



CCJE(2020)2

Strasbourg, 24 June 2020

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

STATEMENT OF THE PRESIDENT OF THE CCJE

**The role of judges during and in the aftermath of the COVID-19
pandemic: lessons and challenges**

Introduction

Challenges for judges

1. The unprecedented situation caused by the COVID-19 pandemic has presented the judiciary in general and individual judges in particular with equally unprecedented challenges.
2. Since the CCJE has always focused on making sure that all conditions are in place in member States for judges to be able to effectively implement the European Convention on Human Rights (hereafter the ECHR) at national level, I would like to share some views as regards the effective work of judges during the pandemic, as well as in its aftermath.
3. Responding effectively to a sanitary crisis in full respect for human rights – and first of all for the ECHR - and the principles of democracy and the rule of law has been the main challenge. The pandemic has resulted in the introduction of restrictions affecting not only civil and political rights protected by the ECHR, but also economic, social and cultural rights. The impact appears to have been particularly severe for the most vulnerable groups.
4. Judges have been faced with dilemmas as regards putting into practice the principles and requirements – such as legality, proportionality, adequacy of the measures, their necessity and duration, equality and non-discrimination - which are necessary in case of suspension or restriction of human rights on public health grounds. Social distancing and lockdown measures have resulted in the disruption of courts' work, including delays in proceedings, and have impacted on procedural time limits and on the provision of legal aid services.
5. The challenge for judges has been to make sure that, in the course of their work, the public health emergency is not used as a pretext for human rights infringements but aims at protecting people, and that new legal measures are applied with strict respect for human rights obligations. A balance must be struck between public safety, on the one hand, and the enjoyment of fundamental rights and freedoms, on the other¹.

Rights to be protected during emergency situations

Responding to challenges while preserving the CCJE standards

6. The CCJE has already emphasised that the rule of law is guaranteed by the fair, impartial and effective administration of justice². These principles developed by the CCJE, as well as by the Council of Europe as a whole, notably including rights to access to a court and to an effective remedy, should be strictly safeguarded during emergency situations in general and a pandemic in particular.
7. The Opinions adopted by the CCJE, now more than ever, are of great relevance. First and foremost, an independent and impartial judiciary is one of the cornerstones of the

¹ See the Venice Commission's Opinion on Protection of Human Rights in Emergency Situations adopted by the Venice Commission at its 66th plenary session (Venice, 17-18 March 2006).

² See Opinion No. 12 (2009) of the CCJE on judges and prosecutors in a democratic society, Bordeaux Declaration, para 1.

rule of law and is a prerequisite for the operation of justice³. The judiciary must be independent to fulfil its constitutional role in relation to the other powers of the state, society in general, and the parties to any particular dispute⁴. This principle should not be called into question during pandemic or any other emergency situation.

8. CCJE standards for the appointment, promotion and disciplinary procedures of judges should be retained and observed at all times. Decisions on selection, nomination and career should be based on objective criteria and taken by the body in charge of guaranteeing independence of judges. Disciplinary proceedings should take place before an independent body with the possibility of recourse before a court⁵. Councils for the Judiciary should continue to play their key role during the time of the pandemic and its aftermath in relation to these processes⁶.
9. In the aftermath of the crisis, no “interim” judges or “special courts” should be established as this would undermine judicial independence and create a risk of politicisation. The backlogs as regards the selection and promotion of judges should be resolved, and positions be filled based on the relevant CCJE criteria taking into account the urgency factor, however without politicising this issue in any way.
10. The CCJE has also made several recommendations about the funding of the judiciary. While in the case of a severe economic downturn, judges and courts have to live within the economic position of the society they serve, there is, at the same time, an obvious link between the funding of courts and the principles of the ECHR. Access to justice and the right to fair proceedings are not properly guaranteed if courts do not have appropriate funds and resources at their disposal⁷.
11. In the context of the pandemic, there is a risk that member States may overlook the significance of the role of courts, such as in relation to effective remedies against emergency measures and grievances caused by the pandemic - and also from the perspective of the economy. Already under-funded judicial systems struggle with resolving the challenges due to the pandemic and there is a risk that court budgets may further be reduced.
12. In this context, member States should provide the necessary resources for courts to fulfil their functions, to address and recover from the pandemic taking into account that chronic underfunding undermines the foundations of a democratic society. The need to have adequate resources, equipment and software for effective teleworking and teleconferencing becomes particularly important.
13. The judicial systems must, at the same time, adapt to the circumstances during and after the pandemic. To this end, a dialogue should be established with judicial stakeholders, such as self-governing bodies and associations of judges, and with different legal professions, such as bar associations.

³ See Magna Carta of Judges (2010) adopted by the CCJE, para 2.

⁴ See Opinion No. 18 (2015) of the CCJE on the position of the judiciary and its relation with the other powers of state in a modern democracy, Section VIII (3).

⁵ See Magna Carta of Judges (2010) adopted by the CCJE, paras 5-6.

⁶ It should be recalled, in this context, that Councils for the Judiciary are bodies the purpose of which is to safeguard the independence of the judiciary and of individual judges, and to promote thereby the efficient functioning of the judicial system. Their establishment has been recommended by the Committee of Ministers of the Council of Europe, by the CCJE and by the Venice Commission.

⁷ See Opinion No. 2 (2001) of the CCJE on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights, para 3.

14. While the courts should be kept functioning during the emergency to ensure judicial control, it is also evident that they should adapt to the circumstances. The development of new technologies and the progressive improvement of videoconference systems in the judiciary have created new possibilities in order to ensure the hearing of witnesses, experts and defendants. This approach is of great interest in the case of a pandemic, avoiding limitations on the functioning of courts. It is necessary to ensure safety from infection while facilitating a hearing that allows parties to fully participate.
15. The European Court of Human Rights (hereafter "ECtHR") has established that physical absence does not necessarily constitute a violation of the right to a fair trial. The ECtHR has pointed to several international law instruments that provide for participation in the trial using videoconferencing as a way of respecting Article 6 of the ECHR⁸, and it has adopted several judgments as regards the use of videoconferencing⁹. It should be noted that, when establishing videoconferencing in courts, due attention should be paid to the preservation of the right of defence.
16. Regarding the webcasting of court sessions, in normal conditions, webcasting is being used to reach a wider audience and encourage a broader interest in the aspects of public life touched upon by courts. Accordingly, when it comes to an emergency situation, webcasting may be even more justified in order to expressly demonstrate that justice is being performed openly and in public.
17. Conditions for the suspension or extension of procedural time limits proportionate to the duration of the pandemic and without prejudice to the reasonable time requirements as regards trials should be clearly stipulated. In addition, any reductions in the time limits to the extent that fair trial rights may be infringed should be avoided. Suspension or extension of procedural time limits should not be applied in urgent cases or cases raising important human rights issues, particularly as regards non-derogable rights.
18. Issuing guidelines for judges to address the emergency situation, such as one threatening public health, is important for courts to ensure that victims and witnesses and other vulnerable groups are effectively assisted and protected and defendants have their rights respected through the whole procedure. Courts should also consider applying, whenever possible, non-custodial measures and a reduction in prison sentences to avoid overcrowding and prevent the dissemination of the disease. They should ensure access for women and children at risk of domestic violence and other vulnerable groups.
19. The impact of emergency situations continues to be felt after the gradual lifting of restriction measures, with particular impact on vulnerable groups disproportionately affected by this pandemic. Possible arrangements and protocols of "social distancing" when re-opening courts and restarting actual hearings need to include all court users.

⁸ See ECtHR *Marcello Viola v. Italy* - 5 October 2006 (<http://hudoc.echr.coe.int/eng?i=001-77246>).

⁹ See ECtHR *Sakhnovskiy v. Russia*, Grand Chamber - 2 November 2010 (<http://hudoc.echr.coe.int/eng?i=001-101568>); *Sakhnovskiy v. Russia*, 27 November 2018 (<http://hudoc.echr.coe.int/eng?i=001-187831>); *Marcello Viola v. Italy* - 5 October 2006 (<http://hudoc.echr.coe.int/eng?i=001-77246>); *Vladimir Vasilyev v. Russia* - 10 January 2012 (<http://hudoc.echr.coe.int/eng?i=001-108478>); *Yevdokimov and Others v. Russia* - 16 February 2016 (<http://hudoc.echr.coe.int/eng?i=001-160620>); *Gorbunov and Gorbachev v. Russia* - 1 March 2016 (<http://hudoc.echr.coe.int/eng?i=001-160993>); *Repashkin v. Russia* (No. 2), 16 December 2010 (<http://hudoc.echr.coe.int/eng?i=001-102282>).

There may be different challenges for different courts, depending on their size and location.

20. New types of cases are likely to reach courts including sanctions against individuals for breaches of quarantines and remedies against other emergency measures. The constitutional and human rights scrutiny of emergency legislation may also be needed.
21. The CCJE has repeatedly emphasised the role of training as a guarantee of judicial independence and impartiality¹⁰. It is essential that judges receive detailed, in-depth, diversified training on national and international law so that they are able to perform their duties satisfactorily. Despite an emergency situation, such as the pandemic, training initiatives should not be suspended, and online training should be considered on this aspect on national and European level - as soon as possible.
22. The courts' caseloads are like to increase considerably due to the suspension of procedures during the crisis. In addition, the expected increase of labour cases, economic and business disputes, insolvencies and possibly family cases and rental issues will test the courts' capacity. Allocation and prioritisation of cases will be required to be properly regulated and any politicisation should be strictly prevented. In particular, the prioritisation of cases following the end of emergency measures should not over-emphasise economic issues over the protection of rights of individuals, and should follow fair and objective criteria. The courts should also question whether there are ways of increasing the involvement of mediation and thereby reducing the caseload, and whether the criminal justice system can be decongested to ease the workload, which would in any case be long overdue in many jurisdictions.
23. There will be an effect also on supra-national courts. Human rights concerns in member States are likely to increase the caseload of the ECtHR. That is why it will be in the interest of this Court that as many cases as possible are resolved at national level.

Conclusion

24. The effective role of courts during, as well as in the aftermath, of the pandemic will help increase the public trust in the judiciary, and will reinforce the application of the ECHR, together with social, economic and cultural rights, across the member States of the Council of Europe.
25. The fundamental principles and standards applicable to the judiciary which the CCJE has been developing remain fully valid and applicable, and have gained new relevance in the context of the pandemic.
26. Member States might consider developing action plans for their courts in the aftermath of the pandemic. A range of disputes is emerging, and the return of the societies to normal life and the re-booting of the national economies will depend on the swift resolution of cases by national courts.

¹⁰ See Opinion No. 4 (2003) of the CCJE on training for judges, paras 3-5.