

Review concerning courts administration, administration of justice and the uniform application of law during the emergency situation

dr. iur. Villu Kõve, Chief Justice of the Supreme Court of Estonia
3 June 2020

Ensuring the work of the court system in the emergency situation

The crisis and the emergency situation caused by the coronavirus came as a shock to the courts as well as everyone else. A number of things and services available so far were suddenly out of reach. The jurisdiction of the administration of justice is granted to the courts alone pursuant to the Constitution, and a seamless operation of the courts at the time of the emergency situation is essential for a state based on the rule of law. Hence, despite the voices heard in the beginning of the emergency situation, requesting to close the courts and to suspend the administration of justice, the courts relied on the principle that the work shall continue, courthouses will remain open for proceedings, and court cases will be adjudicated—naturally in accordance with elementary safety requirements. With this regard, the Estonian courts differed from several courts of the European countries, where the adjudication of numerous cases was practically suspended. For instance, in the Netherlands it was decided to close all courts, but in Italy, Portugal, and Slovenia the circle of adjudicated cases was limited to urgent cases pertaining to fundamental rights in connection with minors, guardianship, or domestic violence.¹ Furthermore, the European Court of Human Rights informed it will be closed for the public, cancelling all the hearings scheduled for March and April and handling the adjudication of high priority issues, incl. the reviewing of extraordinary appeals for interim measures.² Until the 25th of May, the Court of Europe did not organize court hearings to hear oral statements, and extremely urgent cases were adjudicated at first priority. Moreover, the time-limits established in the ongoing proceedings were extended by one month.

No specifications have been provided for judicial proceedings in the legislation of the emergency situation declared in Estonia. The negative impact of the lack of such specifications became obvious by and large during the first days of the emergency situation already, when people were prohibited to gather but oral hearings were supposed to be held. Predominantly, the problems of the court in the adjustment to the emergency situation come from laws which require the physical presence of persons at court hearings and hearing them in addition to working with paper files and mail deliveries. Proceedings in connection with prisoners became problematic, *inter alia* in major criminal cases, where the prisoners being convoyed to the courthouse might have promoted the spread of the virus in a prison or in a house of detention inevitably. Hearings of preliminary investigation matters were held in criminal cases, and the presence of the parties to the proceedings was required at hearings of general procedure, where

¹ European Union Agency for Fundamental Rights (FRA). *Coronavirus pandemic in the EU—Fundamental Rights Implications*. Bulletin 1, April 2020, <https://fra.europa.eu/en/publication/2020/covid19-rights-impact-april-1> (accessed 13 May 2020).

² The European Court of Human Rights implemented extraordinary measures due to the pandemics of COVID-19: the court suspended the 6-month time-limit for an appeal provided in Subsection 1 Article 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as of 16.03.2020 until 15.06.2020; also, all the time-limits established in the ongoing court cases were suspended for 3 months, i.e. until 15.06.2020, except the applications filed to the Grand Chamber.

a video bridge could only be used upon an agreement of the accused prior to a respective legislative amendment. In civil matters, nursing homes and hospitals have been the issue of concern, where people are held against their will or where persons who need guardianship reside in, incl. a number of the elderly people, whom the court has to meet periodically pursuant to the law. Furthermore, the question of the organization of hearings concerned the accumulating bankruptcy cases, for instance, where many debtors have no possibility or capability of a video bridge, but the law prescribes the time-limit for a hearing to be held. In these questions, the judges faced a dilemma whether to abide by the law, thus endangering the life and health of persons, or to suspend certain actions based upon the emergency situation and try to postpone cases. Unfortunately, the ideas about suspending the time-limits of proceedings in the emergency situation submitted to the Ministry of Justice did not reach the legislator, and no particular special provisions were established essentially to alleviate other judicial proceedings besides criminal proceedings.

To improve the situation, the Council for Administration of Courts established recommendations³, on the joint initiative of the Supreme Court and the Ministry of Justice, which helped to ensure the orderly functioning of the administration of justice during the emergency situation. To avoid the spread of the virus among judges, court officers, parties to the proceedings, and other persons in connection with the administration of justice, remote work was incorporated at every position that enabled it. It was decided that as many cases as possible shall be adjudicated in written proceedings, which can be done in the format of remote work thanks to the applications of the Court Information System and the digital file. The transport of paper files was organized in cases with not so digitalized proceedings. Written proceedings were mostly implemented by administrative and circuit courts. Less hearings are organized in their work even not in the times of an emergency situation as compared to a county court. Although the organization of hearings was first and foremost promoted via technical means of communication, in the absence of the latter the court made a decision on the holding of a hearing emanating from the circumstances of every specific case. Courthouses remained open for holding hearings as well as for administration at the office, but for a shorter time and with a restricted access: persons with symptoms of illness or in close contact with the infected persons were not allowed in the house; also, the persons not in connection with the administration of justice during the emergency situation. However, the postponement of hearings to a certain extent has been unavoidable for many reasons. Firstly, the courts did not have any necessary protection masks and disinfectants during the first weeks of the emergency situation. Moreover, it was impossible to follow the gathering and distance rules due to a great number of parties to the proceedings. Secondly, the digital capability of both the courts and the parties to the proceedings was put to a test in the beginning of the emergency situation. Not all the courthouses have been equipped with high quality video conference devices, but the capability of the courts would not even be sufficient. A hearing or a procedural act through a video bridge requires other institutions besides the courts to be capable of it—such as the Prosecutor’s Office, the Bar Association, prisons, the police, etc. We all have our shortcomings, but the practice of the emergency situation shows regrettably that the most failures occurred at holding video hearings in houses of detention and in prisons. They did not have the necessary equipment

³ Recommendations by the Council for Administration of Courts to organise the administration of justice during an emergency situation. Accepted at the hearing of the Council for Administration of Courts on 16.03.2020, <https://www.kohus.ee/sites/www.kohus.ee/files/elfinder/KHN%20recommendations.docx.pdf> (accessed 13 May 2020).

or skills to handle the devices, or the quality of the existing audio devices was inadequate to organize a court hearing. Lastly, people react differently to an emergency situation. There are those who are willing to conduct all procedural acts and to participate at the hearings, defying the risk of infection, but there are those who are sincerely afraid—this has to be taken into account both from the standpoints of the judges and the parties to the proceedings, and every single case has to be evaluated separately.

All in all, it may be concluded that the courts have exceeded the expectations as the result of joint efforts in the circumstances of the emergency situation. This is confirmed by the optimistic assessments provided as feedback by chairmen of the courts. Although both the Bar Association and the Prosecutor's Office have drawn attention to the fact that the organization of work is inconsistent in courts, *inter alia* in terms of the use of video hearings and the postponement of hearings, I find it inevitable during such confusing and unpredictable times. Here, I would like to stress that the postponement of hearings does not mean a work stoppage—when hearings are called off, numerous cases in written proceedings are adjudicated, which otherwise would have been dealt with later on in case the hearings had been held. According to the statistics, the county courts had scheduled 3418 hearings in total for the time period of the 23rd of March to the 15th of May 2020, and approximately 42% of these took place, amongst which 869 were held as video hearings. Although a decrease in the efficiency of the courts could be expected in the conditions of the emergency situation, it could be claimed on the basis of the current indices that essentially the adjudication of cases continued in the same volume. As to the conclusion of the first 4 months of 2020, the county courts managed to adjudicate more civil and criminal matters in comparison with the number of cases received. The efficiency remained at the same level in administrative and circuit courts, meaning the emergency situation did not have an impact on the efficiency of the courts. These indices are definitely remarkable and likely exceptional on the European scale.

Right now, the main question is how to organize the work of the courts after the end of the emergency situation. The risk of infection has not disappeared, but physical procedural acts wait for their turn, incl. hearings in voluminous cases, where a 2-metre distance between persons is difficult if not impossible to ensure. Moreover, it should be noted that the longer such a vague situation lasts, the more problems there will be. On the one hand, judges and officers get tired of working remotely, and on the other hand the parties to the proceedings are interested in direct judicial proceedings as well. To ensure the safety of the parties to the proceedings, plexiglass and movable partition walls are installed in courtrooms. If necessary, additional rooms are rented to follow the distancing rule and to hold hearings with a number of parties to the proceedings. The organization of video hearings shall be improved for sure: to standardize and renew the software in use and to equip the courthouses with the necessary devices. The availability of simple and reliable platforms should be ensured, so that hearings should not necessarily be organized and recorded in a courthouse. However, it does not mean that oral hearings should be called off. It should be kept in mind that direct communication often means the possibility to clarify things and to reach agreements. Often, a party to the proceedings and his or her counsel are in different rooms at video hearings, which might raise a question about a constraint of the right of defence, as the counsel and the party to the proceeding cannot communicate privately. According to the assessment of the European Court of Human Rights, the participation in judicial proceedings through a video bridge is not, in itself, contradictory to the principle of just and public discussion, but the parties to the proceedings shall be guaranteed

a chance to follow the course of the court hearing and be heard without technical malfunctions. Moreover, there must be an efficient and confidential possibility to communicate with one's lawyer.⁴ Right now, the issue of private communication between a counsel and a person being defended has come to a creative solution—for instance, virtual communication channels are used in parallel during a hearing—this is definitely unsustainable. Prisoners should be taken into account as well, in case of whom such alternative solutions are precluded, and therefore the counsel can only execute efficient defence by staying in the same room with the person being defended. A wider problem related to the increase of the percentage of virtual hearings on the account of oral hearings both at the time of the emergency situation and afterwards concerns the openness of proceedings. The constitutional right for public judicial proceedings protects both the interests of the parties to the proceedings and the public. If special rules are applied to persons not related to the proceedings, to participate at the hearings during the crisis, it is probably understandable. However, the question remains how to avoid public access to become seeming in case of a wider use of video hearings, when the crisis is over but everyday life has changed a bit in the light of the crisis. After the emergency situation, the emphasis is inevitably on video hearings and the so-called hybrid hearings, where some of the parties to the proceedings are in a courtroom but some are included through a video bridge. Therefore, in the near future one of the tasks of the court system is to find a reasonable balance between digital and oral proceedings. Perhaps it is almost time to start a discussion about the public broadcasting of hearings on the internet?

Ideas for the legislator

Although the adaptation of the court system to the emergency situation can be given a positive assessment in general, quite a few bottlenecks became apparent. On the one hand, the concerns of the court system are short-term, relating to the adjudication of cases in a reasonable time correctly and justly, exiting the emergency situation, and falling into the presumed economic crisis. On the other hand, more long-term issues are connected with the courts such as a stable, efficient, and economical operation of the system. Today, ideas about the organization of work have been presented for the most part, and speaking of legislative ideas I will not repeat the proposals submitted in the presentation last year. The principle remains the same, though—amendments to the law shall be executed by analysing the impacts in a calm, systematic, and thorough manner. For a more long-term planning of the court system and keeping it competitive, so-to-say, it would be necessary to update the laws from the aspect of the flexibility to allocate cases, to support digital court proceedings and video hearings, and to ensure the openness of the judicial proceedings. Attention should be separately paid to the proposals presented in the report of the supervisory committee of Harju County Court to make criminal proceedings more effective and to accelerate them, and to eliminate unnecessary formalities. The implementation of these proposals would help to prevent the problems we are facing now. I hope that the proposal to restore the work incapacity pension of judges finds the support of the legislator, should it reach the Estonian Parliament (Riigikogu).

Just a year ago, I mentioned that in the economic sense we probably live better than ever before. Economic welfare is reflected in court cases, too. Currently, it has to be admitted that times

⁴ EIKo 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 ja 67481/12, *Yevdokimov et al vs. Russia*, § 43; EIKo 21272/03, *Sakhnovskiy vs. Russia*, § 98.

have changed and soon people will face numerous so-called survival disputes due to redundancies and facing solvency problems in the payment of loans, leases, utilities, or support. Probably, there will be more tax disputes and offences against property with a slight delay, whereat the number of expedited procedure cases of payment orders increased in 2019 already by 14.9% as compared to the previous year, and the trend is continuing. If cases accumulate, it is not certain whether the courts will be able to manage them just as effectively as now. A difficult economic time increases the workload of the courts, and therefore I would urge the legislator to think about it before starting to cut down or to redirect the resources meant for the court. Despite economically difficult times, the income of low-salary court personnel such as clerks of a court session and interpreters would have to be boosted to reduce the staff turnover and to improve quality. Speaking of the ideas discussed last year, I would like once more to develop and support the implementation of a conciliation procedure, first of all in family matters and neighbour disputes. Furthermore, insolvency proceedings should be made more efficient and simplified on the verge of the period of solvency problems which is probably yet to come. If the legislator wishes to contribute to the prevention of accumulating civil disputes quickly and concretely, the amendment to the regulation of minimum support should be wagered. Namely, a more flexible method to calculate support should be created, the system of maintenance allowance should be simplified and enabled to be granted before recouring to the court.

Even though the amendments to the law⁵ enforced on the 7th of May 2020 offered certain alleviation to problems pertaining to the adjudication of criminal cases via technical means and to the proceedings of placing a person into a closed institution, primarily the adjudication of voluminous criminal cases in general proceedings could be seriously restrained in the occurrence of the second wave of the virus, if no more legislative measures will be implemented to reduce the percentage of oral hearings and to expand the possibilities of the use of video hearings. Hopefully, the Ministry of Justice can elaborate respective proposals quickly and present to the legislator as a high-priority issue.

Furthermore, in the light of the emergency situation I would like to draw the attention of the legislator to the bottlenecks listed as follows.

- Judicial proceedings are quite restrained by unreasonable time-limits emanating from the law, which are almost impossible to follow especially in the emergency situation. Such time-limits are rather exceptional in comparison with the procedural codes of other countries. Delaying with the time-limits is not a problem in today's court system, hence, some thought should be given to remove them, leaving the court with flexible possibilities to organize proceedings. For example, Subsection 1 § 384 of the Code of Civil Procedure, which demands an adjudication of a petition for securing an action within twenty-four hours unprecedentedly, but at that the whole case needs to be reviewed, evidence needs to be assessed, etc. Poor examples are also § 15 and 16 of the Bankruptcy Act, which require to hold a session within 10 days as of filing a bankruptcy petition. Both rules are unreasonable even in an ordinary situation, but it is somewhat impossible to follow these rules in the emergency situation.

⁵ Amendment Act of Assistance Police Officer Act and Other Acts (measures in connection with the spread of the SARS-Cov-2 virus which spreads the COVID-19 disease). – RT I, 06.05.2020, 1.

- Speaking of time-limits, the time the court obligatorily must see persons placed in nursing homes against their will should be extended. The yearly check-up obligation emanating from § 538 of the Code of Civil Procedure should be extended to three years—like it was provided in the Code of Civil Procedure previously.
- A digital court file should be regulated properly at the level of the law and legal power should be granted to it, first in civil and administrative matters and later on in offenses.
- The organization of video hearings should be regulated in the law in all judicial proceedings, and the permissibility of written proceedings should be expanded, giving the judges a bigger chance to deliberate.
- Some thought should be given to suspending some of the enforcement activities in an emergency situation, for instance the eviction of persons against their will.