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Citation

Krans, H. B., & Nylund, A. (2021). Civil Courts Coping with Covid-19: Exceptional Times, Normal Times, New Times? In *Civil Courts Coping with Covid-19* (pp. 1-5). Den Haag: Eleven International Publishing. Retrieved from <https://hdl.handle.net/1887/3246822>

Version: Publisher's Version

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Downloaded from: <https://hdl.handle.net/1887/3246822>

Note: To cite this publication please use the final published version (if applicable).

CIVIL COURTS COPING WITH COVID-19

Exceptional Times, Normal Times, New Times?

*Bart Krans and Anna Nylund**

1 UNFORESEEN AND UNPRECEDENTED

The unforeseen Covid-19 pandemic has propelled, and continues to propel, unprecedented transformations to civil proceedings and the landscape in which they operate. Numerous countries across the globe have faced and continue to face the question of how to enable courts to cope with civil cases despite numerous restrictions to the operation of societal functions. After the initial almost full stop in the machinery of civil justice at the onset of the pandemic during the first six months of 2020, courts needed to resume delivering justice. However, many pre-pandemic practices, rules and standards were clearly inappropriate for the new reality, and since the end of the pandemic was not imminent, the civil justice system had to adapt to the exceptional, labile societal circumstances. In late April 2020, we published a study on the initial reactions of civil justice to the pandemic. The study gave a snapshot of the initial reactions of 15 civil justice systems. Courts in all 15 countries were in the process of making a digital leap, but there were still considerable differences among the countries. While we could already see the contours of strategies for coping with the exceptional situation in April 2020, many issues were only emerging at that time. By the time of the present writing, February 2021, some of these issues have become salient. Hence, we attempt to explore how civil courts across the globe are coping with the effects of the pandemic. What have been the most pressing problems, and how have these problems been resolved? What kinds of factors have facilitated or hindered courts pivoting from paper-based and face-to-face hearings to paperless proceedings and remote hearings? What issues does the technological leap engender? What mechanisms other than digitisation help courts continue to operate during ‘the state of exception’? Has the pandemic produced a shift in the role of courts? These and many other questions have emerged.¹

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1 In November 2020, the report ‘The functioning of courts in the Covid-19 pandemic’ was published by the Organization for Security and Co-operation, www.osce.org/odihr/469170. See also European Law Institute,

2 DIFFERENT CIRCUMSTANCES, DIFFERENT RESPONSES TO THE PANDEMIC

Every single day since February 2020, we have been faced with data on how the number of Covid-19 infections, hospitalisations and deaths have surged and declined at different tempos in each country and region. In parallel, we have experienced measures to contain the spread of the virus: social distancing, curfews, lockdowns and so forth. Since both the spread of the virus and the measures vary across countries – and even states and regions within countries – the impact of the pandemic on civil justice also varies. That variation, combined with pre-pandemic differences among the civil justice systems around the world, renders it quite challenging to make firm statements on the impact of the virus and the measures taken to address it on civil justice systems globally.

The pan-European courts serve as an example of how institutions in fairly similar settings opt for different approaches to deal with the same challenges. The Court of Justice of the European Union (CJEU) permits parties who are unable to travel to Luxembourg, under certain conditions, to attend a hearing by videoconference. Furthermore, the CJEU might have replaced some hearings with questions to the parties for a written response owing to the difficulties caused by Covid-19.² A livestream for the hearings seems not to be available.³

Another tone can be heard on the website of the European Court of Human Rights (ECtHR). The ECtHR states that, while it is complying with the public health measures adopted by the host state France, notably by prioritising teleworking and electronic communications, it is continuing all its activities in accordance with the usual rules. Unlike during the previous lockdown periods, the court has not made special arrangements with respect to procedures and time limits.⁴ Since the hearings of ECtHR have been recorded and made freely available (including English and French interpretation) since 2007, pivoting to remote hearings did not necessitate special measures.⁵

ELI Principles for the COVID-19 Crisis, www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf, and European Commission for the Efficiency of Justice (CEPEJ), CEPEJ Declaration: Lessons Learned and Challenges Faced by the Judiciary during and after the Covid-19 Pandemic. Ad hoc virtual CEPEJ plenary meeting Wednesday 10 June 2020, CEPEJ (2020), 8 rev.

2 As stated by the Court on its website (www.curia.europe.eu), under the heading Covid-19 Information – Parties before the Court of Justice.

3 Another example: the CJEU strongly encourages the courts of the Member States and the parties' representatives who do not yet have an e-curia account to become familiar with e-curia, which is a secure application and allows for procedural documents to be filed and served electronically in cases brought before the Court, https://curia.europa.eu/jcms/jcms/p1_3012064/en/ (consulted February 2021).

4 www.echr.coe.int/Pages/home.aspx?p=home (consulted February 2021).

5 *Ibid.* The ECtHR site also makes clear that hearings held in the morning can be viewed from 2.30 p.m. onwards, while those held in the afternoon are available during the evening.

The EFTA Court has assumed a third approach by shifting to remote hearings using videoconferences. Hearings have been streamed live on the Court's website to ensure accessibility and transparency.⁶

These three supranational courts, which are similar in many ways, selected three different approaches as to, *inter alia*, how to ensure openness of the proceedings, which is a basic tenet of the rule of law and a fair trial. Although this book neither deals with supranational courts nor is limited to Europe, the example of these three courts illustrates the variation in responses to the pandemic, as well as how small differences in practices related to interpretation of hearings can contribute to producing palpable differences in practices during the pandemic.

3 RESILIENCE, RESISTANCE AND REORIENTATION

In a way, this study can be considered a follow-up to an earlier study, completed in a very short time, on the initial responses of civil courts during the first few months of the pandemic.⁷ Still, there are several differences between the two studies. First, the earlier study, conducted in April 2020, was intended as a snapshot of emergency reactions to an incomprehensible situation and a tentative attempt to map what was going on, whereas the present study has been conducted at a stage wherein the pandemic has become the 'new normal'. Second, in this book, more countries are included.⁸ Third, this book aims not only at providing more topical information per country but also at providing critical perspectives on current practices and a discussion of how the pandemic-related adaptations will influence the future of civil justice.

The handling and deciding of civil cases has not come to a full stop as a result of the outbreak of the Covid-19 virus in any of the civil justice systems covered in this book, nor hopefully in any other such systems in the world. However, it can certainly be assumed that the virus outbreak, at least in many countries, has forced civil courts to adjust their working methods. What types of cases have courts continued processing and adjudicating, and, conversely, what types of cases have been problematic? Can differences be identified during the respective stages of the pandemic? One of the core topics seems to be the resilience of the civil justice systems or, more precisely, the identification of some factors and solutions that have enabled courts to be resilient.

6 Press release dated 11 December 2020, <https://eftacourt.int/press-publications/press-release-1120/> (consulted February 2021).

7 The report of the study on the initial stages of the pandemic was published online, in the second half of April 2020, by Septentrio: <https://doi.org/10.7557/sr.2020.5>. It cannot be ruled out that minor parts of certain chapters in this book are partially based on the Septentrio report.

8 The Septentrio report includes 15 countries; this book covers 23 countries.

It seems likely that not all the adjustments have been taken for granted by all the participants in the game of civil proceedings. Resistance may be based on technological issues, financial issues or difficulty embracing new developments. One might ask whether it has been easy to adjust or whether it has been necessary to overcome some form – or, probably more precisely, some level – of resistance.

When the battle against the pandemic has finally been conquered, new questions will arise for civil courts. What can we learn from the experiences during the pandemic? Although the pandemic is unquestionably a global tragedy, it may still be possible to identify options to make the well-known motto ‘never waste a good crisis’ applicable to civil courts after the Covid-19 crisis. Can the innovations produced to face the current situation be highly valuable in the post-pandemic period? In other words, has a reorientation taken place, and, if so, what are the new horizons and novel ideas and practices that result?

These questions can be approached in several ways, including studying how courts have solved these problems in practice; asking how courts have coped with civil cases during the pandemic in a given country or jurisdiction; discussing the merits and faults of the shifts in civil proceedings induced by the exceptional situation; and attempting to identify how these could and should influence post-pandemic regulations, practices and thinking.

For example, how should the ways in which courts in different countries are dealing with the impact of the virus, and the resulting government measures, be evaluated? How should courts’ choices be weighed, considering these choices always take place in a specific societal and legal-cultural context? Have civil justice systems that, pre-pandemic, already functioned on the basis of more or less good functioning technology reacted in a similar way to civil justice systems with a less developed pre-pandemic technology in court? It seems very likely that the world will search for equilibrium after the pandemic. What will post-pandemic civil justice be like? For instance, some of the original measures might still be in place, either in their original forms or with some modifications, while some will have been lifted, and some new measures might have been introduced. Also, more permanent changes to the rules regarding court proceedings might have been made or be in progress. The caseload or the composition of cases might have changed, or the restrictions or innovations introduced might have been taken to a different level, induced discussion or both.

4 THE 23 COUNTRIES IN THIS STUDY

To enable us to study the impact of the pandemic on civil justice on a global level, we invited colleagues from countries across the globe to provide insights on developments in their country. We did not provide our colleagues with a table of questions or a specific list

of topics to be covered. We simply asked them to write a short piece about their observations on the impact of Covid-19 on the civil courts in their country, zooming in on one or a few selected aspects they consider interesting. The contributions concern the situation during the pandemic, shed light on 'civil litigation after the pandemic' or both. Considering that many scholars have been faced with having to pivot their teaching to online channels, home office and stay-at-home orders, and other challenges, we deliberately asked for short texts.

The oscillations in the rate of infections and hospitalisations have been accompanied by various types of incessantly changing measures to restrain the spread of the virus. Hence, the consequences for the civil judiciary fluctuate over time. What seems appropriate today may be considered outdated next week, depending on the societal impact of the virus and measures to restrain its spread. As a result, we can identify both convergence and divergence among the countries studied.

The 23 individual chapters hereinafter are in alphabetical order, by country. The continuously changing societal situation of the pandemic era underlines the fact that the respective contributions are snapshots of a country, or parts of a federal state, fixed at a certain point in time. Most of the contributions in this book were finished in January 2021. It is quite possible that the situation may have changed since the chapters were submitted to us, or it may do so on short notice in the near future.

In the Conclusion, we will try to shed some light on several main findings of this study.

