ <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-july-to-september-2020--2/criminal-court-statistics-quarterly-july-to-september-2020#statisticians-comment>

³⁴ <https://www.bbc.co.uk/news/uk-53463856>

³⁵ Cummings ally's PR firm given Covid-19 contracts without tenders, The Guardian, 4 September 2020, available at:

<https://www.theguardian.com/world/2020/sep/04/dominic-cummings-allys-pr-firm-hanbury-strategy-given-covid-19-contracts-without-tenders>

³⁶ Firm with links to Gove and Cummings given Covid-19 contract without open tender, The Guardian, 10 July 2020, available at:

<https://www.theguardian.com/politics/2020/jul/10/firm-with-links-to-gove-and-cummings-given-covid-19-contract-without-open-tender>

³⁷ Coronavirus: Billions of pounds lost to fraudsters in furlough scheme, The Independent, 23 October 2020, available at:

<https://www.independent.co.uk/news/uk/politics/coronavirus-furlough-rishi-sunak-fraud-error-national-audit-office-b1230207.html>

More recently, in February 2021, Matt Hancock, the UK's Health Secretary, was found by the High Court to have acted unlawfully by failing to publish multibillion-pound COVID-19 government contracts within the 30-day period required by law.³⁸ The judgment represents a victory for the Good Law Project, a not-for-profit organization that has made a series of legal challenges related to the government's procurement of protective personal equipment and other services during the pandemic.

While we have not identified corruption cases calling into question the integrity of judges or the judicial system, there is a perception that corruption, fraudulent and improper conduct has become more prevalent in the UK during the COVID-19 pandemic.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation: [Click here to enter text.](#)

Initiating legal actions

As noted in the response to Q3, the justice system was significantly impacted by the COVID-19 pandemic, resulting in court backlogs up 23% in family courts (to 52,391) and by 26% in criminal courts (to 564,249) from pre-COVID to end of August 2020.³⁹ In some instances, cases have been pushed back as far as 2022 or further, raising serious questions about access to justice, in particular where such cases involve children.

Progress, however, is being made. As of October 2020, over 30,000 hearings have been conducted using the Government's new Cloud Video Platform across Crown and magistrates' courts. Jury trials have been resumed in more than three quarters of Crown Court buildings, and more than 900 jury trials have been

³⁸ Matt Hancock acted unlawfully by failing to publish Covid contracts, The Guardian, 19 February 2021, available at:

<https://www.theguardian.com/society/2021/feb/19/matt-hancock-acted-unlawfully-failing-publish-covid-contracts-high-court>

³⁹ <https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/law-under-lockdown-covid-19-measures-access-to-justice-and-vulnerable-people> and <https://www.lawsociety.org.uk/topics/research/law-under-lockdown-the-impact-of-covid-19-measures-on-access-to-justice-and-vulnerable-people>



listed since they were reintroduced in May 2020. To support the disposing of cases, the Government has introduced ten Nightingale courts providing 16 additional rooms that will either be used for non-custodial crime hearings or to enable civil and family hearings freeing up other court rooms across the estate for criminal work.⁴⁰

In addition to the £142m announced on 30 June to speed up technological improvements in the court service and modernize courtrooms and improve court buildings, the Government is investing £80m additional funding reflecting the increased running costs of the courts and tribunals during COVID, the need to hire 1,600 additional staff to support the recovery measures, adaptations to courtrooms to enable more of them to be used, and funding for additional capacity through Nightingale courts.⁴¹

Please also see the section below on the right of detainees to trial within a reasonable time.

Right to legal counsel before trial and Right to an effective and confidential communication between the accused and lawyer

The right to a lawyer is an essential safeguard in criminal proceedings and is protected by Article 6 of the European Convention on Human Rights. In view of the pandemic, the current guidance is that if a police interview is required, it should be conducted with lawyers and other specialist services (such as interpreters) attending remotely, with the disclosure and custody record provided to lawyers in advance of the interview.⁴²

After March 2020, remote attendance of defense lawyers (either by video conference or telephone) became and remained standard practice. This has led to reports of: (i) issues with providing adequate representation remotely; (ii) a lack of genuine privacy for client consultations; and (iii) inconsistent practice across the country.⁴³

Fair Trials conducted a survey of the criminal justice system in England & Wales between March and May 2020. An overwhelming majority of respondents said that COVID-19 had negatively impacted suspects' rights in police custody.⁴⁴ Fair Trials found:

- 71% of respondents and over 80% of defense lawyers believed COVID-19 had a 'significant' or 'moderate' negative impact on suspects' ability to access prompt in-person legal assistance; and
- 59% of respondents believed that suspects' access to legal assistance during police interviews had been 'significantly' or 'moderately' negatively impacted.⁴⁵

⁴⁰

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf

⁴¹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf

⁴² <https://www.lawsociety.org.uk/topics/coronavirus/coronavirus-covid-19-interview-protocol>

⁴³ <https://www.fairtrials.org/news/protection-suspects-and-defendants%E2%80%99-rights-england-wales-during-covid-19>

⁴⁴ <https://www.fairtrials.org/sites/default/files/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf>

⁴⁵ *Ibid.*



Some commentators have expressed concern about the fairness of convictions that rely in any substantial way on evidence obtained during police interview (or drawing adverse inferences from silence) when suspects were refused face-to-face legal support in police stations.⁴⁶

There ultimately appears to be a consensus that the quality of legal assistance has suffered due to COVID-19 restrictions. The pandemic has severely limited in-person contact between suspects and lawyers. Legal advice and assistance is primarily being provided remotely, either via video conference or telephone. The effect of this is increased difficulty in taking instructions from and providing advice to clients, as well as less time speaking to clients. Further, there has been a particularly negative impact on vulnerable suspects who require support for their welfare during criminal proceedings.⁴⁷

Furthermore, a survey by the Law Society found that people living in institutionalized settings, such as prisons, have been subjected to worse and more restrictive conditions, including the use of restraint and solitary confinement. This risks removing an essential element of external scrutiny of conditions in institutions, particularly at a time when detained persons have limited access to their family or solicitor for prolonged periods.

However, there is some optimism that in England and Wales the increased use of video conference could address the high number of people (around 50%) who were waiving their right to free legal assistance before the pandemic.⁴⁸

Security of parties, victims and witnesses

Section 28 of the Youth Justice and Criminal Evidence Act 1999 allows for pre-recorded cross examination of victims and witnesses to take place in advance of the trial. The recording is then played back during the trial and the victim is not required to attend the trial in person.

The Government has accelerated its work to increase the availability of the Section 28 service to support vulnerable victims giving evidence in court. Accordingly, this will enable a greater number of victims to give their evidence closer to the time of the alleged offence and reduce the amount of time they must wait to give evidence.

Before the pandemic, Section 28 was already in place in 18 Crown Courts with at least one Crown Court in every HMCTS region. Section 28 was introduced into an additional 16 courts in August 2020 with all remaining Crown Courts starting the service by the end of 2020.⁴⁹

The Government has stated that the Ministry of Justice is coordinating cross-government work to make victims aware of their rights and the support available, and ensuring that support services are able to meet demand, particularly as lockdown restrictions ease.

It has been proposed that the courts operate additional court sessions. This would consist of two lists operating in one court room: one list in the morning and one list in the afternoon (no one individual would be expected to participate in both the morning and the afternoon sessions). However, a 'standard hours' court will operate to ensure that if, for any reason, a case is unsuitable for the earlier of later

⁴⁶ Covid-19 and Criminal Justice: Temporary Fixes or Long Term Reform? Donald Nicolson, Director of the Essex Law Clinic and Professor at the School of Law and Human Rights Centre, and Jago Russell, Chief Executive of Fair Trials. Available at: <http://repository.essex.ac.uk/28044/1/027.pdf>

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf



session court, it can still be listed in the usual way. This is proposed to address some concerns that the first option will not be suitable for certain cases, defendants (such as youth or female defendants in custody due to extended travel times) or victims.⁵⁰ The blended solution of operating a court room with two lists, as well as a standard hours court, is expected to mitigate against the diversity challenges of practitioners with caring or other responsibilities being unable to attend the earlier morning or later afternoon session.⁵¹

Right of detainees to trial within a reasonable time

The Ministry of Justice published data on 18 February 2021 for the period October 2019 to September 2020, according to these statistics *“the total number of individuals formally dealt with by the [Criminal Justice System] in England and Wales fell by 22% when compared to the previous year (...) In the last year, 10% of defendants were remanded in custody by police prior to appearing at court, 5% were remanded in custody at magistrates’ court, and 41% at the Crown Court. The average custodial sentence length increased across most offence groups over the last year.”*⁵² The Ministry of Justice notes that the data published highlights the impact on criminal court prosecutions and convictions of the pandemic. It further notes that there has been some improvement by September 2020, however, not to pre-pandemic levels. Nonetheless, the use of out of court disposals (sanctions used by police to address offences without the need to deal with them in court) has increased.⁵³

As of January 2021, there was a backlog in the Crown Courts of 54,000 unheard cases. It is expected that some crimes from 2020 will not go before a jury until 2022.⁵⁴ Furthermore, some defendants are having to wait up to four years from the time of an alleged offence to the case reaching Crown Court trial as a result of delays caused by Covid-19.⁵⁵ Consequently, defendants in remand custody face prolonged pre-trial detention as their custody limits are being extended.⁵⁶ The courts have prioritized the more serious offences since April 2020.⁵⁷

Providing additional capacity through Nightingale courts is a key pillar of the Government’s recovery plan. To enable more cases to be disposed of each week, as of October 2020, the Government has opened ten Nightingale courts providing 16 additional rooms that will either be used for non-custodial crime hearings or to enable civil and family hearings freeing up other court rooms across the estate for criminal work.⁵⁸ With guidance from the judiciary, the Government has identified the types and volumes of cases that could be safely heard in Nightingale courts. However, Nightingale courts will not be suitable

⁵⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf

⁵¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf

⁵² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962357/criminal-justice-statistics-quarterly-sept-2020.pdf

⁵³ *Ibid.*

⁵⁴ <https://www.bbc.co.uk/news/uk-55712106>

⁵⁵ <https://www.theguardian.com/law/2020/sep/08/judge-criticises-uk-governments-inadequate-efforts-to-aid-covid-19-backlog>

⁵⁶ <https://www.fairtrials.org/sites/default/files/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf>

⁵⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962357/criminal-justice-statistics-quarterly-sept-2020.pdf

⁵⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf

to hear custodial criminal sentences due to the prohibitive expense of providing secure docks and cell facilities.

By way of regulation made under the Prosecution of Offences Act, Custody Time Limits have been extended from 182 days to 238 days. This amendment will be in effect until 28 June 2021.

63% of respondents to Fair Trials' Justice under Lockdown survey thought that the amount of time defendants spend in detention is likely to be 'higher' or 'much higher' as a result of the pandemic. Responses suggest that custody time limits are being extended routinely as a direct result of delays to trial proceedings. Indeed, some defense lawyers expressed concern that judges were granting extensions of time with "*little regard for the necessity of continued pre-trial detention, whenever a trial was adjourned due to Covid-19.*"⁵⁹

As a consequence of extending detention periods, some defendants have been unable to see family and legal advisors for prolonged periods of time. Solicitors have reported up to eight-week waits to talk to their clients, with hearing dates sometimes offered before they have been able to take instructions.⁶⁰

The government has been asked to provide data on the impact of COVID-19 on custody time limits, but it has refused to do so, due to the "*disproportionate cost*" of gathering such data.⁶¹

Right to an interpreter

Social distancing measures have affected the ability of interpreters to attend police stations or courts. Court guidelines state that it is no longer safe for interpreters to sit next to the necessary parties.⁶² However, translation of any documentation required for the hearing, or audio recording and transcription, can be completed as usual.

The Coronavirus Act 2020 gives the courts in England and Wales the power to direct the remote attendance of interpreters to almost any type of hearing. Where an interpreter is directed to join a remotely held hearing, detailed guidance has been provided to ensure proceedings are conducted justly. This includes using a private and quiet space where there will be no interruption, having a suitable signal and charge to complete the session, and making arrangements for confidential communications with a legal representative during a hearing.⁶³

Notwithstanding the safeguards which have been put in place, 55% of respondents to Fair Trials' Justice under Lockdown survey believed that suspects' access to specialist assistance, such as interpretation and medical assistance, had been undermined.

One lawyer reported that a client with COVID-19 symptoms required an interpreter who refused to attend the interview due to safety concerns. The police were unable to facilitate remote attendance, as a result of which the suspect was not able to obtain legal advice and was ultimately charged without an interview.⁶⁴

⁵⁹ *Ibid.*

⁶⁰ <https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/law-under-lockdown-covid-19-measures-access-to-justice-and-vulnerable-people>

⁶¹ House of Commons, Remand in Custody: Written Questions 48993 and 48994. Available at: <https://questions-statements.parliament.uk/written-questions/detail/2020-05-19/48994>.

⁶² <https://www.legalex.co.uk/news/what-is-best-practice-for-accessing-legal-interpreting-services-during-the-covid-19-restrictions>

⁶³ <https://www.legalex.co.uk/news/what-is-best-practice-for-accessing-legal-interpreting-services-during-the-covid-19-restrictions>

⁶⁴ <https://www.fairtrials.org/sites/default/files/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf>

The government has published statistics on the use of language interpreter and translation services in courts and tribunals between July and September 2020. It was reported that the overall success rate of requests for language services in Q3 2020 was 98%, which is similar to the rates seen since 2017. The proportion of cancellations increased to 34% in Q2 2020. However, this figure dropped to 22% in Q3 2020, which is closer to pre-COVID proportions. Nevertheless, there has been an overall reduction in the volume of requests for language services, which the government attributes to the restrictions on court activity imposed during the pandemic.⁶⁵

Right to trial by a competent, independent and impartial tribunal

To ensure the safety of court users during the pandemic, all new jury trials in England and Wales were temporarily suspended on 23 March 2020. Since then, only a handful of jury trials have resumed, with pressure mounting by commentators with access to justice concerns.

It is estimated that up to 1,000 cases are added to the waiting list each month.⁶⁶ There has been some consideration of the feasibility of moving to online jury trials. Whilst the use of technology in jury trials has increased, the wholesale move online for trials has not happened.⁶⁷

In response, the government has been considering reducing the size of juries from 12 to 7. The Lord Chancellor in his evidence to the justice select committee on 23 June 2020 stated that the severity of the backlog of cases required smaller sizes.⁶⁸

However, there is resistance to reducing the size of juries. It is argued that this would erode the protections afforded to defendants by the jury of 12.⁶⁹ The Criminal Bar Association released the results of an internal ballot on 29 June 2020 which showed that 93% of members who voted were against the erosion of jury trials in the Crown Court.

Right to a public hearing

The Coronavirus Act 2020 amends existing legislation so as to enable the use of technology either in video/audio-enabled hearings in which one or more participants appear before the court using a live video or audio link, or by a wholly video/audio hearing where there is no physical court room and all participants take part in the hearing using telephone or video conferencing facilities.

As a result of COVID-19 restrictions in courts, 9 in 10 hearings in England and Wales are now taking place remotely.⁷⁰ The significant shift to using remote technologies has succeeded in preventing the criminal justice system grinding to a halt, however it is argued that there has been an erosion of the traditional safeguards for protecting suspects and accused.

Research suggests that defendants in remote hearings are more likely to receive a prison sentence or remand.⁷¹ Researchers have found that suspects whose cases were dealt with remotely were also less

⁶⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944734/ccsq_bulletin_jul_sep_2020.pdf

⁶⁶ <https://www.uyanet.org/en/news/united-kingdom-will-covid-19-prove-downfall-jury-trials-uk>

⁶⁷ <https://justice.org.uk/wp-content/uploads/2020/04/Mulcahy-Rowden-Virtual-trials-final.pdf>

⁶⁸ <https://www.barcouncil.org.uk/resource/guest-blog-how-will-restricting-jury-trial-and-reducing-jury-numbers-affect-the-delivery-of-justice.html>

⁶⁹ *Ibid.*

⁷⁰ <https://www.independent.co.uk/news/uk/home-news/coronavirus-court-hearings-jail-sentence-remote-lockdown-a9500101.html>

⁷¹ Covid-19 and Criminal Justice: Temporary Fixes or Long Term Reform? Donald Nicolson, Director of the Essex Law Clinic and Professor at the School of Law and Human Rights Centre, and Jago Russell, Chief Executive of Fair Trials. Available at: <http://repository.essex.ac.uk/28044/1/027.pdf>



likely to have legal representation.⁷² Indeed, guilty pleas were 3 per cent higher in virtual courts than for in-person hearings, with the number of people admitting theft, public order and motoring offences “substantially higher”.⁷³ Furthermore, it was found that defendants in virtual court cases were more likely to receive a custodial sentence and less likely to receive a community sentence.⁷⁴

It is thought that witnesses are less inclined to falsify during in-person hearings.⁷⁵

There is concern that appearing over video link could make defense advocates less effective, particularly in relation to bail applications. For example, it was found to be more difficult for defense advocates to build rapport with their clients in virtual hearings.⁷⁶ Lawyers and defendants have reported difficulties discussing the details of the case without meeting in person.⁷⁷

Researchers at the University of Surrey have suggested that: *“There was a concern that the increased use of video could remove the public’s opportunity to see justice being done, and might undermine trust and confidence in the system.”*

Right to be present at trial

As noted above, the Coronavirus Act 2020 permitted the expanded use of video and audio hearing. The Law Society notes that this measure has been particularly challenging for children and people with mental health issues, learning disabilities language barriers, or other factors affecting their ability to understand proceedings, as well as for litigants in person.

Only 16% of solicitors who responded to a Law Society survey said that the vulnerable clients they represent were able to participate effectively in remote hearings. This indicates that remote hearings are a barrier to justice for vulnerable persons.⁷⁸

As discussed above, research from the University of Surrey found defendants are more likely to be jailed in remote hearings, compared with those who have in-person hearings. Further, suspects whose cases were dealt with remotely were also less likely to have legal representation.⁷⁹ This could result in defendants being unfairly convicted or given harsher sentences as a consequence of having a remote trial rather than an in-person hearing.

Right to appeal

The backlog of unheard cases in the Crown and Magistrates Courts (as discussed above) and consequent delay in trials may result in appeals hearings being delayed even further. As noted, some alleged crimes from 2020 will not go before a jury until 2022. This will necessarily mean that any appeal to a potential sentence cannot be heard until after that time. Accordingly, this will be to the detriment of those seeking an appeal.

⁷² <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>

⁷³ <https://www.independent.co.uk/news/uk/home-news/coronavirus-court-hearings-jail-sentence-remote-lockdown-a9500101.html>

⁷⁴ <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>

⁷⁵ Covid-19 and Criminal Justice: Temporary Fixes or Long Term Reform? Donald Nicolson, Director of the Essex Law Clinic and Professor at the School of Law and Human Rights Centre, and Jago Russell, Chief Executive of Fair Trials. Available at: <http://repository.essex.ac.uk/28044/1/027.pdf>

⁷⁶ <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>

⁷⁷ <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>

⁷⁸ <https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/law-under-lockdown-covid-19-measures-access-to-justice-and-vulnerable-people>

⁷⁹ <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>



How has the COVID-19 pandemic affected the judiciary?

Bibliography – UK

A. Government / government agency publications	
1.	HM Courts & Tribunals Service (2020) COVID-19: Overview of HMCTS response. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery - COVID-19-Overview of HMCTS response A4L v3.pdf .
2.	HM Courts & Tribunals Service (2020) COVID-19: Overview of HMCTS Recovery for Civil and Family Courts and Tribunals. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932496/HMCTS_CFT_Recovery_Plan_v2b.pdf .
3.	HM Courts & Tribunals Service (2020) COVID-19: Update on the HMCTS response for criminal courts in England & Wales. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime WEB.pdf .
4.	House of Commons Justice Committee (2020) Coronavirus (COVID-19): The impact on probation systems, Third Report of Session 2019-21. Available at: https://committees.parliament.uk/publications/1944/documents/18919/default/ .
5.	House of Commons Justice Committee (2020) Coronavirus (Covid-19) The impact on prisons: Government Response to the Committee’s Fourth Report of Session 2019-21. Available at: https://committees.parliament.uk/publications/4074/documents/40487/default/ .
6.	House of Commons Justice Committee (2020) Coronavirus (COVID-19): The impact on the legal professions in England and Wales, Seventh Report of Session 2019-21. Available at: https://committees.parliament.uk/publications/2227/documents/26119/default/ .
7.	Parliamentary Report (2020) Coronavirus (Covid-19): The impact on probation systems: Government Response to the Committee’s Third Report. Available at: https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/826/82602.htm .
8.	Parliamentary Report (2020) Coronavirus (Covid-19): The impact on courts. Available at: https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51902.htm .



9.	Parliamentary Report (2020) Coronavirus (Covid-19): The Impact on the legal profession in England and Wales: Government Response to the Committee’s Seventh Report. Available at: https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/898/89802.htm .
10.	Written evidence from Fair Trials, House of Commons Justice Committee Inquiry into Court Capacity, October 2020. Available at: https://committees.parliament.uk/writtenevidence/12592/pdf/
11.	The Government’s response to COVID-19: human rights implications, Joint Select Committee on Human Rights, 21 September 2020. Available at: https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26511.htm
12.	Criminal Justice Statistics quarterly, England and Wales, October 2019 to September 2020, Ministry of Justice, 18 February 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962357/criminal-justice-statistics-quarterly-sept-2020.pdf
B. NGOs, Think Tank and Professional Body publications	
13.	Centre for Justice Innovation. Available at: https://justiceinnovation.org/aboutcji .
14.	Fair Trials. Available at: https://www.fairtrials.org/covid19justice .
15.	Institute for Government (2020) How has coronavirus disrupted the criminal courts? Available at: https://www.instituteforgovernment.org.uk/publication/performance-tracker-2020/criminal-courts .
16.	JUSTICE (2020) Position on jury trials, JUSTICE. Available at: https://justice.org.uk/wp-content/uploads/2020/06/JUSTICE-position-on-jury-trials.pdf .
17.	JUSTICE (2021) JUSTICE COVID-19 response, JUSTICE. Available at: https://justice.org.uk/our-work/justice-covid-19-response/ .
18.	The Nuffield Family Justice Observatory (2021) Coronavirus and the family justice system, The Nuffield Family Justice Observatory. Available at: https://www.nuffieldfjo.org.uk/coronavirus-family-justice-system/family-courts .
19.	The Law Society (2020) Law under lockdown: the impact of COVID-19 measures on access to justice and vulnerable people. Available at: https://tlsprdsitecore.azureedge.net/-/media/files/topics/research/law-under-lockdown-the-impact-of-covid-19-measures-on-access-to-justice-and-vulnerable-people.pdf?rev=3ece784a46a64b0eb58dffdbdf158634&hash=D870981081122EAB569C2899DAE1FC74



C. Academic publications	
20.	Beardon, S., Byrom, N., and Kendrick, A (2020) The Impact of COVID-19 measures on the civil justice system. <i>The Legal Education Foundation</i> . Available at: https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf .
21.	Beardon, S., Byrom, N., and Kendrick, A (2020) Rapid Review: The Impact of COVID-19 measures on the civil justice system. <i>The Legal Education Foundation</i> . Available at: https://www.judiciary.uk/wp-content/uploads/2020/06/FINAL-REPORT-CJC-4-June-2020.v2-accessible.pdf .
22.	Daigle, M., Laws, E., and Manuel, M (2020) Justice, the rule of law and Covid-19: three expert views. <i>Overseas Development Institute</i> . Available at: https://www.odi.org/blogs/17236-justice-rule-law-and-covid-19-three-expert-views .
23.	Mulcahy, L., Rowden, E., and Teeder, W (2020) Exploring the case for Virtual Jury Trials during the COVID-19 crisis, An evaluation of a pilot study conducted by JUSTICE. <i>JUSTICE</i> . Available at: https://justice.org.uk/wp-content/uploads/2020/04/Mulcahy-Rowden-Virtual-trials-final.pdf .
24.	Mulcahy, L., Rowden, E., and Teeder, W (2020) Testing the case for a virtual courtroom with a physical jury hub, Second evaluation of a virtual trial pilot study conducted by JUSTICE. <i>JUSTICE</i> . Available at: https://justice.org.uk/wp-content/uploads/2020/06/Mulcahy-Rowden-second-evaluation-report-JUSTICE-virtual-trial.pdf .
D. Other resources	
25.	BBC (2020) Covid court delays: Weeds, leaks, and four-year waits for justice, BBC. Available at: https://www.bbc.co.uk/news/uk-54173891 .
26.	BBC (2020) Covid: Years waiting for trial mean ‘people will lose faith’, BBC. Available at: https://www.bbc.co.uk/news/uk-wales-54957734 .
27.	BBC (2020) ‘Lack of investment’ behind delayed court cases, BBC. Available at: https://www.bbc.co.uk/news/business-53995282 .
28.	BBC (2021) Covid and the courts: ‘Grave concerns’ for justice, warn watchdogs, BBC. Available at: https://www.bbc.co.uk/news/uk-55712106 .
29.	BBC (2021) Covid in Scotland: ‘Majority’ of criminal trials on hold for lockdown BBC. Available at: https://www.bbc.co.uk/news/uk-scotland-55617819 .
30.	Harrison Clark Rickerbys Solicitors (2020) How has Covid-19 impacted the family law courts?, Harrison Clark Rickerbys Solicitors. Available at: https://www.hcrlaw.com/blog/how-has-covid-19-impacted-the-family-law-courts/ .



31.	Lawson-West Solicitors (2020) 3-Month Delay in Family Law Courts, Lawson-West Solicitors. Available at: https://www.lawson-west.co.uk/for-people/services/divorce-and-family/articles/coronavirus-3-month-delay-in-family-law-courts .
32.	Remote Courts Worldwide, available at: https://remotecourts.org/ .
33.	The Guardian (2021) Public backs virtual trials in England and Wales to ease court case backlog, The Guardian. Available at: https://www.theguardian.com/law/2021/jan/24/public-backs-virtual-trials-in-england-and-wales-to-ease-court-case-backlog?CMP=Share_iOSApp_Other .
34.	Juries and Covid-19: protecting the right to a fair trial, UK Human Rights Blog, 7 May 2020. Available at: https://ukhumanrightsblog.com/2020/05/07/juries-and-covid-19-protecting-the-right-to-a-fair-trial/
35.	The Times (2021) Covid strikes down 69 judges amid chaos in courts and jails, The Times. Available at: https://www.thetimes.co.uk/article/covid-strikes-down-69-judges-amid-chaos-in-courts-and-jails-2vx5c9grq .
36.	World Prison Brief (2020) International news and guidance on COVID-19 and prisons – 13 March – 30 November, World Prison Brief. Available at: https://www.prisonstudies.org/news/international-news-and-guidance-covid-19-and-prisons-13-march-30-november .
37.	Law under lockdown: COVID-19 measures, access to justice and vulnerable people, the Law Society, 25 September 2020. Available at: https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/law-under-lockdown-covid-19-measures-access-to-justice-and-vulnerable-people
38.	Urgent cash injection needed to halt demise of criminal legal aid firms, The Law Society, 12 February 2021. Available at: https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/urgent-cash-injection-needed-to-halt-demise-of-criminal-legal-aid-firms?sc_campaign=5COFE0D28B474F6BA2EE374CB3EE601B

USA - California

Paul P. Chen, Partner | pchen@mayerbrown.com

Michael Kerr, Senior Counsel | mkerr@mayerbrown.com

Sean A. Flores, Associate | sflores@mayerbrown.com

Qian Xiaowen, Associate | xqian@mayerbrown.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: **United States (California)**

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

There have been no known efforts to challenge the independence of the California state court system. The California Judicial Council is the policymaking body of the California courts, which is the largest state court system in the United States. The California Judicial Council, in accordance with the California Constitution, is responsible for ensuring the consistent, independent, impartial and accessible administration of justice. Committee of the California Judicial Council have met several times during the COVID-19 pandemic to address issues impacting the California state courts due to the pandemic such as trial delays and suspensions and using technology to hold court proceedings for the most urgent cases.

However, on February 9, 2021, the Los Angeles County Superior Court system was sued by several public service organizations in the Los Angeles area. The lawsuit seeks to halt in-person traffic and eviction trials held in Los Angeles County, claiming COVID-19 prevention protocols are failing after two court interpreters who were infected died in recent weeks. In addition to these deaths, at least 445 of the court's 5,100 staff and judges have tested positive since March 2020. To help curb any spread and mitigate backlog, some district attorneys and public defenders have been issued a COVID-19 vaccine.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: Juvenile; Probate; Writs
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



Measures Taken

California courts have taken measures to ensure public health and safety while allowing the continuity of court activities. In general, access to court rooms are restricted to court staff, jurors, and other authorized persons. Members of the press and public may access proceedings by teleconference or videoconference only. Courts published videoconference guidelines on their websites, installed plexiglass to court houses to enhance safety, added signage about social distancing, and installed hand sanitizer dispensers. In Los Angeles County, for example, most members of the public now need appointments to enter courthouses. Within the Los Angeles County Superior Court system, remote proceedings are also now available but cannot be mandated.

In order to deal with the backlogs of cases, courts have made efforts to prioritize certain types of cases. For example, the Los Angeles County Superior Court system has issued an order that deems certain proceedings as essential or emergency (such as restraining orders, criminal (Preliminary Hearings, Bail Review Hearings, and Parole and Post-Release Community Supervision Revocation Hearings)).²

Challenges

One of the more challenging obstacles has been the lack of space and financial resources necessary to construct a substantial number of courtrooms that could safely accommodate a jury trial. This has become a serious problem for civil jury trials, which must take a back seat to criminal cases as long as there are not enough courtrooms. The courts' unfamiliarity with videoconferencing was a challenge at first but turned out to be one that nearly all courts quickly managed. The inability of clerks' offices to operate in person and at full strength has made things very challenging, as well.

To alleviate some of these issues, the California Judicial Council approved a plan to distribute \$50 million to help California state trial courts during COVID-19.³ The first \$25 million was allocated to state trial courts in July 2020. Approval of the second \$25 million distribution was approved in January 2021. In January 2021, the California Judicial Council also held a vote to require trial courts to provide quarterly reports on their progress in reducing their COVID-19 backlogs and how they are using the special COVID-19 funding.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

² That list also includes Civil Ex-Parte Proceedings, Family Law Ex Parte Proceedings, Hague Convention Proceedings, and Emergency Orders Relating to the Health and Safety of a Child), Juvenile (Delinquency Arraignment/Detention Hearings, Adjudication and Disposition, Juvenile Ex Parte Orders, Juvenile Restraining Orders, Juvenile Delinquency Detention Hearings and related case processing, Juvenile Dependency Detention Hearings and related case processing, Emergency Orders Relating to the Health and Safety of a Child), Mental Health (Judicial Commitments for Dangerous Persons based on Mental Health Conditions and Criminal Mental Competency Hearings), Probate (Ex Parte Proceedings, Probate Emergency Petitions for Temporary Conservatorship, and Probate Emergency Petitions for Temporary Guardianship), and Writs (Petitions for Writ Seeking Emergency Relief in Misdemeanor, Limited Civil and Infractions, Emergency Writs Challenging COVID-19 Emergency Measures, Writs of Habeas Corpus Challenging Medical Quarantines, Writ proceedings seeking release by persons judicially committed to a state hospital, development center, or other facility).

³ See Report Entitled "COVID-19 Backlog Funding Data," page 11, available at: <https://www.courts.ca.gov/documents/jbbc-20210105-materials.pdf>. Last visited February 26, 2021.



a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain:

On March 23, 2020, the California Chief Justice issued a statewide order suspending all jury trials in California's superior courts for 60 days and allowing courts to immediately adopt new rules to address the impact of the COVID-19 pandemic. The time period to begin criminal and civil trials was extended for 60 days. These time periods have been further extended and local courts have also issued subsequent orders to extend such time periods.

Delays and backlogs in criminal and civil cases are prevalent in California. Half as many cases were resolved from March 2020 through August 2020 as during the same period in 2019, according to a report published by the Judicial Council of California (Judicial Branch Budget Committee).⁴

In Southern California, when the pandemic reached a global crisis, Los Angeles County Superior Court system shut down its courts for 3 days, from March 17-March 19, for a total of 3 court days. In early September 2020, the Los Angeles County Superior Court system completed its first criminal jury trial since the shutdown in March 2020, and more than 7,000 criminal cases await trial to satisfy the defendants' right to a speedy trial, according to an update provided in September 2020. In the San Diego court system, the second-largest in California, there was a backlog of 54,000 civil cases and 20,000 criminal cases, the San Diego Union-Tribune reported in September.⁵

The Superior Court of County of San Mateo in northern California suspended all criminal and civil jury trials since March, 2020. Effective as of February 5, 2021, it started to hear all criminal jury trials. As of February 9, 2021, all civil jury trials in that court are still suspended through March 12, 2021.⁶ Consistent with the state wide statistics, the number of cases resolved in the Santa Clara Superior Court from March 2020 through August 2020 was 46.7% less than the same period in 2019. The Santa Clara Superior Court resumed jury services in February, 2021.

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

⁴ See Report Entitled "COVID-19 Backlog Funding Data," page 11, available at: <https://www.courts.ca.gov/documents/jbbc-20210105-materials.pdf>. Last visited on February 26, 2021.

⁵ See San Diego courts aim to re-start trials amid massive case backlog, available at <https://www.sandiegouniontribune.com/news/courts/story/2020-09-27/san-diego-courts-aim-to-re-start-trials-amid-massive-case-backlog>. Last visited on February 26, 2021.

⁶ See Thirteenth Court Emergency Response Calendar Memo Order to Novel Coronavirus Pandemic. Available at https://www.sanmateocourt.org/documents/court_news_and_notices/021021a.pdf. Last visited on February 26, 2021.



The lack of physical space to make more courtrooms available to allow safe jury trials makes it challenging to deal with increased workload and backlog of cases. In response, California’s top judicial officials have issued hundreds of emergency orders and rules that grant courts more flexibility in where they can hold hearings using remote tools (such as video and audio conferencing) and extending certain deadlines for trials.⁷

Courts in California have published guidelines on how to prepare to participate in a Zoom video conference. Individual California courts have adopted various technology/online programs that enhance access to justice, for example, e-Courtroom (an electronic program to track courtroom resource availability, such as court reporters, interpreters and other necessary staff), online payment for traffic tickets, online self-help center (where court staffs review forms to start a divorce, parentage cases, etc.) Other programs such as e-filing and online case databases that were widely used even before the pandemic remain important to access to justice.

To address the backlog of criminal cases, courts have also prioritized the types of cases that are more time-sensitive in nature. For example, the Los Angeles County Superior Court system issued an order on September 10, 2020, that requires courts to prioritize criminal jury trials over other matters. Since then, however, the Los Angeles County Superior Court system has issued three separate orders allowing continuances of criminal trials as rates of COVID-19 hit all time highs in Los Angeles County in December and January. Orders suspending criminal and civil trials in Santa Clara Superior Court exclude their application to juvenile cases and other emergency matters.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.
No.
5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:
 - Initiating of legal actions
 - Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
 - Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
 - Security of parties, victims and witnesses
 - Right of detainees to trial within a reasonable time / right to be tried without undue delay
 - Right to an interpreter
 - Right to an effective and confidential communication between the accused and lawyer
 - Right to examine evidence
 - Right to trial by a competent, independent and impartial tribunal
 - Right to a public hearing
 - Right to be present at trial
 - Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

⁷ <https://newsroom.courts.ca.gov/covid-19-news-center/court-emergency-orders>. See also “How COVID-19 is Impacting California Courts: Roundup of Services.” The Recorder (California) Online, July 13, 2020 Monday. Last visited on February 26, 2021.



The Los Angeles County Superior Court system's decision/need to prioritize certain matters has deterred litigants from filing civil suits in court as litigants fear the inability to have a jury trial in less than 3 or more years after filing suit. In certain cases, this has caused many parties to rely on mediation and/or arbitration as alternatives. Additionally, the court's remote access platforms have proved extremely difficult to use for older clients, as well as those who speak poor English or struggle with internet literacy. Many litigants also fear that they will lose their case unless they appear in person.

Another concern is that the use of virtual hearings risks widening the gap between technological haves and have-nots. Some litigants lack internet or phone access, or do not know a remote option is available. And unless a litigant has taken the steps to secure a waiver of the fees from the court, each remote appearance comes at a monetary cost.

Delays in criminal proceedings have direct impacts on individual freedom. For example, in San Francisco, U.S. District Judge Vince Chhabria, who had stopped holding sentencing hearings in his court to protect participants' health, faced a sentencing hearing for a drug defendant who was being held in Santa Rita Jail. Because the inmate was seeking a sentence equal to the time he had already served, postponement would have prolonged his confinement. Judge Chhabria found a federal law that could be interpreted as allowing remote sentencing with the defendant's consent, held a telephonic hearing with both lawyers and sentenced the man to no further confinement.⁸

⁸ Coronavirus Prompts California Courts to Go Virtual. Available at <https://www.governing.com/now/Coronavirus-Prompts-California-Courts-to-Go-Virtual.html>. Last visited on February 26, 2021.

USA - Illinois

James C. Williams, Partner | jcwilliams@mayerbrown.com



MAYER | BROWN

Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: **United States – Illinois State Courts, Cook County (Chicago and its suburbs in Cook County)**

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

There have been no reported attempts to undermine judicial independence using COVID-19 –related emergency powers or measures. It may be noted that the Illinois Supreme Court exercises authority over the Illinois state courts and the courts' responses to COVID-19. There has been no observed interference in the Illinois Supreme Court's authority by the other branches of government as a result of the COVID-19 emergency.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters [See attached summary:](#)
 - Constitutional protections
 - Criminal [Criminal jury trials have been suspended but are expected to resume in March, 2021.](#)
 - Family [Protective orders continue to be issued.](#)
 - Civil
 - Labor [The Illinois courts do not have special labor courts.](#)
 - Bankruptcy: [The responses in this Questionnaire are limited to the state courts in Cook County, which are under the administrative supervision of the Illinois Supreme Court. While all U.S. states, including Illinois, have statutes regarding insolvency and liquidations, bankruptcy in the United States is governed by the federal Bankruptcy Code and most bankruptcy matters, including insolvency, liquidations, reorganizations, and personal debt relief are handled by the U.S. federal courts, which are separate from the state courts and independent of the executive and legislations branches of the federal government.](#)
 - Other: Evictions
- Continuation of activities with preventive & health measures [Preventive and health and safety measures have, for the most part, taken the form of remote video and telephone conferencing. Where in-person hearings, such as grand jury proceedings, take place, the Illinois courts have adopted mask requirements and social distancing measures.](#)
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation: [As is the case with the courts in many jurisdictions, the actions taken by the Illinois Supreme Court and the Cook County Courts have evolved, from initial suspension of many activities to remote hearings via telephone](#)

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



and hearings via Zoom and similar video conferencing to plans to resume in-person judicial procedures. See the attached summary.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: Click here to enter text.

Please explain: [See attached summary.](#)

b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

[Critics of the Cook County courts believe that the steps taken have not been sufficient. See attached summary.](#)

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

[None observed](#)

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation: [See attached summary](#)

How Has the COVID-19 Pandemic Affected the Judiciary United States – Illinois State Courts, Cook County (Chicago and its Suburbs)

Report Summary

Introduction. As permitted by the Illinois Supreme Court, in March, 2020, the Cook County Circuit Court, which is the state trial court for all civil and criminal trial matters in Cook County (which includes the City of Chicago and surrounding suburban communities), temporarily ceased most of its activities and then transitioned to remote hearings by video conferencing and telephone conferences.

Overall Assessment: No Observable Impact on the Independence of the Cook County Courts as a Result of the COVID-19 Pandemic. There has been no observable effect on the independence of the judiciary in the Illinois courts as a result of the COVID-19 Pandemic. The Illinois Supreme Court has continued to exercise independence in the administration of its own court and the Illinois lower courts, including the courts in Cook County.

Extensive Delays. That is not to say, however, that the COVID-19 Pandemic has not had a severe and adverse effect on the Illinois state courts and the administration of justice in Cook County. As described below, the initial suspension of most court activities beginning in April 2020 due to the COVID-19 Pandemic, followed by a shift to remote activities, has resulted in extensive delays. Civil matters came to a virtual halt for a period of time.

Criminal Courts. In General Administrative Order 2020-01, Timothy Evans, Chief Judge of the Cook County Circuit Court initially suspended all matters in the Cook County courts except for except for, in the case of criminal matters, urgent matters – bond court, new arraignments in felony cases, and emergency bond reviews for individuals in custody at the Cook County Jail. Virtual court hearings were resumed in July, 2020. There have been no jury trials in Leighton Criminal Court Building, Chicago’s main criminal court building in more than a year. The target date for the first jury trial in the Leighton Criminal Court Building since the pandemic began is scheduled for March 22, 2021.

As a result, the actual disposition of cases criminal cases has been greatly diminished when compared to normal periods. Data from the Cook County State’s Attorney Office shows that in the 2018-2019 period, the Cook County Criminal Courts processed an average of 6,966 case dispositions between April 1 and June 30. In 2020, the courts processed only 477 cases, about 7% of their usual total. Guilty pleas, which usually constitute about 63% of case resolutions have also greatly diminished. Also, the number of people leaving jail or electronic monitoring has decreased.

Courts have continued in session for plea agreement and juvenile detention hearings. Grand jury proceedings have continued throughout the pandemic.

Eviction Notices. Effective March 14, 2021, the Cook County Sheriff was ordered to cease enforcement of eviction orders relating to residences in Cook County except in certain cases. Federal and state eviction moratoriums have remained in effect throughout the pandemic. This order remains in effect. In addition, there are federal and state orders prohibiting evictions until later in March, 2021.¹

Child Protective Orders. Temporary custody hearings and emergency motions continued to be held.

¹ The end of the federal and state eviction moratoriums may not result in evictions actually occurring until evictions actions are filed and proceed to disposition and the cease enforcement order put into effect by the Cook County courts has been lifted.

²**Civil Matters.** At the start of the pandemic in March, 2020, civil trials in progress were allowed to continue but since then, there have been no new trials (jury trials or, to the knowledge of the contributors, bench trials) commenced in the Cook County state courts. Civil litigation shifted remotely (video and telephone conferencing). This has allowed other litigation proceedings, such as discovery, depositions, oral arguments before a judge, scheduling and case management conferences with the courts to proceed. Judges have also held pretrial settlement conferences. As a result, the cases that are proceeding to a final disposition are, for the most part, limited to cases for which settlements have been reached and cases where the judge can decide the case on the basis of briefs. Cases in which a judge must make a determination that the disposition is fair and reasonable have generally not proceeded to disposition. The lack of the prospect of going to trial and the accompanying heightened pressure on the parties to consider the merits of going to trial vs. settlement that the immediacy of a trial date brings, has likely resulted in an overall diminishment in the pace of settlements.

The lack of trials has also contributed to increases use of alternative dispute resolution.

5. Concerns over due process or fair trial rights that have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions **Note: There has been no cessation of the initiation of criminal actions; the initiation of civil actions can now proceed electronically.**
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

The suspension of jury trials in criminal cases has affected many of the due process or fair trial rights listed above. The suspension of jury trials by the courts has resulted in a suspension of the right to a speedy trial, delayed the right to a trial by a competent, independent and impartial tribunal, the right to a public hearing, and the right to be present at trial. In the U.S., where so many criminal case dispositions are the result of plea bargaining, the suspension of jury trials puts defendants at a disadvantage and results in longer pre-trial incarcerations. Remote interactions hamper the interactions of attorneys and their clients, which effects the communications and the sharing of information between attorneys and their clients. Not included in the above list but which is considered a right in the United States, is the right of the accused to confront witnesses.

² This discussion of civil cases is based largely on discussions with practicing attorneys.

How has the COVID-19 pandemic affected the judiciary?

Bibliography – Illinois Supreme Court and Cook County Courts (Chicago and Cook County Suburbs)

A. Government / government agency publications, press releases, and orders	
1.	Press Release: Illinois Supreme Court Approves Temporary Orders for Eviction Cases and Electronic Signatures, February 23, 2021. Available at: https://courts.illinois.gov/Media/PressRel/2021/022321.pdf
2.	Press Release: Illinois Supreme Court Issues Order for Remote Criminal Case Proceedings, February 11, 2021. Available at: https://courts.illinois.gov/Media/PressRel/2021/021121-1.pdf
3.	Press Release: Illinois Supreme Court Goes Remote for January Oral Arguments, Bar Admission Ceremony, January 11, 2021. Available at: https://courts.illinois.gov/Media/PressRel/2021/011121.pdf
4.	Press Release: Illinois Supreme Court Issues Order for Eviction Cases, December 22, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/122220-1.pdf
5.	Press Release: Illinois Supreme Court Approves Timeline for Expansion of Remote Access Policy, December 18, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/121820-3.pdf
6.	Press Release: Illinois Supreme Court Adopts New Rule for Text Messaging Programs, December 9, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/120920.pdf
7.	Press Release: Illinois Supreme Court Issues Pandemic-Related Orders for Remote Jury Trials and Protective Orders, October 27, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/102720.pdf
8.	Press Release: Illinois Supreme Court to Hold In-Person September Term in Springfield, September 10, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/091020.pdf
9.	Press Release: Illinois Supreme Court Issues Temporary Order Limiting In-Person Court Appearances Through Change to Fee Waivers and Summons to Appear, September 1, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/090120.pdf
10.	Press Release: Supreme Court Amends Rule to Address E-Filing Barriers During Pandemic, August 14, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/081420.pdf

11.	Press Release: Illinois Supreme Court Adopts New Rule for Eviction Cases, July 17, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/071720.pdf
12.	Press Release: Supreme Court Temporarily Amends Rule to Allow New Law School Graduates to Work at Private Law Firms, July 2, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/070220.pdf https://courts.illinois.gov/Media/PressRel/2020/070220.pdf
13.	Press Release: Illinois Judicial Conference Announces Creation of Task Force for COVID-19 Crisis, June 30, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/063020.pdf
14.	Press Release: Illinois Supreme Court Amends Rules to Support Use of Remote Hearings in Court Proceedings, May 22, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/052220-1.pdf
15.	Press Release: Illinois Supreme Court Issues Pandemic-Related Temporary Order for Eviction Cases, May 22, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/052220.pdf
16.	Press Release: Illinois Supreme Court Issue Guidelines for Resuming Judicial Branch Operations During COVID-19 Pandemic, May 20, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/052020.pdf
17.	Press Release: Illinois Supreme Court Issues Order Limiting Freeze on Personal Bank Accounts, April 25, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/042420.pdf
18.	Press Release: Illinois Judicial College to Host Live Webcast on Remote Hearings in Child Protection Cases, April 14, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/041420.pdf
19.	Press Release: Illinois Court Procedures for COVID-19; Supreme Court Livestream, March 13, 2020. Available at: https://courts.illinois.gov/Media/PressRel/2020/031320.pdf
20.	Cook County Court Reestablishment Plan, May 28, 2020. Available at: https://courts.illinois.gov/administrative/covid/052820-Cook_AO.pdf
21.	In Re Illinois Courts Response to COVID-19 Emergency / Remote Proceedings in Criminal Matters, February 11, 2021. Available at: https://courts.illinois.gov/SupremeCourt/Announce/2021/021121-1.pdf
22.	Supreme Court Guidelines for Resuming Illinois Judicial Branch Operations During the COVID-19 Pandemic. Available at: https://courts.illinois.gov/Administrative/covid/052020_SC_GL.pdf

23.	Eviction Schedule, Cook County Sherriff’s Office. Available at: https://www.cookcountysheriff.org/eviction-schedule/
B. NGOs, Think Tank and Professional Body publications	
24.	<i>Practice Note: Impact of COVID-19 on Illinois Practice</i> , Thomson Reuters, Practical Law. Available at: https://content.next.westlaw.com/w-024-8124?isplcus=true&transitionType=Default&contextData=(sc.Default)&firstPage=true
C. Other resources	
25.	Crepeau, “Paused by pandemic, Cook County jury trials set to resume,” <i>Chicago Tribune</i> , February 25, 2021. Available at: https://www.msn.com/en-us/news/crime/cook-county-set-to-resume-jury-trials-as-first-notices-are-sent-out-since-pandemic-closures/ar-BB1dX2EN
26.	Cherone, “Pritzker Extends Ban on Coronavirus-Related Evictions Until March 6,” WTTW News, February 8, 2021. Available at: https://news.wttw.com/2021/02/08/pritzker-extends-ban-coronavirus-related-evictions-until-march-6
27.	Staudt, “Cook County courts Massively Behind Schedule on Criminal Cases”, Chicago Appleseed Center for Fair Courts, September 24, 2020. Available at: https://www.chicagoappleseed.org/cook-county-courts-massively-behind-schedule-on-criminal-cases/
28.	Bloomquist and Leon, “Examining “Cook County E-Court” and Looking Toward the Future of the COVID-19 Pandemic,” Chicago Appleseed Center for Fair Courts, August 19, 2020. Available at: https://www.chicagoappleseed.org/081920-cook-county-e-court/

USA - Maryland

Thomas Delaney, Partner | tdelaney@mayerbrown.com

Howard Waltzman, Partner | hwaltzman@mayerbrown.com

Logan Payne, Associate | lpayne@mayerbrown.com

Kerri Webb, Associate | kwebb@mayerbrown.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: **United States (Maryland)**

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

There have been no known efforts to challenge the independence of the Maryland state court system. The Chief Judge of the Court of Appeals is the administrative head of the Judicial Branch of Maryland and has emergency powers under Chapter 1000 of Title 16 of the Maryland Rules of Practice and Procedure. Under this authority, the Chief Judge is required to determine the extent to which court operations and judicial function can continue in instances of emergency conditions. The Chief Judge issued several administrative orders to address issues impacting the Maryland state courts due to the pandemic such as trial delays and suspensions and prioritizing the most urgent cases.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: Juvenile, election, land record filings
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

On May 22, 2020, the Chief Judge issued a 5 phase plan:

1. Phase 1: emergency response in March and April 2020 which involved the closure of courts to the public except for certain emergency matters and prioritization of emergency matters.

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.

2. Phase 2: expansion of matters to be heard remotely and on-site, including matters that were postponed or deferred during restricted operations. Maryland state courts were in Phase 2 between June 5, 2020, through July 19, 2020, and again between November 30, 2020, through March 14, 2021.²
3. Phase 3: further expansion of activities, including holding certain non-jury trials and providing limited in-person services. The Maryland courts were in Phase 3 from July 20, 2020, through August 31, 2020, and again from November 16, 2020, through November 30, 2020.
4. Phase 4: resumption of non-jury trials and contested hearings in criminal, civil, family, and juvenile matters. The Maryland courts were in Phase 4 from September 1, 2020, through October 4, 2020, and will return to Phase 4 beginning March 15, 2021.³
5. Phase 5: resumption of full operations, including jury trials.⁴ The Maryland courts were in Phase 5 from October 5, 2020, through November 15, 2020⁵ and are expected to return to Phase 5 on April 26, 2021.⁶

Interruption or scaling-down of judicial activity

There was interruption and/or scaling back of judicial activity, as follows:

- On March 12, 2020, the Chief Judge ordered the suspension of all civil and criminal jury trials in Maryland Circuit and District Courts scheduled to begin on March 16, 2020.⁷ For criminal matters with jury trials during this time period, the Chief Judge ordered county administrative judges to hold hearings as necessary to resolve speedy trial issues in individual cases and to set new trial dates.⁸ On October 5, 2020, the judiciary resumed full operations with health protocols, including jury trials.⁹ However, beginning November 16, 2020, jury trials were suspended again and are scheduled to resume beginning April 26, 2021.¹⁰
- On March 13, 2020, the Chief Judge issued another administrative order closing the courts to the public effective March 16, 2020, with the caveat that certain mandatory matters would continue to be scheduled and heard consistent with statutory requirements, either in person or remotely.¹¹

² The Court of Appeals of Maryland (2021) Amended Administrative Order Expanding Statewide Judiciary Operations in Light of the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210216amendedorderexpandingstatewidejudiciaryoperationsinlightofthecovid19emergency.pdf>.

³ The Court of Appeals of Maryland (2021) Amended Administrative Order Expanding Statewide Judiciary Operations in Light of the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210216amendedorderexpandingstatewidejudiciaryoperationsinlightofthecovid19emergency.pdf>.

⁴ The Court of Appeals of Maryland (2020) Administrative Order on the Progressive Resumption of Full Function of Judiciary Operations Previously Restricted Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200522progressiveresumptionoffullfunctionofjudiciaryoperations.pdf>.

⁵ The Court of Appeals of Maryland (2020) Sixth Administrative Order Restricting Statewide Judiciary Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20201124sixthadministrativeorderrestrictingstatewidejudiciaryoperationsduetothe covid19emergency.pdf>.

⁶ The Court of Appeals of Maryland (2021) Amended Administrative Order Expanding Statewide Judiciary Operations in Light of the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210216amendedorderexpandingstatewidejudiciaryoperationsinlightofthecovid19emergency.pdf>.

⁷ The Court of Appeals of Maryland (2020) Administrative Order on the Statewide Suspension of Jury Trials. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200312suspensionofjurytrials.pdf>.

⁸ The Court of Appeals of Maryland (2020) Administrative Order on the Statewide Suspension of Jury Trials. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200312suspensionofjurytrials.pdf>.

⁹ Maryland Courts (2021) Maryland Judiciary Coronavirus (COVID-19) Updates. Available at: <https://www.mdcourts.gov/coronavirusupdate>.

¹⁰ The Court of Appeals of Maryland (2020) Fifth Amended Administrative Order Extending the Statewide Suspension of Jury Trials and Maintaining Grand Juries. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20201222fifthamendedadministrativeorderextendingthestatewidesuspensionofjurytrialsandmaintaininggrandjuries.pdf>.

¹¹ The Court of Appeals of Maryland (2020) Administrative Order on Statewide Closing of the Courts to the Public Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200313statewideclosingofcourts.pdf>.

- On March 16, 2020, the Chief Judge ordered the closure of all courts except for emergency operations beginning on March 17, 2020.¹² Orders extended the closure through June 5, 2020.¹³
- On April 3, 2020, the Chief Judge suspended all grand juries.¹⁴ The suspension was lifted on May 22, 2020.¹⁵
- The Maryland Courts prioritized matters with statutory timing requirements and other urgent matters.

Digital justice mechanisms

Prior to the COVID-19 pandemic, in 2018, the Court of Appeals issued an Administrative Order on the Implementation of Remote Electronic Participation in Judicial Proceedings, which permits evidentiary and non-evidentiary proceedings to be conducted electronically and remotely if compliant with standards developed by the State Court Administrator.¹⁶ Further, all but three jurisdictions used the Maryland Electronic Courts (“MDEC”) electronic filing system before the pandemic.¹⁷ On March 20, 2020, the Chief Judge ordered courts, to the extent they had the capacity to do so, to hear emergency and other matters remotely in a manner consistent with the 2018 order.¹⁸ For the three non-MDEC jurisdictions, the Chief Judge issued an order allowing the use of drop boxes for electronic filing if feasible. The Chief Judge also issued an order permitting parties to file papers in new and pending matters before the Court of Special Appeals or the Court of Appeals through the MDEC system even if the cases originated in the non-MDEC jurisdictions.¹⁹ The Court of Appeals of Maryland held remote oral arguments via videoconference beginning May 2020.²⁰ Meetings of judicial governance entities were required to be conducted by remote hosting technology.²¹ The Chief Judge also ordered jurisdictions to electronically file and process instruments that are required to be recorded via the Simplifile application to the extent possible and consistent with previously adopted protocols.²²

Courts have also taken measures at a local level. For example, Baltimore City courts gave potential jurors in civil cases the option of participating in jury selection via Zoom.²³

Suspension of procedural deadlines

¹² The Court of Appeals of Maryland (2020) Administrative Order on Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200316restrictedoperationsduetocovid19.pdf>.

¹³ The Court of Appeals of Maryland (2020) Second Amended Administrative Order Expanding and Extending Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200414expandingandextendingstatewidejudiciaryrestrictedoperationssecondamended.pdf>.

¹⁴ The Court of Appeals of Maryland (2020) Administrative Order on Expanding the Statewide Suspension of Jury Trials and Suspending Grand Juries. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200403expandingstatewidesuspensionofjurytrialsetc.pdf>.

¹⁵ The Court of Appeals of Maryland (2020) Administrative Order Lifting the Statewide Suspension of Jury Trials and Resuming Grand Juries. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200522liftingthestatewidesuspensionofjurytrialsandresuminggrandjuries.pdf>.

¹⁶ The Court of Appeals of Maryland (2018) Administrative Order on the Implementation of Remote Electronic Participation in Judicial Proceedings. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20180618remoteparticipationjudicialproceedings.pdf>.

¹⁷ The Court of Appeals of Maryland (2020) Administrative Order Expanding Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200403expandingstatewidejudiciaryrestrictedoperations.pdf>.

¹⁸ The Court of Appeals of Maryland (2020) Administrative Order on Remote Hearings Held During the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200320remotehearingsheldduringcovid19emergency.pdf>.

¹⁹ The Court of Appeals of Maryland (2020) Administrative Order on the Permissive Use of the MDEC System for Appellate Filings During the COVID-19 Emergency. Available at: <https://www.mdcourts.gov/sites/default/files/admin-orders/20200327permissiveuseofmdecforappellatefilings.pdf>.

²⁰ The Court of Appeals of Maryland (2020) Amended Administrative Order on Rescheduling April Oral Arguments and Postponing May Oral Arguments. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200428reschedulingaprilargumentspostponingmaycoaamended.pdf>.

²¹ The Court of Appeals of Maryland (2020) Sixth Administrative Order Restricting Statewide Judiciary Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20201124sixthadministrativeorderrestrictingstatewidejudiciaryoperationsduetothe covid19emergency.pdf>.

²² The Court of Appeals of Maryland (2020) Administrative Order on Statewide Judiciary Operations that Must Be Maintained During the COVID-19 Emergency: as to Land Records. Available at: <https://www.mdcourts.gov/sites/default/files/admin-orders/20200318operationslandrecords.pdf>.

²³ Tim Prudente (2020) *Court's in session: Anxious feelings, extensive preparations surround start of jury trials in Maryland amid pandemic*, Baltimore Sun. Available at: <https://www.baltimoresun.com/news/crime/bs-md-cr-jury-trials-maryland-coronavirus-20201004-vxye2nptfamclmpboq4bpfuti-story.html>.

Annual reports on completed cases were not required for Fiscal Years 2020 and 2021 (July 1, 2019, through June 30, 2021), given the additional workload that will be required to address case backlogs.²⁴

All statutory and rules deadlines related to the initiation of matters and the conduct of pending judicial proceedings were tolled or suspended effective March 16, 2020, by the number of days the courts were closed to the public due to the COVID-19 emergency.²⁵ When the Maryland courts reopened to the public on July 20, 2020, the filing deadline to initiate matters was extended by an additional 15 days and the deadlines to conduct proceedings pending on March 16, 2020, were extended by an additional 60 days.²⁶ The application of case time standards was also suspended for cases reaching a conclusion in the Circuit Courts and the District Court of Maryland between March 16, 2020, and June 30, 2021.²⁷ The application of time standards is set to resume on July 1, 2021, as a benchmarking exercise to determine the extent of and project the time to reduce the backlogs caused by the COVID-19 pandemic.²⁸

Prioritization of cases/procedures

The Chief Judge ordered that certain mandatory matters continue to be scheduled and heard, either in person or remotely, consistent with statutory requirements.²⁹ These matters included certain election law matters certain petitions of Writs of Mandamus, certain certified questions of law, quarantine and isolation matters, requests for injunctive relief pending appeal, appeals in cases in which a lack of action would result in a dispositive outcome, bail reviews, arraignments for detained defendants, juvenile detention hearings, new domestic violence protective petitions, emergency evaluation petitions, extradition cases, body attachments, extreme risk protective order petitions and appeals, new peace order petitions, initial appearances, applications for statement of charges, acceptance of bail bonds, bench warrant satisfactions, emergency delinquency hearings, emergency Habeas Corpus petitions, emergency issues in guardianship matters, family law emergencies, criminal competency matters, contempt hearings related to peace or protective orders, matters involving locally incarcerated defendants, and search warrants.³⁰ For all other emergency matters, judges were ordered to review petitions and make a determination on whether in person proceedings were required on a case-by-case basis.³¹ The order noted that to the extent an individual court had capacity to hear

²⁴ The Court of Appeals of Maryland (2021) First Amended Administrative Order on Case Time Standards and Related Reports for Fiscal Years 2020 and 2021 in Light of the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210202firstamendedadministrativeorderoncasetimestandardsandrelatedreportsforfiscalyears2020and2021inlightofthecovid19emergency.pdf>.

²⁵ The Court of Appeals of Maryland (2021) Eight Revised Administrative Order of the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210216eighthrevisedorderonemergencytollingorsuspensionofstatutesoflimitationsandstatutoryandrulesdeadlines.pdf>.

²⁶ The Court of Appeals of Maryland (2021) Eight Revised Administrative Order of the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210216eighthrevisedorderonemergencytollingorsuspensionofstatutesoflimitationsandstatutoryandrulesdeadlines.pdf>.

²⁷ The Court of Appeals of Maryland (2021) First Amended Administrative Order on Case Time Standards and Related Reports for Fiscal Years 2020 and 2021 in Light of the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210202firstamendedadministrativeorderoncasetimestandardsandrelatedreportsforfiscalyears2020and2021inlightofthecovid19emergency.pdf>.

²⁸ The Court of Appeals of Maryland (2021) First Amended Administrative Order on Case Time Standards and Related Reports for Fiscal Years 2020 and 2021 in Light of the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210202firstamendedadministrativeorderoncasetimestandardsandrelatedreportsforfiscalyears2020and2021inlightofthecovid19emergency.pdf>.

²⁹ Administrative Order on Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200316restrictedoperationsduetocovid19.pdf>.

³⁰ The Court of Appeals of Maryland (2020) Amended Administrative Order Expanding Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200316restrictedoperationsduetocovid19.pdf>.

³¹ The Court of Appeals of Maryland (2020) Administrative Order on Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200316restrictedoperationsduetocovid19.pdf>.

additional matters, it could, and that courts should continue to resolve matters that could be addressed without a proceeding involving testimony or argument.³²

On April 14, 2020, the Chief Judge ordered judges to expedite the handling of motions for review of bonds or body attachments in child support contempt matters and hold hearings, as appropriate, for detained adults pending trial for a nonviolent criminal act or acts, or an alleged technical or minor violation of probation, or for contempt of a child support order.³³ Hearings were required to be held the next business day following the service of a warrant or body attachment for technical or minor violations of probation, child support contempt matters, failure to pay costs or fines, or failure to appear, as appropriate.³⁴ In the three non-MDEC jurisdictions, the Chief Judge authorized courts to process and handle only emergency and urgent matters and to receive filings by mail and via physical drop boxes installed at local courthouses.³⁵

Continuation of activities with preventive & health measures

Beginning March 12, 2020, the Chief Judge issued orders to mitigate COVID-19 exposure, including by prohibiting persons exposed to COVID-19 from entering judicial branch facilities.³⁶ On July 31, 2020, the Chief Judge issued an administrative order requiring social distancing and the use of face masks in all courthouses and judicial facilities.³⁷ Any person seeking entrance to courts and judicial facilities is also subject to COVID-19 screening questions and non-contact temperature checks where available.³⁸ Administrative judges are allowed to limit the number of people entering a courthouse or courtroom, however, credentialed press were allowed admittance to hearings open to the public, subject only to available capacity and incompliance with Centers for Disease Control and Maryland Department of Health guidance.³⁹ Local jurisdictions also took additional measures. For example, Baltimore City courts were equipped with headsets so that attorneys would not need to approach the judge's bench and Plexiglas shields were installed to separate jurors.⁴⁰

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:

a. In what matters?

- Constitutional protections
- Criminal
- Family

³² The Court of Appeals of Maryland (2020) Administrative Order on Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200316restrictedoperationsduetocovid19.pdf>.

³³ The Court of Appeals of Maryland (2020) Administrative Order Guiding the Response of the Trial Courts of Maryland to the COVID-19 Emergency as it Relates to Those Persons who are Incarcerated or Imprisoned. Available at: <https://www.mdcourts.gov/sites/default/files/admin-orders/20200414guidingresponseoftrialcourts.pdf>.

³⁴ The Court of Appeals of Maryland (2020) Administrative Order Guiding the Response of the Trial Courts of Maryland to the COVID-19 Emergency as it Relates to Those Persons who are Incarcerated or Imprisoned. Available at: <https://www.mdcourts.gov/sites/default/files/admin-orders/20200414guidingresponseoftrialcourts.pdf>.

³⁵ The Court of Appeals of Maryland (2020) Administrative Order Expanding Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200403expandingstatewidejudiciaryrestrictedoperations.pdf>.

³⁶ The Court of Appeals of Maryland (2020) Administrative Order on the Statewide Suspension of Non-Essential Judicial Activities Due to Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200312suspensionnonessential.pdf>.

³⁷ The Court of Appeals of Maryland (2020) Administrative Order Clarifying COVID-19 Health Measures in Courthouses and Judicial Branch Facilities. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20200731clarifyingcovid19healthmeasuresincourthousesandjudicialbranchfacilities.pdf>.

³⁸ The Court of Appeals of Maryland (2020) Sixth Administrative Order Restricting Statewide Judiciary Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20201124sixthadministrativeorderrestrictingstatewidejudiciaryoperationsduetothe covid19emergency.pdf>

³⁹ The Court of Appeals of Maryland (2020) Sixth Administrative Order Restricting Statewide Judiciary Operations Due to the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20201124sixthadministrativeorderrestrictingstatewidejudiciaryoperationsduetothe covid19emergency.pdf>

⁴⁰ Tim Prudente (2020) *Court's in session: Anxious feelings, extensive preparations surround start of jury trials in Maryland amid pandemic*, Baltimore Sun. Available at: <https://www.baltimoresun.com/news/crime/bs-md-cr-jury-trials-maryland-coronavirus-20201004-vxye2nptfamclmpboq4bpfuti-story.html>.

- Civil
- Labor
- Bankruptcy
- Other: [Click here to enter text.](#)

Please explain: [Click here to enter text.](#)

Civil and criminal jury trials in Maryland were suspended from March 16, 2020, through October 4, 2020, and again beginning November 16, 2020. During this brief time, courts were able to hold some of the jury trials originally scheduled before the shutdown. Jury trials are scheduled to resume beginning April 26, 2021.⁴¹ In July 2020, the Maryland Judiciary stated it was unable to specify the number of cases placed on hold.⁴² Generally, there is no statewide information on the number or type of backlogged cases. Although statewide information on the backlog of cases is unavailable, some counties have publicly released information on the backlog of cases. For example, in Cecil County, out of 951 criminal cases that were pending jury trials as of January 2021, 782 were resolved through plea agreements, dismissals, bench trials, and other methods.⁴³

- b.** Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

The Chief Judge eliminated the requirement for courts to submit annual reports on completed cases for Fiscal Years 2020 and 2021 (July 1, 2019, through June 30, 2021), given the additional workload that will be required to address case backlogs.⁴⁴ The Case Management Subcommittee of the Court Operations Committee of the Judicial Council is required to meet within 90 days of the resumption of Phase 4 emergency operations to determine backlogs and other delays in cases related to the COVID-19 emergency and formulate recommendations.⁴⁵

The Conference of Circuit Judges Work Group on the Resumption of Jury Operations in Circuit Courts made several recommendations for trial type priority in resuming jury trials, including prioritizing criminal cases nearing the statutory deadline for trial and cases involving incarcerated defendants, as well as cases that require smaller panels so courts can move a larger volume of cases along.⁴⁶

On August 31, 2020, the courts resumed nonjury trials in order to reduce the backlog of pending cases. In addition, for the majority of the pandemic, proceedings other than jury trials have generally continued either in-person or remotely.

⁴¹ The Court of Appeals of Maryland (2020) Fifth Amended Administrative Order Extending the Statewide Suspension of Jury Trials and Maintaining Grand Juries. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20201222fifthamendedadministrativeorderextendingthestatewidesuspensionofjurytrialsandmaintaininggrandjuries.pdf>.

⁴² Steve Lash (2020) *As Md. trial backlog grows, attorneys fear impact of justice delayed*, The Daily Record. Available at: <https://thedailyrecord.com/2020/07/20/as-md-trial-backlog-grows-attorneys-fear-impact-of-justice-delayed/>.

⁴³ Carl Hamilton (2021) *COVID-19 causes backlog of Cecil County cases set for jury trial*, Cecil Whig. Available at: https://www.cecildaily.com/bargaineer/covid-19-causes-backlog-of-cecil-county-cases-set-for-jury-trial/article_1b2e1bc2-3e49-5a83-896a-8cd5802bb944.html.

⁴⁴ The Court of Appeals of Maryland (2021) First Amended Administrative Order on Case Time Standards and Related Reports for Fiscal Years 2020 and 2021 in Light of the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210202firstamendedadministrativeorderoncasetimestandardsandrelatedreportsforfiscalyears2020and2021inlightofthecovid19emergency.pdf>.

⁴⁵ The Court of Appeals of Maryland (2021) First Amended Administrative Order on Case Time Standards and Related Reports for Fiscal Years 2020 and 2021 in Light of the COVID-19 Emergency. Available at: <https://mdcourts.gov/sites/default/files/admin-orders/20210202firstamendedadministrativeorderoncasetimestandardsandrelatedreportsforfiscalyears2020and2021inlightofthecovid19emergency.pdf>.

⁴⁶ Maryland Judiciary (2020) Conference of Circuit Judges Work Group on the Resumption of Jury Operations in Circuit Courts. Available at <https://www.mdcourts.gov/sites/default/files/import/jurysevice/pdfs/juryworkgroupreportresumptionofoperations.pdf>.

For the brief time jury trials resumed, local jurisdictions had discretion on how to prioritize cases. For example, Baltimore City courts prioritized lesser offenses, while Baltimore County courts prioritized felony cases with defendants who were held in jail the longest.⁴⁷

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

No.

5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:

- Initiating of legal actions
- Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
- Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
- Security of parties, victims and witnesses
- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation: [Click here to enter text.](#)

Criminal defense attorneys have noted that defendants are being detained for months after their jury trials were originally scheduled.⁴⁸ Attorneys argued that increased incarceration time and uncertain trial dates have pressured defendants into pleading guilty in order to be released from custody.⁴⁹ In addition to speedy trial concerns, attorneys also expressed concern over the exposure of defendants to COVID-19 while being held in jail.⁵⁰ Further, defense attorneys have noted that in some cases they are unable to communicate with incarcerated clients due to the restrictions in jails.⁵¹

For the brief period that jury trials resumed in the Maryland, attorneys and potential jurors expressed concern about the safety of holding trials due to the risk of exposure to COVID-19.⁵²

⁴⁷ Tim Prudente (2020) *Court's in session: Anxious feelings, extensive preparations surround start of jury trials in Maryland amid pandemic*, Baltimore Sun. Available at: <https://www.baltimoresun.com/news/crime/bs-md-cr-jury-trials-maryland-coronavirus-20201004-vxyse2nptfamclmpboq4bpfuti-story.html>.

⁴⁸ Steve Lash (2020) *As Md. trial backlog grows, attorneys fear impact of justice delayed*, The Daily Record. Available at: <https://thedailyrecord.com/2020/07/20/as-md-trial-backlog-grows-attorneys-fear-impact-of-justice-delayed/>.

⁴⁹ Jack Moore (2020) *Maryland courts set tentative reopening as lawyers prep for surge in backlogged cases*, WTOP. Available at: <https://wtop.com/coronavirus/2020/05/maryland-courts-set-tentative-reopening-as-lawyers-prep-for-surge-in-backlogged-cases/>.

⁵⁰ Tim Prudente (2020) *Court's in session: Anxious feelings, extensive preparations surround start of jury trials in Maryland amid pandemic*, Baltimore Sun. Available at: <https://www.baltimoresun.com/news/crime/bs-md-cr-jury-trials-maryland-coronavirus-20201004-vxyse2nptfamclmpboq4bpfuti-story.html>.

⁵¹ Jack Moore (2020) *Maryland courts set tentative reopening as lawyers prep for surge in backlogged cases*, WTOP. Available at: <https://wtop.com/coronavirus/2020/05/maryland-courts-set-tentative-reopening-as-lawyers-prep-for-surge-in-backlogged-cases/>.

⁵² Tim Prudente (2020) *Court's in session: Anxious feelings, extensive preparations surround start of jury trials in Maryland amid pandemic*, Baltimore Sun. Available at: <https://www.baltimoresun.com/news/crime/bs-md-cr-jury-trials-maryland-coronavirus-20201004-vxyse2nptfamclmpboq4bpfuti-story.html>.



How has the COVID-19 pandemic affected the judiciary?

Bibliography – United States (Maryland)

A. Government / government agency publications	
1.	The Court of Appeals of Maryland (2018), Administrative Order on the Implementation of Remote Electronic Participation in Judicial Proceedings. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20180618remoteparticipationjudicialproceedings.pdf .
2.	The Court of Appeals of Maryland (2020) Administrative Order on the Statewide Suspension of Jury Trials. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200312suspensionofjurytrials.pdf .
3.	The Court of Appeals of Maryland (2020) Administrative Order on the Statewide Suspension of Non-Essential Judicial Activities Due to Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200312suspensionnonessential.pdf .
4.	The Court of Appeals of Maryland (2020) Administrative Order on Statewide Closing of the Courts to the Public Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200313statewideclosingofcourts.pdf .
5.	The Court of Appeals of Maryland (2020) Administrative Order on Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200316restrictedoperationsduetocovid19.pdf .
6.	The Court of Appeals of Maryland (2020) Administrative Order on Remote Hearings Held During the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200320remotehearingsheldduringcovid19emergency.pdf .
7.	The Court of Appeals of Maryland (2020) Administrative Order Extending the Length of Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200325extendinglengthofrestrictedoperations.pdf .
8.	The Court of Appeals of Maryland (2020) Administrative Order on Expanding the Statewide Suspension of Jury Trials and Suspending Grand Juries. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200403expandingstatewidesuspensionofjurytrialsetc.pdf .



9.	The Court of Appeals of Maryland (2020) Administrative Order Expanding Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200403expandingstatewidejudiciaryrestrictedoperations.pdf .
10.	The Court of Appeals of Maryland (2018) Administrative Order on Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200403emergencytollingorsuspensionofstatutesoflimitationsetc.pdf .
11.	The Court of Appeals of Maryland (2020) Amended Administrative Order Expanding Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200316restrictedoperationsduetocovid19.pdf .
12.	The Court of Appeals of Maryland (2020) Second Amended Administrative Order Expanding and Extending Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200414expandingandextendingstatewidejudiciaryrestrictedoperationssecondamended.pdf .
13.	The Court of Appeals of Maryland (2020) Amended Administrative Order on Rescheduling April Oral Arguments and Postponing May Oral Arguments. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200428reschedulingaprilargumentspostponingmaycoaamended.pdf .
14.	The Court of Appeals of Maryland (2020) Administrative Order on Case Time Standards and Related Reports for Fiscal Years 2020 and 2021 in Light of the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200501casetimestandardsandrelatedreports.pdf .
15.	The Court of Appeals of Maryland (2020) Administrative Order Lifting the Statewide Suspension of Jury Trials and Resuming Grand Juries. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200522liftingthestatewidesuspensionofjurytrialsandresuminggrandjuries.pdf .
16.	The Court of Appeals of Maryland (2020) Administrative Order on the Progressive Resumption of Full Function of Judiciary Operations Previously Restricted Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200522progressiveresumptionoffullfunctionofjudiciaryoperations.pdf .
17.	The Court of Appeals of Maryland (2020) Third Amended Administrative Order Re-Imposing the Statewide Suspension of Jury Trials and Maintaining Grand Juries. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20201112thirdamendedadministrativeorderreimposingthestatewidesuspensionofjurytrialsandmaintaininggrandjuries.pdf .



18.	The Court of Appeals of Maryland (2020) Administrative Order Clarifying COVID-10 Health Measures in Courthouses and Judicial Branch Facilities. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20200731clarifyingcovid19healthmeasuresincourthousesandjudicialbranchfacilities.pdf .
19.	The Court of Appeals of Maryland (2020) Sixth Administrative Order Restricting Statewide Judiciary Operations Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20201124sixthadministrativeorderrestrictingstatewidejudiciaryoperationsduetothe covid19emergency.pdf .
20.	The Court of Appeals of Maryland (2020) Fifth Amended Administrative Order Extending the Statewide Suspension of Jury Trials and Maintaining Grand Juries. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20201222fifthamendedadministrativeorderextendingthestatewidesuspensionofjurytrialsandmaintaininggrandjuries.pdf .
21.	The Court of Appeals of Maryland (2020) Sixth Administrative Order Restricting Statewide Judiciary Operations Due to the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20201124sixthadministrativeorderrestrictingstatewidejudiciaryoperationsduetothe covid19emergency.pdf .
22.	The Court of Appeals of Maryland (2020) Administrative Order Guiding the Response of the Trial Courts of Maryland to the COVID-19 Emergency as it Relates to Those Persons who are Incarcerated or Imprisoned. Available at: https://www.mdcourts.gov/sites/default/files/admin-orders/20200414guidingresponseoftrialcourts.pdf .
23.	The Court of Appeals of Maryland (2020) Administrative Order on the Permissive Use of the MDEC System for Appellate Filings During the COVID-19 Emergency. Available at: https://www.mdcourts.gov/sites/default/files/admin-orders/20200327permissiveuseofmdecforappellatefilings.pdf .
24.	The Court of Appeals of Maryland (2020) Administrative Order on Statewide Judiciary Operations that Must Be Maintained During the COVID-19 Emergency: as to Land Records. Available at: https://www.mdcourts.gov/sites/default/files/admin-orders/20200318operationslandrecords.pdf .
25.	Maryland Judiciary (2020) Conference of Circuit Judges Work Group on the Resumption of Jury Operations in Circuit Courts. Available at https://www.mdcourts.gov/sites/default/files/import/jury-service/pdfs/juryworkgroupreportresumptionofoperations.pdf .
26.	The Court of Appeals of Maryland (2021) Amended Administrative Order Expanding Statewide Judiciary Operations in Light of the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20210216amendedorderexpandingstatewidejudiciaryoperationsinlightofthecovid19emergency.pdf .



27.	The Court of Appeals of Maryland (2021) Eight Revised Administrative Order of the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20210216eighthrevisedorderonemergencytollingorsuspensionofstatuesoflimitationsandstatutoryandrulesdeadlines.pdf .
28.	The Court of Appeals of Maryland (2021) First Amended Administrative Order on Case Time Standards and Related Reports for Fiscal Years 2020 and 2021 in Light of the COVID-19 Emergency. Available at: https://mdcourts.gov/sites/default/files/admin-orders/20210202firstamendedadministrativeorderoncasetimestandardsandrelatedreportsforfiscalyears2020and2021inlightofthecovid19emergency.pdf .
29.	Maryland Courts (2021) Maryland Judiciary Coronavirus (COVID-19) Updates. Available at: https://www.mdcourts.gov/coronavirusupdate .
B. Other resources	
30.	Steve Lash (2020) <i>As Md. trial backlog grows, attorneys fear impact of justice delayed</i> , The Daily Record. Available at: https://thedailyrecord.com/2020/07/20/as-md-trial-backlog-grows-attorneys-fear-impact-of-justice-delayed/ .
31.	Tim Prudente (2020) <i>Court's in session: Anxious feelings, extensive preparations surround start of jury trials in Maryland amid pandemic</i> , Baltimore Sun. Available at: https://www.baltimoresun.com/news/crime/bs-md-cr-jury-trials-maryland-corovairus-20201004-vxyse2nptfamlcmpboq4bpfutistory.html .
32.	Jack Moore (2020) <i>Maryland courts set tentative reopening as lawyers prep for surge in backlogged cases</i> , WTOP. Available at: https://wtop.com/coronavirus/2020/05/maryland-courts-set-tentative-reopening-as-lawyers-prep-for-surge-in-backlogged-cases/ .
33.	Carl Hamilton (2021) <i>COVID-19 causes backlog of Cecil County cases set for jury trial</i> , Cecil Whig. Available at: https://www.cecildaily.com/bargaineer/covid-19-causes-backlog-of-cecil-county-cases-set-for-jury-trial/article_1b2e1bc2-3e49-5a83-896a-8cd5802bb944.html .

USA - New York

Scott McMurry, Associate | smcmurry@mayerbrown.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: U.S.A. – New York State

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

During the COVID-19 pandemic, New York state courts endeavored to preserve their independence and access to justice. The Courts undertook extensive efforts to balance the protection of participants in the judicial process with retaining access to justice. Unfortunately, these continuing protective actions have engendered delays in many, though not all, judicial proceedings, but restrictions are loosening as the pandemic situation improves.

The New York State Government passed laws and implemented Executive Orders to protect the independence of the judicial processes, for example from interference by Federal Immigration Officials though such actions appeared to be unrelated to COVID-19, and has sought to preserve access to justice by suspending filing deadlines for most judicial actions. See New York Executive Order No. 202.8, March 7, 2020. The state has also sought maintain housing by postponing eviction and foreclosure proceedings and property tax deadlines for residential and commercial tenants. *Id.* For example, within weeks of the pandemic emergency being declared, all eviction and foreclosure actions were postponed. Although the original moratorium was for only sixty days, it was extendable for COVID-19-related hardships, and has been extended repeatedly, still being in-force today. See New York Chief Judge Janet Di Fiore, Administrative Order Nos. AO/340/2020 and AO/341/2020.

When declaring the COVID-19 pandemic to be an emergency, New York Governor Andrew Cuomo claimed sweeping emergency powers to “temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster,” pursuant to a New York State Statute, enacted long before the pandemic: Section 29-a of Article 2-B of the New York State Executive Law. Executive Order No. 202.8. The order, among other things, claimed control over judicial proceedings in the state to the extent necessary to protect public health and consistent with the U.S. and New York State Constitutions and federal law. Section 29-A of the Executive Law provides,

“1. Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent,

¹ For this project's purposes, “judicial independence” is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



hinder, or delay action necessary to cope with the disaster....2. Suspensions pursuant to subdivision one of this section shall be subject to the following standards and limits:... b. no suspension shall be made which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort...”

Despite the broad emergency powers granted to the governor, it does not appear that he has used his emergency powers to control the judiciary in ways unrelated to protecting public health to date.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

- Interruption or scaling-down of judicial activity
- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation:

In response to the COVID-19 pandemic and pursuant to Executive Orders issued by the governor, on March 16, 2020, New York courts postponed in-person functions, moving to a virtual model “to provide court access in the broadest possible range of cases.” NY Chief Judge Janet DiFiore, “The State of Our Judiciary,” March 2, 2021 (“SOJ 2021”) at 2. More specifically, New York courts postponed in-person hearings and trials, instituted virtual hearings, expanded electronic filings, and prioritized criminal and certain family court cases focusing on emergency issues of individual rights such as criminal arraignments and emergency family court child placements and orders.

Bench and jury trials were suspended temporarily. Bench trials and hearings resumed in a limited fashion after a month or two. *Id.* Jury trials were completely suspended until recently. *Id.* For the allowed in-person hearings, which included criminal arraignments and emergency family court petitions, New York courts mandated social distancing, capacity limitations, replaced in-person public access with live streaming on the court website, and allowed or mandated virtual participation by witnesses, judges, and/or counsel. *Id.* at 2-4. Individual judges were allowed to set additional COVID-19-related rules for their own courtrooms. In cases where COVID-19 exposure was a particular concern, such as immunocompromised witnesses or personnel, judges have postponed proceedings or ordered virtual participation. Though juries were suspended, the courts did empanel at least one sitting grand jury in every county of the state. *Id.* at 3.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:
a. In what matters?



- Constitutional protections
- Criminal
- Family
- Civil
- Labor
- Bankruptcy
- Other: Limited information is available.

Please explain:

During the pandemic, the New York State judiciary experienced a 10% reduction in funding and increased costs for implementing public health measures. As such, with normal attrition fewer personnel were available to process court proceedings. No end is in sight due to the 2022 zero-growth budget that is expected to reduce staffing even further. In addition, the ongoing suspension of filing deadlines and most court filings is expected to increase filings dramatically when the courts fully reopen, creating additional backlogs. To mitigate the effects during the pandemic closures, the judiciary was directed to address existing backlogs and matters that could be decided without in-person hearings.

Case filings in New York state were down significantly in 2020. New York State Unified Court System, “2020 Annual Report of the Chief Administrator of the Courts,” at 55. In 2020, 1,925,133 cases were filed in the state trial courts, compared to 3,028,669 in 2019. Criminal filings in 2020 fell 41% from 2019, from 997,535 in 2019 to 553,712 in 2020. Civil filings fell 30%, from 1,311,551 in 2019 to 927,443 in 2020. Family court filings fell 44%, from 578,346 in 2019 to 325,694 in 2020. *Id.*

Although one-to-one comparative data is not readily available, the most recently available statistics show that dispositions of cases slowed dramatically in New York state courts during the pandemic, reversing years of progress in reducing the backlog of cases. In civil cases during 2019, the courts attained 196,671 dispositions compared to 174,000 new filings, but in 2020 attained only 120,161 dispositions compared to 132,391 new civil filings. *Id.* at 56-60; New York State Unified Court System, “2019 Annual Report of the Chief Administrator of the Courts” at 36-40. The disposition of felony cases similarly dropped dramatically. In 2019, 41,795 felony dispositions were attained compared to 36,077 new felony filings; but in 2020, only 16,470 felony dispositions were attained, compared to 17,695 new felony filings. Family court cases were similar. In 2019, dispositions were reached in 570,826 cases, compared to 578,346 few family court filings; but in 2020, only 297,306 dispositions were attained compared to 325,694 new case filings.

During the pandemic, the courts remotely conducted over “740,000 case conferences; settled or otherwise disposed of over 230,000 matters;... issued over 80,000 decisions on motions and undecided matters” and conducted “over 10,000 virtual bench trials and evidentiary and fact-finding hearings since the beginning of November.” NY Chief Judge Janet DiFiore, “The State of Our Judiciary,” March 2, 2021 (“SOJ 2021”) at 4. Each week, courts remotely conduct more than 20,000 conferences. *Id.* In family court matters, New York implemented virtual intake proceedings, disposed of “nearly 90,000 matters” conducted “over 1,700 virtual trials,” and recruited forty volunteer state judges to dispose of backlogged, non-emergent matters. *Id.* at 5-6. In criminal matters, New York courts conducted over 100,000 arraignments, “remotely conferencing 4,000 cases and disposing of approximately a third of the cases heard,” sped up the transition to electronic dockets and increased opioid-treatment courts. *Id.* at 4, 6. While civil matters were temporarily suspended during the pandemic, judges greatly



reduced the backlog of pending motions, deciding “almost 20,000 motions in just a few months,” eliminating the backlog of motions outside of New York City and bringing the backlog in New York City “to almost zero by early Fall.” *Id.* at 7. By the end of 2020, judges in virtual courts had conducted 562,088 virtual conferences, reached outcomes or dispositions in 184,838 matters, decided 73,049 motions, conducted 137,986 Virtual Arraignments and 949,955 Family Court Virtual Appearances. New York State Unified Court System, “2020 Annual Report of the Chief Administrator of the Courts.”

- b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?

The New York state judiciary experienced a 10% reduction in funding and increased costs for implementing public health measures. As such, with normal attrition, fewer personnel were available to process court proceedings, and no end is in sight due to the 2022 zero-growth budget that is expected to reduce staffing even further. The ongoing suspension of filing deadlines is further expected to dramatically increase filings when the courts fully reopen, creating additional backlog. To mitigate the effect of the pandemic closures, the judiciary was directed to address existing backlogs and matters that could be decided without in-person hearings. While it remains to be seen whether the state courts can effectively handle the expected future increase in workload, it appears unlikely that the courts will be able to reduce the expected upcoming backlog without additional measures.

- 4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.

Corruption cases uncovered in New York state relate to the governor’s underreporting COVID-19-related nursing home deaths in the state, vendor fraud in obtaining local government personal protective equipment (“PPE”) contracts, and price gouging for PPE. Melissa DeRosa, a top aide of New York Gov. Andrew Cuomo, admitted in a meeting with legislators that the state hid data on nursing home deaths, attributing to hospitals deaths that occurred after COVID-infected nursing home residents were moved to a hospital, so that the Trump administration could not use it against New York. *See, e.g.* Kevin Tampone, “Disturbing, criminal, corrupt: NY leaders rip Cuomo nursing home disclosures”, The Syracuse Post-Standard, Feb 12, 2021, available at <https://www.syracuse.com/coronavirus/2021/02/disturbing-criminal-corrupt-ny-leaders-rip-cuomo-nursing-home-disclosures.html>. PPE vendor fraud has also been alleged. *See, e.g.* Press Release, “New Jersey Man Arrested for \$45 Million Scheme to Defraud and Price Gouge New York City During COVID-19 Pandemic,” U.S. Attorney for S.D.N.Y., May 26, 2020. Others have been accused of falsely touting a connection with N95 mask manufacturer 3M to greatly inflate prices of those masks, though not in connection with state or local governments.

- 5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:
 - Initiating of legal actions
 - Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
 - Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
 - Security of parties, victims and witnesses



- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation:

While New York state courts have worked to protect participants from the risks of COVID-10, these actions have engendered delays and a lack of in-person hearings. Various commentators have pointed out that justice delayed can be justice denied. With non-emergency filings postponed, the public's ability to initiate legal actions has been compromised, presumably temporarily. Postponing jury trials implicates the Constitutional guarantee to a speedy trial, risks unusually prolonged incarceration, and trials by a jury, particularly if time could prevent one like with elderly parties.

The courts quickly moved to a virtual system in an attempt to safely process criminal arraignments and emergency family court petitions without incurring substantial delays. However, the virtual nature of most judicial proceedings occurring during the pandemic raises concerns over an accused's right to confront witnesses and be present at trial. It also complicates the ability of parties to communicate confidentially with their attorney. It is unclear what actions New York state courts have undertaken to address these concerns during the pandemic-related closures and restrictions.

USA - Virginia

Thomas Delaney, Partner | tdelaney@mayerbrown.com

Howard Waltzman, Partner | hwaltzman@mayerbrown.com

Logan Payne, Associate | lpayne@mayerbrown.com

Kerri Webb, Associate | kwebb@mayerbrown.com



Questionnaire for pro bono project: How has the COVID-19 pandemic affected the judiciary?

Country: **United States (Virginia)**

1. Has the pandemic posed any particular challenge to the judiciary's independence or its efforts to safeguard independence¹? Please consider any attempts to undermine judicial independence using COVID-19-related emergency powers or measures.

There have been no known efforts to challenge the independence of the Virginia state court system.

Virginia's judicial system is comprised of the Supreme Court of Virginia, the Court of Appeals of Virginia, circuit courts in thirty-one judicial circuits, general district and juvenile and domestic relations district courts in thirty-two districts, and magistrates in offices in thirty-two districts. The administrative office of the courts, known in Virginia as the Office of the Executive Secretary, supports the administration of the court system under the direction of the Chief Justice and the Executive Secretary.

On March 12, 2020, Virginia Governor Ralph Northam entered Executive Order Number Fifty-One (2020), *Declaration of a State of Emergency Due to Novel Coronavirus COVID-19*, and issued subsequent directives including bans on gatherings. On March 16, 2020, the Chief Justice of the Supreme Court of Virginia declared a judicial emergency in all district and circuit courts of the Commonwealth of Virginia, pursuant to Va. Code § 17.1-330, to protect the health and safety of court employees, litigants, judges, and the general public. All "non-essential, non-emergency" court proceedings were suspended, and all deadlines were tolled and extended. Courts were directed to prioritize emergency matters including, but not limited to, quarantine or isolation matters, criminal arraignments, bail reviews, protective order cases, emergency child custody or protection cases, civil commitment hearings, petitions for temporary injunctive relief, proceedings related to emergency protection of elderly or vulnerable persons, petitions for appointment of a guardian or conservator, and proceedings necessary to safeguard applicable constitutional protections. Protective health measures were implemented for activities that were conducted under these orders. These orders were modified and extended several times throughout 2020 and 2021, and as of March 2021 remain in effect.

Pursuant to these orders, courts were instructed to conduct as much business as possible by means other than in-person court proceedings. In all civil and criminal matters, courts were encouraged to continue the use of video conferencing, teleconferencing, email, or other means that do not involve in-person contact. Chief Circuit Court Judges were required to submit plans for their judicial circuit, including the timing and process for safely conducting jury trials, to the Chief Justice of the Virginia Supreme Court. Plans to restart jury trials were approved by all circuit courts in the state and resumed jury trials.

At the federal district court level, the United States District Court for the Western District of Virginia postponed all jury trials until April 1, 2021. In the United States District Court for the Eastern District of Virginia, jury trials and grand jury proceedings resumed beginning on March 1, 2021.

2. What kind of provisions has the judiciary taken for the continuity of its activities during the pandemic?

Interruption or scaling-down of judicial activity

¹ For this project's purposes, "judicial independence" is the set of conditions under which disputes are resolved by decision-makers who are empowered to determine facts and to apply laws impartially, without materially disruptive political, social or economic pressures. In practice, judicial independence has at least three elements: (1) a neutral unbiased state of mind by the decision-maker, avoiding (to the extent possible) prejudices against litigants arising from any matter other than the facts of the case as presented in the proceeding; (2) the suppression of any political, social or economic pressure by the government or non-state actors, including bribes or extortion, and (3) the development of institutional structures to insulate the judiciary from undue influence, including proper resourcing, transparent employment, professional development, physical security, and clear regulation of conduct.



- Digital justice mechanisms
- Suspension of procedural deadlines
- Prioritization of cases/procedures. Please select the prioritized matters:
 - Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)
- Continuation of activities with preventive & health measures
- Other: [Click here to enter text.](#)

Please explain the selected options briefly, identifying any relevant challenge or innovation: Courts were instructed to conduct as much business as possible by means other than in-person court proceedings and remain in this state in various degrees based on decisions made at local levels. Courts are encouraged to continue the use of video conferencing, teleconferencing, email, or other means that do not involve in-person contact.

3. Is there information available regarding an increased workload and backlog of cases in the judiciary? If so:
- a. In what matters?
- Constitutional protections
 - Criminal
 - Family
 - Civil
 - Labor
 - Bankruptcy
 - Other: [Click here to enter text.](#)

Please explain: No data available. News reports indicate a substantial backlog of cases due to continuations, court closures, suspension of jury trials, and other factors discussed above.

- b. Are measures taking place to enable the judicial system to deal with the increased workload and backlog of cases effectively?
- At this time, Virginia court systems remain in various stages of curtailed operations and have not yet fully reopened. Cases are being heard in order of priority.

4. Have there been any relevant corruption cases related to COVID-19 response measures? If so, please describe briefly any actions by the judiciary to address these cases.
- No.
5. What kind of concerns over due process or fair trial rights have arisen regarding the judiciary's functioning during the pandemic, such as restrictions over:
- Initiating of legal actions
 - Right of people in custody to information (including the reasons for detention, notification of right to legal counsel)
 - Right to legal counsel before trial (including time and facilities to communicate confidentially with counsel)
 - Security of parties, victims and witnesses



- Right of detainees to trial within a reasonable time / right to be tried without undue delay
- Right to an interpreter
- Right to an effective and confidential communication between the accused and lawyer
- Right to examine evidence
- Right to trial by a competent, independent and impartial tribunal
- Right to a public hearing
- Right to be present at trial
- Right to appeal

Please explain the selected options briefly, identifying any relevant challenge or innovation: Virginia's Speedy Trial Act, Virginia Code § 19.2-243, imposes statutory time deadlines on criminal prosecutions subject to various exceptions and tolling provisions. One of the statutory tolling provisions states that the Act "shall not apply to such period of time as the failure to try the accused was caused . . . [b]y a natural disaster." Virginia Code § 19.2-243(7). The Supreme Court of Virginia issued an order clarifying that the tolling provisions of emergency orders tolled the running of any statutory speedy trial period applicable to criminal prosecutions throughout the declared Judicial Emergency, which remains in effect. Separately, the pandemic resulted in the complete suspension of jury trials for several months early in the pandemic; although some courts have resumed jury trials, the volume and speed of jury trials has not been restored to pre-pandemic levels.



How has the COVID-19 pandemic affected the judiciary?

Bibliography – United States (Virginia)

A. Government / government agency publications	
1.	Supreme Court of Virginia, Declaration of Judicial Emergency (Mar. 16, 2020), available at: http://www.courts.state.va.us/news/items/covid/2020_0317_supreme_court_of_virginia.pdf
2.	Supreme Court of Virginia, Order Extending Declaration of Judicial Emergency (Mar. 27, 2020), available at http://www.vacourts.gov/news/items/2020_0327_scv_order_extending_declaration_of_judicial_emergency.pdf
3.	Supreme Court of Virginia, Third Order Extending Declaration of Judicial Emergency (Apr. 22, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0422_scv_order_extending_declaration_of_judicial_emergency.pdf
4.	Supreme Court of Virginia, Clarification Order Concerning Tolling of Speedy Trial Deadlines (May 1, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0501_scv_order_clarification.pdf
5.	Supreme Court of Virginia, Fourth Order Modifying and Extending Declaration of Judicial Emergency (May 6, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0506_scv_order.pdf
6.	Supreme Court of Virginia, Fifth Order Modifying and Extending Declaration of Judicial Emergency (June 1, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0601_scv_amendment_to_fifth_order.pdf
7.	Supreme Court of Virginia, Amendment to Fifth Order Modifying and Extending Declaration of Judicial Emergency (June 8, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0601_scv_amendment_to_fifth_order.pdf
8.	Supreme Court of Virginia, Second Amended Fifth Order Modifying and Extending Declaration of Judicial Emergency (June 22, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0622_scv_second_amended_fifth_order.pdf



9.	Supreme Court of Virginia, Sixth Order Extending Declaration of Judicial Emergency (June 22, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0622_scv_sixth_order.pdf
10.	Supreme Court of Virginia, Seventh Order Extending Declaration of Judicial Emergency (July 8, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0708_scv_seventh_order.pdf
11.	Supreme Court of Virginia, Eighth Order Extending Declaration of Judicial Emergency (July 29, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0728_scv_eighth_order.pdf
12.	Supreme Court of Virginia, Amendment to Eighth Order Extending Declaration of Judicial Emergency (Aug. 7, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0807_scv_amendment_to_eighth_order.pdf
13.	Supreme Court of Virginia, Ninth Order Extending Declaration of Judicial Emergency (Aug. 20, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0820_scv_order_ninth_extending_declaration_of_judicial_emergency.pdf
14.	Supreme Court of Virginia, Tenth Order Extending Declaration of Judicial Emergency (Sept. 4, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0904_scv_order_tenth_extending_declaration_of_judicial_emergency.pdf
15.	Supreme Court of Virginia, Second Clarification Order Concerning Tolling of Statutory Speedy Trial Deadlines During the Judicial Emergency (Sept. 11, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0911_scv_order_second_clarification.pdf
16.	Supreme Court of Virginia, Eleventh Order Extending Declaration of Judicial Emergency (Sept. 28, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0928_scv_order_eleventh_extending_declaration_of_judicial_emergency.pdf
17.	Supreme Court of Virginia, Twelfth Order Extending Declaration of Judicial Emergency (Oct. 19, 2020), available at http://www.vacourts.gov/news/items/covid/2020_1019_scv_order_twelfth_extending_declaration_of_judicial_emergency.pdf
18.	Supreme Court of Virginia, Thirteenth Order Extending Declaration of Judicial Emergency (Nov. 9, 2020), available at http://www.vacourts.gov/news/items/covid/2020_1109_scv_thirteenth_order_extending_declaration_of_judicial_emergency.pdf
19.	Supreme Court of Virginia, Fourteenth Order Extending Declaration of Judicial Emergency (Dec. 3, 2020), available at http://www.vacourts.gov/news/items/covid/2020_1203_scv_order_fourteenth_extending_declaration_of_judicial_emergency.pdf



20.	Supreme Court of Virginia, Fifteenth Order Extending Declaration of Judicial Emergency (Dec. 18, 2020), available at http://www.vacourts.gov/news/items/covid/2020_1218_scv_order_fifteenth_extending_declaration_of_judicial_emergency.pdf
21.	Supreme Court of Virginia, Sixteenth Order Extending Declaration of Judicial Emergency (Dec. 18, 2020), available at http://www.vacourts.gov/news/items/covid/2021_0119_scv_order_sixteenth_order_extending_declaration_of_judicial_emergency.pdf
22.	Supreme Court of Virginia, Seventeenth Order Extending Declaration of Judicial Emergency (Dec. 18, 2020), available at http://www.vacourts.gov/news/items/covid/2021_0208_scv_order_seventeenth_extending_declaration_of_judicial_emergency.pdf
23.	Supreme Court of Virginia, Eighteenth Order Extending Declaration of Judicial Emergency (Dec. 18, 2020), available at http://www.vacourts.gov/news/items/covid/2021_0302_scv_order_eighteenth_extending_declaration_of_judicial_emergency.pdf
24.	Supreme Court of Virginia, Nineteenth Order Extending Declaration of Judicial Emergency (Dec. 18, 2020), available at http://www.vacourts.gov/news/items/covid/2021_0315_scv_order_nineteenth_extending_declaration_of_judicial_emergency.pdf
25.	Supreme Court of Virginia, Approved Plans to Restart Jury Trials – Listed by Court (accessed Mar. 15, 2021), available at http://www.vacourts.gov/news/items/covid/rjt_list.pdf
26.	Supreme Court of Virginia, COVID-19 Appellate and Local Court Information (accessed Mar. 15, 2021), available at http://www.courts.state.va.us/news/items/covid_19.pdf
27.	Supreme Court of Virginia, Letter to Chief Circuit Judges re: Resumption of Jury Trials (July 29, 2020), available at http://www.vacourts.gov/news/items/covid/2020_0729_resumption_jury_trials.pdf
28.	United States District Court for the Eastern District of Virginia, COVID-19 Guidance (last updated March 15, 2021), available at https://www.vaed.uscourts.gov/covid-19
29.	United States District Court for the Western District of Virginia, COVID-19 Information (accessed March 15, 2021), available at http://www.vawd.uscourts.gov/court-information/covid-19.aspx
B. Other resources	



30.	Alex Thorson, <i>How COVID is stressing court systems and its impact on Virginians</i> , WFXRTV.com (Jan. 8, 2021).. Available at: https://www.wfxrtv.com/news/regional-news/virginia-news/how-covid-is-stressing-court-systems-and-its-impact-on-virginians/
31.	Margaret Mataray, <i>673,000 court cases in Virginia have been postponed during pandemic, state says as justice system begins move back to normal</i> , The Virginian-Pilot (May 6, 2020). Available at: https://www.pilotonline.com/news/crime/vp-nw-supreme-court-coronavirus-update-20200506-vf5tcrpxzzal5pffa3rzt34tl4-story.html
32.	Parker Cotton, <i>With pandemic stretching on, wheels of justice slowly turn with backlog in Pittsylvania County, Danville</i> , Danville Register & Bee (Sept. 25, 2020). Available at: https://godanriver.com/news/local/crime-and-courts/with-pandemic-stretching-on-wheels-of-justice-slowly-turn-with-backlog-in-pittsylvania-county-danville/article_162039f2-ba74-56db-be8a-716a55246588.html
33.	Rachel Mahoney, <i>Jury trials approved for counties around Lynchburg, but courts in no rush amid record COVID-19 numbers</i> , The News & Advance (Dec. 21, 2020). Available at: https://newsadvance.com/news/local/crime-and-courts/jury-trials-approved-for-counties-around-lynchburg-but-courts-in-no-rush-amid-record-covid/article_9180e167-88ac-5ed4-8a7f-ef5d9b8ea008.html