

IMPACT OF COVID-19 PANDEMIC ON CRIMINAL JUSTICE SYSTEMS ACCROSS EUROPE

Marina Matić Bošković, PhD, Research Fellow

Institute for Criminological and Sociological Research, Belgrade

Gracanicka 18, Belgrade

m.m.boskovic@roldevelopmentlab.com

Svetlana Nenadić, PhD, Deputy Public Prosecutor

Office of the War Crimes Prosecutor

Ustanicka 29, Belgrade

svetlananenadic11@gmail.com

ABSTRACT

Last year the Europe and world were facing with COVID-19 outbreak that put at the risk lives of the people and capability of healthcare systems to provide their services. To prevent spread of the COVID-19 governments have imposed restrictive measures, while some of them declared state of emergency. The response to the pandemic influenced on the functioning of the criminal justice system and daily operation of courts, but also on the substantive criminal law since some states are applying criminal law to violation of restrictive measures or to criminalizing disinformation on COVID-19 outbreak.

Outbreak of COVID-19 revealed new trends in criminal law like accelerated introduction of new crimes during pandemic, extremely flexible interpretation and rapid changes of criminal laws, which tend to be threat for legal stability and human rights protection. In addition, populist governments tend to use that new trend as a tool in suppression of political dissidents.

COVID-19 pandemic has posed unprecedented challenges to the functioning of judiciaries. Courts and prosecution services were working with limited capacities to ensure social distancing. Some countries introduced ICT tools and fast-track procedures to organize hearings, which raised question of procedural rights and protection of rights of defendant.

In the article authors assessed whether derogation of fair trial rights was in the line with standards of international human rights law and if introduction of state of emergency and restrictions were proportionate, time limited and needed and whether they changed understanding of the fundamental rights protection, especially right to a fair trial. Furthermore, authors explore whether COVID 19 changed perception of criminal law and legal certainty. Authors assessed how restrictions in the organization of judiciary work influenced on human rights protection and citizens trust in judiciary. Consequently, authors assesses whether some of

introduces changes, especially use of ICT tools made permanent changes in operation of courts and understanding of access to justice. Finally, authors are assessing whether these changes tend to erode judiciaries or put into the risk access to justice in the EU members states and candidate countries or whether they jeopardized EU principle of mutual trust.

Keywords: *access to justice, independence of judiciary, rule of law, right to a fair trial, criminal justice*

1. STATE OF EMERGENCY IN RESPONSE TO THE COVID-19 CRISIS

Since last year the Europe and world are facing with COVID-19 outbreak that put at the risk lives of the people and capability of healthcare systems to provide their services. To combat COVID-19 pandemic as effectively as possible, states have largely opted for a preventive approach by applying the precautionary principle¹, which implies the obligation to anticipate relevant hazards and a proactive approach.² At the same time, the effective fight against the pandemic implies the restriction of numerous human rights and most often restriction of the right to move freely.³ The legal basis for precautionary principle and the restriction and deviation from guaranteed human rights was the introduction of a state of emergency as a legal response to an emergency situation that poses a substantial danger to a country.⁴ Introduction of state of emergency raised questions of their legitimacy, duration and level of oversight.⁵

¹ About precautionary principle in fight against pandemia, see more: Goldner Lang I., *“Laws of Fear” in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19*, European Journal of Risk Regulation, 2021, p. 1-24.

² Venice Commission, *Report - Respect for Democracy Human Rights and Rule of Law during State of Emergency - Reflection*, CDL-PI(2020)005rev, 26 May 2020, Introduction, [[https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)005rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e)], Accessed 15 March 2021.

³ About restrictions of human rights in combating COVID-19 pandemia in Serbia see report: YUCOM, *Ljudska prava i COVID-19, Analiza izmene pravnog okvira tokom vanrednog stanja i uticaj na uživanje ljudskih prava*, 2020. For Croatia see more: Roksandić, S.; Grđan, K., *COVID-19 i razumijevanje pravnih propisa vezanih za suzbijanje zaraznih bolesti u Republici Hrvatskoj – osvrt na bitna pravna pitanja od početka pandemije do listopada 2020*, Pravni vjesnik, 2020, Vol. 36, No. 3-4, 327-343, also: Roksandić, S.; Mamić, K., *Širenje zaraznih bolesti kao prijetnja ostvarenju ljudske sigurnosti i kaznenopravni mehanizmi u sprječavanju širenja bolesti COVID-19*, Hrvatski ljetopis za kaznene znanosti i praksu, 2020, Vol. 27, No. 2, 681-713.

⁴ Venice Commission, *Compilation of Venice Commission opinions and reports on states of emergency*, CDL-PI(2020)003, 16 April 2020, par. 244, [[https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)003-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e)], Accessed 15 March 2021.

⁵ European Parliament, *State of emergency in the Response to the coronavirus crisis: Situation in the certain Member States*, PE. 649.408, June 2020.

The rule of law approach to state of emergency, implies that the state of emergency must be a subject of legal regulation⁶ and that relevant procedures should be followed.⁷ All relevant documents of international human rights law are based on the rule of law state of emergency approach and therefore they include derogative clauses to regulate which human rights and under what conditions could be derogated in state of emergency.⁸ Practice has shown that a state of emergency can be an ideal opportunity for various types of abuse and violation of rights by the executive and from that reason the Human Rights Committee issued two General Comments stipulating that a state of emergency must be exceptional, temporary in nature and proportionate.⁹ The Council of Europe has repeatedly taken the view that a state of emergency must be legally limited in duration, circumstance and scope, while the emergency powers may be exercised only for the purposes for which they were granted.¹⁰ Venice Commission has defined several basic principles governing the state of emergency – necessity, proportionality, temporariness, effective (parliamentary and judicial) scrutiny, predictability of emergency legislation and loyal co-operation among state institutions.¹¹

State of emergency necessarily implies a disturbance of the balance between the three branches of government, in favour of the executive. The state of emergency during COVID-19 pandemic is characterized by an additional power reduction of the legislature and the judiciary, given that due to the pandemic, many parliaments restricted their sessions, and the courts limited their work. An example of the above is Hungarian parliament that, due to the pandemic, passed a law authorizing the government to govern by decree without parliamentary approval.¹²

⁶ There are two ways of understanding State of emergency, see more in: Venice Commission, *Report - Respect for Democracy Human Rights and Rule of Law during State of Emergency - Reflection*, *op. cit.*, par. 8.

⁷ Grdašević, Dj., *Pandemija i Ustav Republike Hrvatske*, Informator 6623, 2020 [<https://informator.hr/strucni-clanci/pandemija-i-ustav-republike-hrvatske>], Accessed 05 May 2021.

⁸ Issue of human rights derogation in case of State of Emergency is regulated in article 14 International Covenant on Civil and Political Rights and article 15 European Convention on Human Rights.

⁹ UN Human Rights Committee (HRC), *CCPR General Comment No. 5: Article 4 (Derogations)*, 31 July 1981 [<https://www.refworld.org/docid/453883ff1b.html>], Accessed 7 March 2021; UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Derogations during a State of Emergency*, 31 August 2001, [<https://www.refworld.org/docid/453883fd1f.html>], Accessed 7 March 2021.

¹⁰ Council of Europe, Parliamentary Assembly, Resolution 2209 (2018) State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights, par. 4, [<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24680&clang=en>], Accessed 7 March 2021.

¹¹ Venice Commission, *Report - Respect for Democracy Human Rights and Rule of Law during State of Emergency - Reflection*, *op. cit.*, par. 7-16.

¹² See more: Picheta, R.; Halasz, S., *Hungarian parliament votes to let prime minister rule by decree*, Constitutionnet, 30 March 2020, [<http://constitutionnet.org/news/hungarian-parliament-votes-let-prime-min>

Therefore, the pandemic created a risk that the executive would strive to preserve the imbalance between the three state powers even after the end of the pandemic.¹³

Introduction of state of emergency had multiple effects on criminal justice. Thus, question arises whether the growing criminal repression is an adequate and proportional response to the threat of a pandemic. Also, whether weakening of the judiciary branch in favour to executive could decrease the existing standards of judicial independence, especially having in mind that during the pandemic judicial supervision over the executive is inefficient. Question can be raised about derogability of fair trial rights in state of emergency. The fair trial right is not marked as *jus cogens* in international law,¹⁴ but development of human rights determines this right as not derogable right.¹⁵

Introduced measures influenced on the independence of judiciary. In France, for example some measures raised significant discussion, specifically automatic prolongation of the length of pre-trial detention without decision of judge.¹⁶ Based on the legal action contesting the legality of prolongation, the Court of Cassation ruled that the court that would normally have decided on the prolongation should rapidly review the validity of the prolongation decision.¹⁷ In Serbia, Governmental decree was used to give instruction to judiciary to used videoconference trials. Although the Serbian Criminal Procedure Code did not envisage trial by video conference, except in specific circumstances,¹⁸ the Serbian Government adopted a decree by which during the state of emergency, judge could decide that defendant's participation can be ensured through a video link.¹⁹

ister-rule-decree], Accessed 7 March 2021.

¹³ OSCE, ODIHR, *The Functioning of Courts in the COVID19 Pandemic*, October 2020, [<https://www.osce.org/odihr/469170>], Accessed 7 March 2021, p. 9.

¹⁴ Article 4.1. International Covenant on Civil and Political Rights stipulates that fair trial right is derogable.

¹⁵ For example: UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Derogations during a State of Emergency*, *op.cit.* stipulates that states are not allowed, under any circumstances, to invoke a derogation to justify non-compliance with fundamental principles of a fair trial.

UN Human Rights Committee (HRC), *CCPR General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, August 2007, [<https://www.refworld.org/docid/478b2b2f2.html>], Accessed 7 March 2021 stipulates that guarantees of a fair trial must not be subject to derogation, as this could pose a risk to all preemptory norms protected by a fair trial.

¹⁶ Art. 16, Ordinance 2020-303 of 25 March 2020.

¹⁷ Judgment no. 974 of the Court of Cassation of 26 May 2020 (20-81.910).

¹⁸ Article 104 of the Criminal Procedure Code.

¹⁹ Uredba o načinu učešća optuženog na glavnom pretresu u krivičnom postupku koji se održava za vreme vanrednog stanja proglašenog 15 March 2020, Official Gazette RS, No. 49/2020.

2. CRIMINAL JUSTICE IN PANDEMIC – HOW COVID 19 AFFECTED CRIMINAL JUSTICE?

In the fight against the pandemic, governments have resorted to various methods. Complex public health issues are often politicized, and pandemic crisis is presented in simplified way with a dose of spectacularism²⁰. This wave of medical populism,²¹ which mean creating panic and dramatizing the crisis go hand in hand with populist demand for the most severe punishment known as penal populism. In this regard, governments have recognized criminal law as the most effective means of fighting pandemic. The criminal law, as an expression of the sovereign right of the state to punish, has become the most commonly used legal method in the fight against the pandemic, primarily because of its efficiency²². COVID 19 expand opportunities for various types of crime while presenting unprecedented challenges for the criminal justice system²³, this situation has created an ideal ground for multiple transformations of criminal law, which are reflected in: use of criminal law to implement restrictive measures; prescribing new crimes to combating pandemic, which may result in overcriminalization; endangering the procedural rights of defendants; extremely rapid changes in regulations and overlapping penal provisions; growing flexibility in interpreting the law; abuse of criminal law to suppress freedom of speech and political dissidents; partial suspension of the *work of courts* and the risks of using ICT in criminal justice. All these issues are capable to create different criminal justice approach in EU member states which may disturb principles of mutual trust and mutual recognition.

2.1. Use of criminal law to implement restrictive measures

Use of criminal law in the context of public health is well known. For example, it has been used in suppression of HIV infection²⁴. COVID 19 pandemic created tremendous risk for public health all over the world and to suppress the pandemic states resort to limitations of freedom of movement and communication through introduction of measures such as isolation, quarantine, social distancing, and lock

²⁰ Lasco G., *Medical populism and the COVID-19 pandemic*, Glob Public Health, Vol. 15, Issue 10, 2020, p. 1417-1429.

²¹ Lasco, G.; Curato, N, *Medical populism*, Social science and medicine, No. 221, 2019, p. 1-8.

²² For general overview of using criminal law, as ultima ratio law, in fight against virus see more: Drumbl M.; Roksandić S., *Virus and Terrorism*, JUSTICE – 360 blog, 13 April 2020, [<https://justice-360.com/virus-terrorism/>], Accessed 28 April 2021.

²³ Miller, J.M.; Blumstein, A., *Crime, Justice & the COVID-19 Pandemic: Toward a National Research Agenda*, American Journal of Criminal Justice, Vol. 45, Issue 4, 2020, p. 515.

²⁴ About criminalization of HIV transmission see UNAIDS review, [https://www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_en.pdf], Accessed 28 April 2021.

down. Criminal law was used in some states to ensure the effective implementation of these measures. Criminal law is the most coercive state tool and therefore its usage should be carefully weighed, especially in relation to human rights and scientific evidence. It is noted that despite the evolving scientific knowledge, criminalisation has been written and implemented across the world faster than the development of the general understanding of the virus itself.²⁵ This fact create risk that coercive state measures might not be efficient enough in pandemic suppression, while it could create citizen dissatisfaction and resistance. Excessive reliance on criminal law threatens to create the impression of controlling the pandemic and led to neglect of use of non-coercive measures. The conclusion that sanctions were the wrong strategy for stopping the spread of the disease came from HIV experience.²⁶ Therefore, overuse and misuse of criminal law in public health issues can be non-productive or even counterproductive. For example, Italy has reportedly charged more than 40,000 individuals for violating its quarantine rules and it is questionable whether this measure created any significant anti-pandemic effect.²⁷ In Spain, over 7,000 people were arrested or detained between 15 March and 15 May 2020 for allegedly breaching the state of confinement or rules created to COVID-19.²⁸ Additional challenge is the fact that many countries introduced draconic sanctions for breaching restrictive measures that are not proportionate to the threat posed by offences. Thus, Albanian Government propose amendments to the Criminal Code to impose prison sentences up to 15 years on citizens found guilty for violation of Government orders taken to prevent the spread of COVID-19.²⁹ It is well known that deterrence is generally found to have a small influence

²⁵ *When considering the criminalisation of COVID-19, lessons from HIV should be retained*, HIV Justice Network, 17 June 2020, [<https://www.hivjustice.net/news-from-other-sources/when-considering-the-criminalisation-of-covid-19-lessons-from-hiv-should-be-retained/>], Accessed 8 March 2021.

²⁶ Witt, J.F., *American Contagions Epidemic and the Law from Smallpox to Covid 19*, Yale University Press, 2020, p. 96.

²⁷ Sun, N.; Zilli, L., *COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures, Part II, 2020.*, [<http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-enforcement-of-public-health-measures-part-ii/>], Accessed 10 March 2021.

²⁸ Short update: 7,556 arrests and 869,537 fines proposals since the start of emergency in Spain, Fair Trails, May 2020, see: [<https://www.fairtrials.org/news/short-update-7556-arrests-and-869537-fines-proposals-start-emergency-spain>], Accessed 28 April 2021.

²⁹ See: Civil Right Defenders, *Albania's Government Unconstitutionally Pushes Draconian Sentences in Fight Against COVID-19*, 16 April 2020. [<https://crd.org/2020/04/16/albanias-government-unconstitutionally-pushes-draconian-sentences-in-fight-against-covid-19/>], Accessed 10 March 2021.

Milder sanctions were approved in comparison to the initial draft proposed by the government. Changes of Criminal Code include prison sentences of 3-8 years in cases of violation of COVID 19 preventative measures, when they had serious consequences for the health and life of the population. See more: Civil Right Defenders, *Impact of Covid-19 Measures on Human Rights and Criminal Justice*

on most people's behaviour,³⁰ so these draconic sanctions will probably appear to have no effect on pandemic, but it is possible to show some effect on legitimacy of law and legitimacy of state's actions in pandemic suppression.

Overuse and the misuse of criminal law in public health emergencies set a concerning precedent on the future use of penal law.³¹ It raised a concern whether the patterns of criminal law from the time of pandemic become permanent.

2.2. Prescribing new crimes at combating pandemic and risk of overcriminalization

To suppress the pandemic, many countries have resorted to the criminalization of exposure and transmission of the COVID-19 virus. Criminalization was carried out in two ways. First is through general criminal provisions such as the criminal offence of failure to comply with health regulations during an epidemic or criminal offence spreading of infectious diseases,³² and the second is through the introduction of new criminal offences relating exclusively to COVID-19.

Criminalization of COVID-19 exposure and transmission is legal and social challenge. As COVID-19 is not the first epidemic against which criminal law has been used, it is important to recall the experiences from criminalizing HIV exposure and transmission. The criminalization of these actions proved to be insufficiently effective from the point of view of virus spreading, but it created other risks, such as increasing stigmatisation.³³ A similar threat is posed by criminalization of COVID-19, which can lead to patient's stigmatisation, or stigmatisation of those people who may have symptoms similar to COVID illness, but also to discrimination of entire groups that are presumed to be virus carriers, such as people of Asian descent.³⁴

in Western Balkans and Turkey, 26 May 2020, [<https://crd.org/2020/05/26/impact-of-covid-19-measures-on-human-rights-and-criminal-justice-in-western-balkans-and-turkey/>], Accessed 28 April 2021.

³⁰ Tyler, T.; Jackson, J. *Future Challenges in the Study of Legitimacy and Criminal Justice*, Yale Law School, Public Law Working Paper No. 264, 2013, p. 2, [<https://ssrn.com/abstract=2141322> or <http://dx.doi.org/10.2139/ssrn.2141322>], Accessed 10 March 2021.

³¹ Sun; Zilli, *op.cit.* note 27, *Part II*.

³² For example, in Serbia articles 248 and 249 Criminal Code, and in Croatia article 180 Criminal Code.

³³ Sun; Zilli, *op.cit.* note 27, *Part I*.

³⁴ About discrimination against people of Asian descent see more: Witt, *op.cit.*, note 26, p. 133 and Yun Liew, J.C., *Spread of Anti-Asian Racism: Prevention and Critical Race Analysis in Pandemic Planning*, in: Flood et al (eds.), *Vulnerable. The Law, Policy and Ethics of COVID 19*, University of Ottawa, 2020 p. 393-407.

Parallel with the criminalization of exposure and transmission of COVID-19, many governments have resorted to criminalization of various types of behaviour that, in their opinion, makes the fight against the virus more difficult.

World Health Organisation announced that pandemic was accompanied by an infodemic of mis- and disinformation and that constituted a serious risk to public health and public action.³⁵ States recognised that information considered fake news or misinformation could lead to potential spread of panic among the population.³⁶ Thus, criminalisation of spreading false news about the pandemic was not rare. In Hungary this crime was introduced jointly with the crime of violating epidemic measures.³⁷ Russia took similar action and amended Criminal Code with provision that those who found deliberately spread false information about serious matters of public safety such as COVID-19 will face fines and up to five years of imprisonment.³⁸ Albania also introduced new criminalization prescribing that diffusion of fake information or announcements in any form aimed at creating a state insecurity and panic among the people is the crime.³⁹

Spreading false information as a crime was introduced with rationale that panic makes fight against the virus more difficult. However, the criminalization of spreading false information could challenge freedom of expression and press freedom. Thus, crime of spreading false information might be able to discourage critical opinions and produce chilling effect on journalist and academia.⁴⁰ This crime could be used as a political tool for censoring critical report and creating atmosphere that prevents criticism of any government action regarding pandemic, since the criticism could be interpretate as spreading false information. Use of vaguely legal definitions is ideal base for censorship because it can be unclear whether an information is false or true or weather some matter is serious enough. From the

³⁵ WHO Situation Report No. 13, 2 February 2020, [<https://www.who.int/docs/default-source/coronavirus/situationreports/20200202-sitrep-13-ncov-v3.pdf>], Accessed 10 March 2021.

³⁶ Noorlander, P., *COVID and free speech. The impact of COVID-19 and ensuing measures on freedom of expression in Council of Europe member states*, Council of Europe, 2020, p. 7, [<https://rm.coe.int/covid-and-free-speech-en/1680a03f3a>], Accessed 10 March 2021.

³⁷ Drinoczi, T.; Bien – Kacala, A., *COVID – 19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism*, *The Theory and Practice of Legislation*, Vol. 8, No. 1-2, 2020, pp. 171-192, p. 186.

³⁸ International Press Institute, *New fake news law stifles independent reporting in Russia on Covid 19*, 8 May 2020, [<https://ipi.media/new-fake-news-law-stifles-independent-reporting-in-russia-on-covid-19/>], Accessed 10 March 2021.

³⁹ Erebara, G., *Albania Prosecutors to Probe Panic-Mongering About Coronavirus*, 24 February 2020, [<https://balkaninsight.com/2020/02/24/albania-prosecutors-open-investigation-over-corona-virus-panic-spreading-information/>], Accessed 10 March 2021.

⁴⁰ Drinoczi; Bien – Kacala, *op. cit.*, note 37, p. 186.

sociological and politicological point of view introducing spreading false information as a crime is caused by the fact that governments have been facing with loss of trust in anti-pandemic actions. Unable to create citizens trust, governments compensate this lack by threat of sanction. This could lead to intimidation of citizens and strengthening the belief that governments are hiding something.

These trends are fully in the line with the thesis that modern society suffers from overcriminalization because there is an explosive growth in the size and scope of criminal law. The pressing problem of modern criminal law lies in the fact that we have too much of it.⁴¹

2.3. Extremely rapid changes in regulations and overlapping penal provisions

Pandemic has shown two important features of modern criminal law: overcriminalization, and high frequency of amendments. Frequent changes in anti-virus strategies, as well as uncertainties about the manner and intensity of virus spreading have caused frequent and bustling changes of penal provisions. In the absence of a unified anti-virus strategy and in a situation where information of the nature of the virus has changed day by day, legislators have resorted to adaptation tactics, which has resulted in extremely rapid changes in legislation and accelerated procedure for laws approval. This was further contributed by the need to adapt the economy to the new situation to prevent economic losses.

Thus, in the Republic of Serbia the misdemeanour provisions regarding the prevention of the spread of the infection were changed several dozen times within three months.⁴² It was similar in Hungary where 70 decrees were issued during the emergency. Some of them regulate the same matters, some have an omnibus nature legislation and others amend the previously issued emergency decrees.⁴³ Poland also have had massive and chaotic legislative activities.⁴⁴ In Italy restrictions and sanctions were hectic because they were prescribed on a day by day basis and came from different institutions – government, ministers, regions, city majors or civil protection department.⁴⁵

⁴¹ Husak, D. *Overcriminalization, The Limits of the Criminal Law*, Oxford University Press, 2008, p. 3.

⁴² Golubović, K. *et al*, *Ograničenje kretanja i suđenja za vreme vanrednog stanja*, 2020, p. 19, [<https://www.yucom.org.rs/analiza-ogranicenje-kretanja-i-sudenja-za-vreme-trajanja-vanrednog-stanja/>], Accessed 10 March 2021.

⁴³ Drinoczi; Bien – Kacala, *op. cit.*, note 37, p. 186.

⁴⁴ Drinoczi; Bien – Kacala, *op. cit.*, note 37, p. 189.

⁴⁵ Canestrini, N., *Covid 19 Italian emergency legislation and infection of the rule of law*, *New Journal of European Criminal Law*, Vol 11, No. 2, 2020, p. 118.

The practice of the Serbian NGO YUCOM speaks about the problem of over-criminalization and excessively frequent amendments to the law during the pandemic. A large number of citizens addressed this organization with claim that they were ordered into custody for violating measures of home self-isolation, without receiving any previous notification of self-isolation obligation. Therefore, they did not even be aware of mandatory self-isolation. This happened due to the fact the Government's decision prescribing the obligation of self-isolation was changed as many as ten times in one month in different directions: conditions for self-isolation, methods of self-isolation and self-isolation deadlines. This decision was almost impossible to track even for legal professionals. YUCOM pointed out that the purpose of criminal punishment of citizens cannot be achieved if citizens are punished for obligations that they did not even know they had.⁴⁶

Legislative chaos led to a massive overlap of criminal and administrative penal provisions and sanctions, which has created a risk of violating the defendant's right against double jeopardy. Poland faced this problem.⁴⁷ In Serbia overlapping has been even encouraged by Government who prescribed the possibility of conducting the misdemeanour procedure against defendant who is in the process of the criminal offence for the same conduct.⁴⁸ This decision abolished the *ne bis in idem* principle in Serbian legal system which was previously successfully established in the field of criminal and misdemeanour law.

Overcriminalization, high frequency of law changes and overlapping have led to situation in which proper following the law became almost impossible. Citizens were not able to follow the law, because very often they were not aware of penal provisions, or they were confused by the content of the provisions. When citizens misunderstood or if they are ignorant of the law, they are in a mistake of law. Widespread mistake of law could jeopardise rule of law and lead to lowering standards of legal certainty in criminal justice. Also, it is opposing to the article 7 of the European Convention on Human Rights which prescribe no punishment without law. Caselaw of ECtHR advocates that relevant penalties must be clearly defined by the law⁴⁹ and that penal law has to have qualitative requirements such as accessibility and foreseeability.⁵⁰

⁴⁶ Golubović *et al*, *op.cit.*, note 42, p. 19-20.

⁴⁷ Drinoczi; Bien – Kacala, *op.cit.*, note 37, p. 191.

⁴⁸ Article 2. Uredba o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o razgraničenju i zabrani kretanja lica na teritoriji Republike Srbije, Official Gazette, No. 398/2020.

⁴⁹ *Parmak and Bakir v. Turkey*, ECtHR, App. nos. 22429/07 and 25195/07, 3 December 2019, par. 58.

⁵⁰ *Kasymakhunov and Saybatalov v. Russia*, ECtHR, App. nos. 26261/05 and 26377/06, 14 March 2013, par. 77.

2.4. Growing flexibility in interpreting the law

The principle that analogy is forbidden in criminal law, as well as the principle that penal provisions should be interpreted restrictively, have shown as superfluous from the point of view of the criminal law in the field of pandemic protection. The executive requires the robust action of criminal law and show no interest in theoretical principles of criminal law. As a consequence, a request for a flexible interpretation of criminal law have been created.

An example of executive request is recommendation of the Ministry of Justice Republic of Serbia to the public prosecutors. In the recommendation Ministry is requiring from the public prosecutors to propose detention for any person accused of breaching self-isolation measures. At the same time, prosecutors should take care for medical quarantine time limitations. In a case that public prosecutor does not propose detention, Ministry recommended to the Republic public prosecutor to submit a disciplinary charge against public prosecutor.⁵¹ Although this recommendation does not have legal binding force, it undoubtedly influenced prosecutors and courts to interpret detention provisions more flexibly and broadly. The fact that executive recommends proposing detention beyond legal grounds is worrying.

Similar situation happened in France and Italy. In France some measures included the early release of certain categories of detainees, but an automatic prolongation of the length of pre-trial detention was also introduced.⁵² In Italy, police has interpret extensively limitations which should be restrictively applied.⁵³ Flexibility in interpretation can produce different consequences, so it is correct to conclude that criminal law in pandemic creates a risk that courts will expand the scope of crimes such as assault and aggravated assault for conduct such as coughing.⁵⁴

⁵¹ See Ministry of Justice Recommendations, [<https://www.mpravde.gov.rs/sr/obavestenje/29543/poostравanje-sankcija-za-lica-koja-prekrse-mere-samoizolacije-.php>], Accessed 11 March 2021.

⁵² European Commission, SWD(2020) 309 Commission staff working document 2020 Rule of Law Report Country Chapter on the rule of law situation in France Accompanying the document communication from the Commission to the European parliament, the Council, The European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report, 'The rule of law situation in the European Union, Brussels, 30.9.2020, p. 4, [<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0309&from=EN>], Accessed 15 March 2021.

⁵³ Canestrini, *op.cit.*, note 45, p. 122.

⁵⁴ Skolnik, T., *Criminal Law During (and After) COVID-19*, Manitoba Law Journal, Vol. 43, No. 4, 2020, p. 145.

2.5. Endangering the procedural rights of defendants

The COVID-19 outbreak also has an impact on the exercise of procedural rights of suspects and accused persons. Direct communication with a lawyer, interpreter or with third person, especially while the suspects or accused persons are deprived of liberty was reduced.⁵⁵ In addition to access to a lawyer, the suspects and accused had limited access to the case files due to restricted access to the courts and police stations. Access to a lawyer, access to an interpreter and access to the case files are aspects of the right to a fair trial and limitation or violation of these rights during criminal procedure represent violation of the European Convention of Human Rights and relevant EU Directives on rights of suspects and accused.⁵⁶ Countries were struggling to find solutions that will protect health and prevent spread of virus and to fulfil human rights standards. Some of the introduced measures were not function properly at the beginning of pandemic, especially those depending on technology and IT equipment.

In Spain, authorities introduced measure that prevented detained persons from attending court hearings and thus unable them to communicate with their lawyer before and after their appearance.⁵⁷ Lawyers reported challenges in accessing remote hearings due to lack of videoconferencing equipment and/or bad internet connections. In the Netherlands, the Netherlands Committee of Jurists for Human Rights reported that confidential lawyer-client communication was not possible during videoconference hearings.⁵⁸ Same problem was notified in Spain, where remote hearings were introduced as anti-pandemic measure in April 2020.⁵⁹ However, the physical presence of the accused is required for crimes which are punishable with at least five years of imprisonments, but only during the trial. That solution had as a consequence that in the phases of the criminal procedure before trial defendant was placed in the police station while lawyer was in the

⁵⁵ Beyond Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe, Fair Trials, June 2020, p. 24, [https://www.fairtrials.org/sites/default/files/publication_pdf/Beyond%20the%20emergency%20of%20the%20COVID-19%20pandemic.pdf], Accessed 11 April 2021.

⁵⁶ Jimeno-Bulnes, M., *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?*, CEPS, 2010, p. 171.

⁵⁷ See: Fair Trials, Short Update: Assistance ALA request appropriate Legal Assistance to Detainees in a letter addressed to the Superior Court of Justice in Madrid, [<https://www.fairtrials.org/news/short-update-association-ala-requests-appropriate-legal-assistance-detainees-letter-addressed>], Accessed 11 April 2021.

⁵⁸ Netherlands Committee of Jurists for Human Rights Report, 10.06.2020, [<https://www.rijksoverheid.nl/documenten/rapporten/2020/06/19/tk-bijlage-njcm-brief-over-zorgen-om-corona-maatregelen-in-de-strafrechtspiegling>], Accessed 11 April 2021.

⁵⁹ Royal Decree – Law 16/2020, April 28, 2020.

court room with the judge, which prevented any confidential counseling.⁶⁰ In addition, not all courts across the EU countries have adequate videoconferencing equipment, which specifically was reported by lawyers in France.⁶¹

Limitations and bans on access to a lawyer for people in prison were introduced in some countries. In Portugal lawyers were reported that they could visit clients in prison in duly justified urgent matters and situations, which impeded preparation of the proceedings.⁶²

The right to access to a lawyer is enshrined in the EU Directive on the right of access to a lawyer in criminal proceedings,⁶³ which sets minimum standards for EU member states to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such manner so as to allow them to exercise their rights of defence practically and effectively.⁶⁴ The right of access to a lawyer has been subject of the Court of Justice interpretation and Court of Justice referred to the jurisprudence of the European Court of Human Rights.⁶⁵

According to the jurisprudence of the European Court of Human Rights, telephone and video conference as alternative for hearings and other procedural actions, may be used if there are based in law, time-limited and demonstrably necessary and proportionate in the local circumstance and do not prevent confidential communication of a person with their lawyer. In the criminal cases participation in the proceedings by videoconference is acceptable to the European Court of Human Rights when it is explicitly provided in the national legislation (*Marcello Viola v Italy*,⁶⁶ para 65) and if technical conditions enable smooth transmission

⁶⁰ Bulnes, M. J., Commentary: iProcess - Judicial Emergency in Spain during the COVID-19 crises, [https://www.fairtrials.org/news/commentary-iprocess---judicial-emergency-spain-during-covid-19-crisis], Accessed 11 April 2021.

⁶¹ Beyond Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe, Fair Trials, June 2020, [https://www.fairtrials.org/sites/default/files/publication_pdf/Beyond%20the%20emergency%20of%20the%20COVID-19%20pandemic.pdf], Accessed 11 April 2021.

⁶² Ramos, V.C, Pereira, D.S., Commentary: COVID-19 - What does all this mean for your ability to defend your clients' right to a fair trial – the Portuguese case, April 7, 2020 [https://www.fairtrials.org/news/commentary-covid-19-what-does-all-mean-your-ability-defend-your-clients'-right-fair-trial-], Accessed 11 April 2021.

⁶³ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294.

⁶⁴ Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer International Publishing, 2017, p. 632.

⁶⁵ Case 612/15 *Kolev and others*, ECLI:EU:C:2018:392, par. 106.

⁶⁶ Application no. 45106/04, judgement 5 October 2006.

of the voice and images (para 74). It is important that use of videoconference do not prevent confidential communication with the defense counsel. The European Court of Human Rights pointed out this condition in case *Marcello Viola v Italy* (para 75), which was ensured through direct contact with lawyer. Use of videoconference in judiciary is not a new technology and prior to COVID-19 it was used in specific procedures, especially in cross border or for hearing vulnerable victims.⁶⁷ The specifics of videoconferencing during COVID-19 is to replace all or majority of hearings, not to be used for limited number of specific cases. Since face to face meetings with lawyers were limited during pandemic the Fair Trials developed detail recommendations⁶⁸ on access to a lawyer, especially access to legal assistance for defendants in detention to ensure confidentiality. Recommendations were focused on secure and unlimited use for telephones, so that calls cannot be intercepted or recorded.

Introduced measures and solutions to combat COVID-19 resulted in limitation of access to a lawyer, since suspects and accused had restricted lawyers' assistance prior to police questioning as well as during police questioning.⁶⁹ The EU right acquis on right to access a lawyer includes right to receive legal assistance at the early stages of criminal proceedings, including prior to any questioning of police, which helps a person to understand their situation and consequences of their choices. In addition, the right to access to a lawyer includes the physical presence and effective participation of their lawyer during questioning by police to enable to intervene during the questioning.

In the Netherlands, stakeholders have raised concerns about the effective safeguarding of the right to a fair trial and quality of justice during pandemic,⁷⁰ since the prosecution service has announced plans to make increased use of its power to

⁶⁷ Gori, P., Pahladsingh, A. *Fundamental rights under Covid-19: an European perspective on videoconferencing in court*, ERA Forum, Vol. 21, 2021, p. 575.

⁶⁸ Safeguarding the right to a fair trial during coronavirus pandemic: remote criminal justice proceedings, 2020 Fair Trials, [<https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>], Accessed 11 April 2021.

⁶⁹ Justice Under Lockdown in Europe – A survey on the impact of COVID-19 on defence rights in Europe, 2020, Fair Trials, [https://www.fairtrials.org/sites/default/files/publication_pdf/COVID-19%20Europe%20Survey_Justice%20under%20lockdown%20paper_Sept%202020_0.pdf], Accessed 11 April 2021.

⁷⁰ The Netherlands Committee of Jurists for Human Rights, 2020, Letter on concerns about corona measures in criminal justice.

decide itself on certain criminal cases.⁷¹ This could have an impact on the right to a fair trial, if citizens are not adequately informed.⁷²

Similar situation occurred in the USA where has been an increase in plea bargains during the COVID-19 pandemic.⁷³ Council on Criminal Justice raised concern that defendants may feel pressured to plead guilty to stay out of prison.⁷⁴

When it comes to the right to access case files as an aspect of a right to a fair trial, it is enshrined in the EU Directive on the right to information in criminal proceedings which gives suspect and accused persons the right to access all documents in the possession of the competent authorities.⁷⁵ To allow effective exercise of the right to access to the materials of the cases the access should be granted in due time.

In Belgium, lawyers reported that they were provided access to the case file for only 48 hours with no option of receiving copy of the file for clients in pre-trial detention.⁷⁶ Only later, the lawyers were allowed to scan documents. In Portugal, the lawyers could access to case files after submitting a special application and scheduling a specific time and date from relevant authority.⁷⁷ Some EU member states made electronic access to the case files, but it depends on availability of equipment.⁷⁸

⁷¹ Such decisions by the prosecution service cannot impose a prison sentence and can be contested in court. See the Letter from the Minister for Justice and Security and the Minister for Legal Protection to the House of Representatives of 25 June 2020: 'Contours of the Approach to Address Backlogs in Criminal Justice'.

⁷² See in that regard: National Ombudsman, Proper Provision of Information is the Basis of Access to Justice – Bottlenecks in the Provision of Information about Penalties and Dismissal Decisions.

⁷³ Baldwin, J.M., Eassey, J.M., Brooke, E.J., *Court Operations during the COVID-19 Pandemic*, American Journal of Criminal Justice, Vol. 45, Issue 4, 2020, pp. 743-758.

⁷⁴ Council on Criminal Justice, April 17, 2020, Facing COVID-19 in the Courts (Webinar), [<https://justicroundtable.org/event/council-on-criminal-justice-facing-covid-19-in-the-courts>], Accessed 11 April 2021.

⁷⁵ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142.

⁷⁶ See: [<https://www.lecho.be/dossiers/coronavirus/la-justice-penale-au-rabais-bienvenue-chez-kafka-2-0/10225297.html>], Accessed 11 April 2021.

⁷⁷ Ramos; Pereira, *op.cit.*, note 62, note 9.

⁷⁸ Some courts in France granted online access to specific documents. See: Dreu, C.A., Commentary: Silver lining to a very dark cloud: what could we learn from the COVID-19 crisis? A French perspective, [<https://www.fairtrials.org/news/commentary-silver-lining-very-dark-cloud-what-could-we-learn-covid-19-crisis-french-perspective>], Accessed 11 April 2021.

In addition to legislative actions, safety measures should be adopted, such as glass protections at police stations or in detention facilities, in order to enable the exercise of the right of access to lawyer or the right to an interpreter.

In times of COVID-19, the procedural rights of suspects and accused persons need to be respected to ensure fair proceedings. Limited derogations, which are provided for by the decrees, should be interpreted restrictively by the competent authorities and not be employed on a large scale.

2.6. Abuse of criminal law in order to suppress freedom of speech and political dissidents

The state of emergency strengthened the executive branch at the expense of the legislative and judicial. Authoritarian governments are therefore happy to resort to a state of emergency to use broader powers of state authorities in accordance with “imposing opposition and restricting human rights”.⁷⁹ Although “governments should counter COVID-19 by encouraging people to mask up, not shut up”,⁸⁰ according to some reports, at least 83 governments around the world have abused the pandemic to justify violating the freedom of speech and peaceful assembly.⁸¹ For example, charges were brought by Polish authorities against two activists for a poster campaign. They were detained after they put up posters in Warsaw accusing the government of manipulating COVID-19 statistics. Activist were charged with theft and burglary for removing the glass covering of advertisements on bus shelters to replace them with their own posters and they faced possible prison sentences of up to 10 years. Amnesty International warned that charges might create additional barriers to the work of human rights defenders.⁸²

Abuse of the state of emergency to settle accounts with political opponents is not uncommon. The European Court for Human Rights also ruled on this, warning on several occasions that “public emergency threatening the life of the nation must

⁷⁹ Venice Commission, *Compilation of Venice Commission opinions and reports on states of emergency*, CDL-PI(2020)003, *op.cit.*, para 51.

⁸⁰ Gerry Simpson associate crisis and conflict director at Human Rights Watch in Human Rights Watch. See: Human Rights Watch, *Covid-19 Triggers Wave of Frees Speech Abuse, Scores of Countries Target Media, Activist, Medics, Political Opponents*, 11 February 2021, [<https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse>], Accessed 12 March 2021.

⁸¹ *Ibid.*

⁸² See: Amnesty International, *Poland: Activists at risk of 10-year jail term for COVID-19 poster campaign challenging government statistics*, 11 June 2020, [<https://www.amnesty.org/en/latest/news/2020/06/poland-activists-at-risk-of-10-year-jail-term-for-covid-19-poster-campaign-challenging-government-statistics/>], Accessed 12 March 2021.

not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society”.⁸³

2.7. Partial suspension of the *work of courts*

The courts have been unable to simultaneously meet general safety guidelines while maintaining full operations and usual caseloads. Subsequently, the primary response among many courts has been to either reduce or eliminate their in-person practice by halting all such operations, even closing their physical locations.⁸⁴ The reduced activities in courts and lockdown measures have impact on court operations. Majority of countries were looking for solutions that would limit interaction with courts and suspension of non-urgent cases was one of the applied measures.

In Hungary, the Government ordered by Decree that the functioning of Hungarian courts be suspended, apart from certain urgent cases, for an undefined period of time.⁸⁵ Two weeks later, the Government introduced changes to the procedural laws, aimed at facilitating the operation of the justice system during the state of danger.⁸⁶ In Bulgaria, following a decision of the Judges’ chamber of the Supreme Judicial Council,⁸⁷ the processing of court cases was temporarily suspended for one month during the state of emergency, except for urgent cases.⁸⁸ In Austria, most activity of courts was temporarily suspended from 16 March to 13 April 2020 due to the COVID-19 pandemic, with specific measures adopted to postpone procedural deadlines, which could lead to increased backlogs in the justice system.⁸⁹

Although suspension or limitation of courts’ operations were necessary measure at the beginning of pandemic, it was not sustainable solution and Governments and judiciary were obliged to find more suitable solutions, either through use of information technologies, or amendments to procedural legislation and incentives for

⁸³ *Mehmet Hasan Altan v. Turkey*, ECHR, Appl.no.13237/2017, 20 March 2018, par. 210; as well as *Şahin Alpay v. Turkey*, ECtHR, Appl.no.16538/17, 20 June 2018, par. 180.

⁸⁴ Miller, C., How COVID-19 is Impacting California Courts: Roundup of Services, 2020, [<https://www.law.com/therecorder/2020/06/16/how-covid-19-is-impacting-california-courts-roundup-of-services/?slreturn=20200528125509>], Accessed 11 April 2021.

⁸⁵ Government Decree 45/2020 of 14 March 2020.

⁸⁶ Government Decree 74/2020 of 31 March 2020. That Decree became ineffective on 18 June 2020, in accordance with Article 53(4) of the Fundamental Law.

⁸⁷ Extraordinary Session, Short Protocol No. 9, 10 March 2020.

⁸⁸ Such as those on reviewing pre-trial detention or undertaking victim protection measures and child protection measures.

⁸⁹ 1. und 2. COVID-Justizbegleitgesetz.

court settlements.⁹⁰ Such approach was taken in Italy, where Government adopted organizational measures in cooperation with the Heads of Judicial Offices and the High Council for Judiciary, allowing for remote civil and procedural hearings.⁹¹

Spain declared state of alarm on 14 March 2020⁹² and during period of three months the activities of the courts were limited, procedural deadlines being suspended, and procedural acts being maintained only in urgent procedures. The second nationwide state of alarm has been in place since 25 October 2020 till 9 May 2021,⁹³ and limitation to rights approved in the context of the second state of alarm are much less restrictive than those imposed between March and June 2020. Concerns was raised that these measures may have impact on the justice system to deal with the backlogs generated during state of alarm.⁹⁴ Efforts are undertaken to minimize the impact of the COVID-19 pandemic on the justice system through adoption of new legislation foreseeing special procedural and organizational measures.⁹⁵ The measures envisaged also include a wider use of digital technologies for procedural acts and trial for crimes punishable with up to five years of imprisonment.

In Portugal, several measures were adopted related to teleworking and possibilities to hold hearings and conduct other procedures remotely.⁹⁶ Deadlines in non-urgent cases were suspended, and non-urgent cases were adjourned. Portugal foresees a set of measures to address challenges after initial lockdown. Special focus of the measures is to address increased demand for justice and need to reduce backlog. One of the envisaged measures is a temporary regime of reduction of court fees to facilitate reaching of court agreements.

⁹⁰ Kostić, J.; Matić Bošković, M., *How COVID-19 Pandemic Influences Rule of Law Backsliding in Europe*, *Regional Law Review*, Institute of Comparative Law, 2020, pp. 77-90.

⁹¹ Art. 83 of the Decree-law of 17 March 2020 n. 18.

⁹² Royal Decree 463/2020, declaring the state of alarm as a result of the health crisis caused by COVID-19.

⁹³ Royal Decree 926/2020.

⁹⁴ The Commission has also addressed this issue in the context of the European Semester. Recital 28, Council Recommendation on the 2020 National Reform Programme of Spain and delivering a Council opinion on the 2020 Stability Programme of Spain, p. 8 [<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0509&from=EN>], Accessed 11 April 2021.

⁹⁵ For example, 11 to 31 August were declared working days for procedural purposes.

⁹⁶ 2020 Rule of Law Report – Country Chapter on rule of law situation in Portugal, SWD(2020) 321 final, p. 5.

2.8. Risks of using ICT in criminal justice

To enable functioning of the courts, countries where level of information technology development allowed introduced modalities of online hearings and/or other use of modern technologies during proceedings like electronic filing.

The COVID-19 pandemic enhanced the process of digitalization of the justice system. A number of initiatives are being taken ranging from allowing court users to monitor on-line the stages of proceedings to organize on-line hearings. The crisis led to an acceleration of digitalization in criminal trials, where the Prosecution service was granted the possibility to hear witnesses and examine suspect through video conference and appoint experts.⁹⁷

Countries in which e-justice systems are well advanced, like in Estonia and Latvia, showed a high degree of accessibility to court users and functioning of the courts continued without significant disruption during COVID-19 pandemic.⁹⁸

However, one has to be careful with conclusions. The access to justice is definitely improved by virtual courts, with the major exception of digitally excluded people who does not have access to internet, computers on technology in general. The Eurostat numbers show some alarming data regarding the member states disparities. According to 2020 data, in the Netherlands almost all households have broadband access (97 percent), compared to 79 percent of households in Bulgaria and 73 percent in Bosnia and Herzegovina.⁹⁹

Additionally, the uneven use of information and communication technologies tools in the EU member states judicial system put additional challenge for access to justice across the Europe.¹⁰⁰ The European Commission carried out comprehensive analysis and mapping of the digitalisation of justice in all member states, which reveals different level of progress amongst the member states.¹⁰¹ Specifically,

⁹⁷ 2020 Rule of Law Report – Country chapter on rule of law situation in Italy, SWD(2020) 311 final, p. 5. Information received in the context of the country visit and of the consultation process for the preparation of the report, e.g. Ministry of Justice contribution (an increase of 89% in videoconferences has been registered in May 2020 with respect to May 2019).

⁹⁸ 2020 Rule of Law Report – The Rule of Law situation in the European Union, SWD(2020) 580 final, p. 11.

⁹⁹ Eurostat, Households with broadband access, 2020, [<https://ec.europa.eu/eurostat/databrowser/view/tin00073/default/table?lang=en>], Accessed 5 May 2021.

¹⁰⁰ Wahl, T., Commission Plans to Speed Up Digitalisation of Justice Systems, January 2021, Eurim.

¹⁰¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Digitalisation of justice in the European Union – A toolbox of opportunities, {SWD(2020) 540 final} Brussels, 2.12.2020 COM(2020) 710 final.

in the context of criminal law, victims can access an electronic file in seven member states and defendants in nine, evidence can be submitted to a court exclusively in digital format in the context of all types of criminal proceedings in 13 member states. To overcome this inequality and to ensure protection of human rights the European Commission developed plan to support advancement of national justice system digitalisation and improving digitalisation of cross-border judicial cooperation at the EU level.

3. PANDEMIC AND MUTUAL TRUST IN THE EU

The high level of trust between EU member states on which the mutual recognition instruments are based on strict respect of high standards of individual rights protection in each member state.¹⁰² In addition, the mutual recognition instruments are based on the premiss that the criminal courts meet the standards of effective judicial protection, which include in particular independence and impartiality of these courts.¹⁰³

The existence of a real risk that person to whom mutual recognition instrument relates to would suffer a violation of his fundamental rights, can present reason for member state judicial authority to refuse to act according to the request from the instrument.¹⁰⁴ Belgium and the Netherlands have specifically included a human rights clause in their national legislation for implementation of European arrest warrant,¹⁰⁵ allowing a judge to refuse extradition in case of a potential breach of human rights.¹⁰⁶

The relevance of organization of judiciary is confirmed in the EU Court of Justice decision from June 2019 in the case Commission against Poland.¹⁰⁷ Court of Justice conclude that Poland took obligation to follow “common values from article 2 of the EU Treaty”, including the rule of law. Court of Justice also stated that “although the organization of judiciary is within the member states jurisdiction”, that does not mean that member states can violate EU *acquis*. In September 2020, the Inter-

¹⁰² Willems, A., *The Principle of Mutual Trust in EU Criminal Law*, 2021, Hart Publishing, p. 26.

¹⁰³ Suominen, A., *The Principle of Mutual Recognition in Cooperation in Criminal Matters*, Intersentia, 2011, p. 51.

¹⁰⁴ According to article 1 (3) of the Framework Decision 2002/584 mentioned decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

¹⁰⁵ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190/1.

¹⁰⁶ Willems, *op.cit.*, note 102, p. 65.

¹⁰⁷ *Commission v Poland*, Case C-619/18, ECLI:EU:C:2019:531.

national Legal Assistance Chamber of the Amsterdam District court announced that it would temporarily stop extraditing people who are suspected or convicted of a crime to Poland due to concerns related to the independence of the Polish judiciary. This is the first time that a domestic court has issued a blanket ban on extradition to another EU member state. The Amsterdam Court's announcement present opportunity for the Court of Justice of the EU to revise its approach. In addition, the Amsterdam court would lead to the projection of fundamental rights, including the right to a fair trial.

Overcriminalisation during COVID-19 outbreak and partial double criminality check potentially could raise challenges for application of mutual recognition instruments, especially European Arrest Warrant.¹⁰⁸ Although, according to the Framework Decision 2002/584/JHA the double criminality check is not required where the offence that the warrants refer to is included in the list of 32 categories of offences, the overcriminalisation during COVID-19 could create problems in assessing the law of issuing state that is not included in the list. The list linked to the European Arrest Warrant refers rather to criminological categories than to the judicial definition of infringements, which leaves a wide margin for interpretation on the part of national judicial authorities. Some countries criminalised and prosecuted behaviour that in other countries has been purposely excluded.¹⁰⁹

It has to be seen how the measures introduced during COVID-19 pandemic will influence on the mutual trust and mutual recognition instruments in the EU and member states. Limitation to ensure procedural rights of suspect and accused persons might have impact on individual decisions. Although each country proposed anti-pandemic measures based on the specific situation in their country, the EU and member states should bear in mind that these measures have cross-border impact.

4. CONCLUSION

The COVID-19 crisis caused unprecedented challenges for criminal justice system across Europe. When the crisis began in March 2020, all governments and judiciaries in Europe imposed strict measures to contain the spread of the virus. Court operations were reduced to a minimum, home based work was organised, and only emergency personnel attended the courts to process urgent cases. In many countries, the lockdown eased, and courts resumed operations during the summer

¹⁰⁸ Janssens, C., *The Principle of Mutual Recognition in EU Law*, Oxford University Press, 2013, p. 176.

¹⁰⁹ See: Amnesty International, *Poland: Activists at risk of 10-year jail term for COVID-19 poster campaign challenging government statistics*, 11 June 2020.

2020. However, due to the second and third wave of COVID-19 spread during winter 2020/2021 the courts operations were again limited, depending on situation in each country.¹¹⁰

In parallel to the measures introduced by judiciaries, the Governments opted for use of criminal law as an instrument for ensuring implementation of anti-pandemic measures. Modalities of use of criminal law vary across Europe, some countries introduced new crimes and severe sanctions. Frequent changes in the law and overcriminalisation caused challenges for legal certainty, both for citizens and judiciary. There are examples of Governments' interventions that jeopardise independence of judiciary, such as automatic prolongation of detention in France, or instruction for conducting misdemeanour procedure in parallel to the criminal procedure in Serbia.

Possible violations of human rights, especially rights of defendant, as well as over-criminalisation could have implication on mutual recognition instruments and cause challenges for their application.

The crisis created an opportunity for judiciaries to make better use of remote and e-tools for case processing and made decision makers, court staff and court users more apt to change. Responding to the challenges faced by EU's judicial systems during COVID-19 crisis, the European Commission has initiated legislation as part of the Roadmap on Digitalisation of justice in the EU.¹¹¹ However, the used of ICT tools in the judiciary raises questions of protection of procedural rights of defendants, which required additional protection measures to ensure smooth application of e-tools. Also, the level of ICT equipment development and internet connection caused challenges in implementation and provide additional obstacles for exercise of procedural rights.

Countries and judiciaries across the EU should be prepared for crisis situations in the future. Lessons learned from COVID-19 outbreak should be used and applied in the future to prevent introduction of any measures and rules that could jeopardise

¹¹⁰ In the Ireland the remote work has been continued during spring 2021, and priority has been given to urgent matters such as domestic violence and trials with single accused person [<https://www.courts.ie/covid-19-response-updates>], Accessed 5 May 2021. In Croatia the president of the Supreme Court adopted Instruction for court presidents to organize court's work in line with predefined models of operations to limit circulation of parties and citizens in the courts [<http://www.vsrh.hr/CustomPages/Static/HRV/Files/2020dok/Priopcenja/Upute%20o%20mjerama%20za%20sprječavanje%20širenja%20epidemije%20bolesti%20COVID-19%20od%202.11.pdf>], Accessed 5 May 2021.

¹¹¹ Roadmap on Digitalisation of justice in the EU, [<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12547-Digitalisation-of-justice-in-the-EU>], Accessed 12 April 2021.

ardise independence of judiciary, rights of defendants in the criminal procedure, legal certainty and stability and overuse of criminal law.

REFERENCES

BOOKS AND ARTICLES

1. Baldwin, J.M.; Eassey, J.M., Brooke, E.J., *Court Operations during the COVID-19 Pandemic*, American Journal of Criminal Justice, Vol. 45, Issue 4, 2020, pp. 743-758
2. Canestrini, N., *Covid 19 Italian emergency legislation and infection of the rule of law*, New Journal of European Criminal Law, Vol. 11, Issue 2, 2020, pp. 116-122
3. Drinoczi, T.; Bien – Kacala, A., *COVID – 19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism*, The Theory and Practice of Legislation, Vol. 8, No. 1-2, 2020, pp. 171-192
4. Goldner Lang I., *“Laws of Fear” in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19*, European Journal of Risk Regulation, 2021, pp 1-24
5. Golubović, K. et al, *Ograničenje kretanja i suđenja za vreme vanrednog stanja*, YUCOM, Belgrade, 2020
6. Gori, P.; Pahladsingh, A. *Fundamental rights under Covid-19: an European perspective on videoconferencing in court*, ERA Forum, Vol. 21, 2021, pp. 561–577
7. Grđašević, Dj., *Pandemija i Ustav Republike Hrvatske*, Informator 6623, 2020
8. Husak, D., *Overcriminalization, The Limits of the Criminal Law*, Oxford University Press, 2008
9. Janssens, C., *The Principle of Mutual Recognition in EU Law*, Oxford University Press, 2013
10. Jimeno-Bulnes, M., *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?*, CEPS, 2010
11. Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer International Publishing, 2017
12. Kostić, J.; Matić Bošković, M., *How COVID-19 Pandemic Influences Rule of Law Backsliding in Europe*, Regional Law Review, Institute of Comparative Law, 2020, pp. 77-90
13. Lasco, G.; Curato, N., *Medical populism*, Social science and medicine, No. 221, 2019, pp. 1-8
14. Lasco G., *Medical populism and the COVID-19 pandemic*, Glob Public Health, 2020, Vol15, Issue 10, pp. 1417-1429
15. Miller, J.M.; Blumstein, A., *Crime, Justice & the COVID-19 Pandemic: Toward a National Research Agenda*, American Journal of Criminal Justice, Vol 45, Issue 4, 2020, pp. 515–524
16. Noorlander, P., *COVID and free speech. The impact of COVID-19 and ensuing measures on freedom of expression in Council of Europe member states*, Council of Europe, 2020
17. Roksandić, S.; Grđan, K., *COVID-19 i razumijevanje pravnih propisa vezanih za suzbijanje zaraznih bolesti u Republici Hrvatskoj – osvrt na bitna pravna pitanja od početka pandemije do listopada 2020.*, Pravni vjesnik, Vol. 36, No. 3-4, 2020, p. 327-343

18. Roksandić, S.; Mamić, K., *Širenje zaraznih bolesti kao prijetnja ostvarivanju ljudske sigurnosti i kaznenopravni mehanizmi u sprječavanju širenja bolesti COVID-19*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol 27, Issue 2, 2020, pp. 681-713
19. Skolnik, T., *Criminal Law During (and After) COVID-19*, Manitoba Law Journal, Vol. 43, No. 4, 2020, pp. 145-178
20. Suominen, A.: *The Principle of Mutual Recognition in Cooperation in Criminal Matters*, Intersentia, 2011
21. Tyler, T.; Jackson, J. *Future Challenges in the Study of Legitimacy and Criminal Justice*, Yale Law School, Public Law Working Paper, No. 264, 2013
22. Wahl, T., *Commission Plans to Speed Up Digitalisation of Justice Systems*, Eucrium, January 2021
23. Willems, A., *The Principle of Mutual Trust in EU Criminal Law*, Hart Publishing, 2021
24. Witt, J.F., *American Contagions Epidemic and the Law from Smallpox to Covid 19*, Yale University Press, 2020
25. Yun Liew, J.C., *Spread of Anti-Asian Racism: Prevention and Critical Race Analysis in Pandemic Planning*, in: Flood *et al* (eds), *Vulnerable. The Law, Policy and Ethics of COVID 19*, University of Ottawa, 2020, pp. 393-407

REPORTS

1. Amnesty International, Poland: Activists at risk of 10-year jail term for COVID-19 poster campaign challenging government statistics, 11 June 2020
2. Civil Right Defenders, Albania's Government Unconstitutionally Pushes Draconian Sentences in Fight Against COVID-19, 16 April 2021
3. Civil Right Defenders, Impact of Covid-19 Measures on Human Rights and Criminal Justice in Western Balkans and Turkey, 26 May 2020, [<https://crd.org/2020/05/26/impact-of-covid-19-measures-on-human-rights-and-criminal-justice-in-western-balkans-and-turkey/>], Accessed 28 April 2021
4. Human Rights Watch, Covid -19 Triggers Wave of Frees Speech Abuse, Scores of Countries Target Media, Activist, Medics, Political Opponents, 11 February 2021
5. OSCE, ODIHR, The Functioning of Courts in the COVID19 Pandemic, October 2020,
6. UNAIDS, Criminalization of HIV transmission, [https://www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_en.pdf], Accessed 28 April 2021
7. YUCOM, Ljudska prava i COVID-19, Analiza izmene pravnog okvira tokom vanrednog stanja i uticaj na uživanje ljudskih prava, 2020
8. WHO Situation Report No. 13, 2 February 2020

ECHR

1. *Kasymakhunov and Saybatalov v. Russia*, App. nos. 26261/05 and 26377/06 (14 March 2013)
2. *Mehmet Hasan Altan v. Turkey*, App. nos. 13237/2017 (20 March 2018)
3. *Parmak and Bakir v. Turkey*, App. nos. 22429/07 and 25195/07 (3 December 2019)

4. *Şahin Alpay v. Turkey*, App. nos. 16538/17 (20 June 2018)
5. *Marcello Viola v Italy*, App. nos. 45106/04 (5 October 2006)

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531.
2. Case 612/15, *Kolev and others*, ECLI:EU:C:2018:392.

EU LAW

1. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142
2. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294
3. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190

EU DOCUMENTS

1. European Commission, Commission staff working document 2020 Rule of Law Report Country Chapter on the rule of law situation in France, Accompanying the document communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30.9.2020, SWD(2020) 309 final
2. European Commission, Commission staff working document 2020 Rule of Law Report – Country chapter on rule of law situation in Italy, Accompanying the document communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30.9.2020, SWD(2020) 311 final
3. European Commission, Commission staff working document 2020 Rule of Law Report – The Rule of Law situation in the European Union, SWD(2020) 580 final
4. European Commission, Commission staff working document, 2020 Rule of Law Report – Country Chapter on rule of law situation in Portugal, Accompanying the document communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30.9.2020, SWD(2020) 321 final
5. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Digitalisation

of justice in the European Union – A toolbox of opportunities, {SWD(2020) 540 final} Brussels, 2.12.2020 COM(2020) 710 final

6. Roadmap on Digitalisation of justice in the EU, Ares(2020)4029305
7. European Parliament, State of emergency in the Response to the coronavirus crisis: Situation in the certain Member States, PE. 649.408, June 2020

UN DOCUMENTS

1. UN Human Rights Committee (HRC), *CCPR General Comment No.5: Article 4 (Derogations)*, 31 July 1981
2. UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Derogations during a State of Emergency*, 31 August 2001
3. UN Human Rights Committee (HRC), *CCPR General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, August 2007

COUNCIL OF EUROPE DOCUMENTS

1. Council of Europe, Parliamentary Assembly, Resolution 2209, State of emergency: proportionality issues concerning derogation under Article 15 of the European Convention on Human Rights, 2018
2. Venice Commission, Report - Respect for Democracy Human Rights and Rule of Law during State of Emergency - Reflection, CDL-PI(2020)005rev, 26 May 2020
3. Venice Commission, Compilation of Venice Commission opinions and reports on states of emergency, CDL-PI(2020)003, 16 April 2020

WEBSITE REFERENCES

1. Bulnes, M. J., *Commentary: iProcess - Judicial Emergency in Spain during the COVID-19 crises*, [<https://www.fairtrials.org/news/commentary-iprocess---judicial-emergency-spain-during-covid-19-crisis>] Accessed 11 April 2021
2. Dreu, C.A., *Commentary: Silver lining to a very dark cloud: what could we learn from the COVID-19 crisis? A French perspective*, Fair Trials, 2020, [<https://www.fairtrials.org/news/commentary-silver-lining-very-dark-cloud-what-could-we-learn-covid-19-crisis-french-perspective>], Accessed 11 April 2021
3. Drumbl M.; Roksandić S., Virus and Terrorism, JUSTICE – 360 blog, 13 April 2020, [<https://justice-360.com/virus-terrorism/>], Accessed 28 April 2021
4. Erebara, G., *Albania Prosecutors to Probe Panic-Mongering About Coronavirus*, 24 February 2020, [<https://balkaninsight.com/2020/02/24/albania-prosecutors-open-investigation-over-corona-virus-panic-spreading-information/>], Accessed 10 March 2021
5. Miller, C., *How COVID-19 is Impacting California Courts: Roundup of Services*, 2020, [<https://www.law.com/therecorder/2020/06/16/how-covid-19-is-impacting-california-courts-roundup-of-services/?sreturn=20200528125509>], Accessed 11 April 2021

6. Picheta, R.; Halasz, S., *Hungarian parliament votes to let prime minister rule by decree*, Constitutionnet, 30 March 2020, [<http://constitutionnet.org/news/hungarian-parliament-votes-let-prime-minister-rule-decree/>], Accessed 7 March 2021
7. Ramos, V.C; Pereira, D.S., *Commentary: COVID-19 - What does all this mean for your ability to defend your clients' right to a fair trial – the Portuguese case*, April 7, 2020, [<https://www.fairtrials.org/news/commentary-covid-19-what-does-all-mean-your-ability-defend-your-clients'-right-fair-trial-/>], Accessed 11 April 2021
8. Sun, N.; Zilli, L., *COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures, Part I*, 2020, [<http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-exposure-and-transmission-part-i/>], Accessed 10 March 2021
9. Sun, N.; Zilli, L., *COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures, Part II*, 2020, [<http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-enforcement-of-public-health-measures-part-ii/>], Accessed 10 March 2021
10. Civil Right Defenders, *Albania's Government Unconstitutionally Pushes Draconian Sentences in Fight Against COVID-19*, 16 April 2020, [<https://crd.org/2020/04/16/albanias-government-unconstitutionally-pushes-draconian-sentences-in-fight-against-covid-19/>], Accessed 10 March 2021
11. Eurostat, *Digital economy and society statistics – households and individuals*, September 2020, [https://ec.europa.eu/eurostat/statisticsexplained/index.php/Digital_economy_and_society_statistics_-_households_and_individuals], Accessed 11 April 2021
12. Fair Trials, *Safeguarding the right to a fair trial during coronavirus pandemic: remote criminal justice proceedings*, 2020, [<https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>], Accessed 11 April 2021
13. Fair Trials, *Justice Under Lockdown in Europe – A survey on the impact of COVID-19 on defence rights in Europe*, 2020, [https://www.fairtrials.org/sites/default/files/publication_pdf/COVID-19%20Europe%20Survey_Justice%20under%20lockdown%20paper_Sept%202020_0.pdf], Accessed 11 April 2021
14. Fair Trials, *Short Update: Assistance ALA request appropriate Legal Assistance to Detainees in a letter addressed to the Superior Court of Justice in Madrid*, 2020, [<https://www.fairtrials.org/news/short-update-association-ala-requests-appropriate-legal-assistance-detainees-letter-addressed/>], Accessed 11 April 2021
15. Fair Trials, *Beyond Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe*, June 2020, [https://www.fairtrials.org/sites/default/files/publication_pdf/Beyond%20the%20emergency%20of%20the%20COVID-19%20pandemic.pdf], Accessed 11 April 2021
16. International Press Institute, *New fake news law stifles independent reporting in Russia on Covid 19*, 8 May 2020, [<https://ipi.media/new-fake-news-law-stifles-independent-reporting-in-russia-on-covid-19/>], Accessed 10 March 2021

17. Netherlands Committee of Jurists for Human Rights Report, 10.06.2020, [<https://www.rijksoverheid.nl/documenten/rapporten/2020/06/19/tk-bijlage-njcm-brief-over-zorgen-om-corona-maatregelen-in-de-strafrechtspleging>], Accessed 11 April 2021
18. *When considering the criminalisation of COVID-19, lessons from HIV should be retained*, HIV Justice Network, 17 June 2020, [<https://www.hivjustice.net/news-from-other-sources/when-considering-the-criminalisation-of-covid-19-lessons-from-hiv-should-be-retained/>], Accessed 8 March 2021