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A Call to Arms: With the Medical World on the Front Lines, The Legal World Must Prepare for its Role

Jerome ROTH

Of course we lawyers are in shock. From one week to another, the ground shifted violently beneath our feet. In California we know earthquakes can be quick jolts or long rolls. This one has been both.

On February 29, I was on stage in a crowded theater in Belgrade, speaking as President of UIA to the Serbian legal community to celebrate their law day. A few days later I met at a round table with lawyers in Liege, Belgium, to discuss the role of international bar associations. And on March 4, I took the Paris metro, cheek to jowl with my fellow passengers, to start my trip home to San Francisco to prepare for UIA institutional meetings and a seminar on international litigation.

By March 11, the world had fallen off its axis. The virus was crossing the globe like a shadow, closing down Asia, decimating Iran, then Italy, Spain, France, spreading across the United States. After a tense night of reflection, I cancelled our meetings – and just in time. Our governor and mayor ordered us to remain at home. My law firm, along with most others, closed its physical doors and went virtual. Lawyers around the globe confronted the same stark reality. And since that fateful week, economies have tumbled, companies have shuttered, workers have struggled, and we all have woken each day to reports of illness and death counts. Mingling in a packed auditorium with our fellow lawyers, sitting close together in a conference room, standing unprotected in an overflowing subway car – all these commonplace events seem inconceivable, deeply missed, but out of the question for the moment. Within a few short weeks, we have become small isolated faces meeting on a screen in a box with our family, friends, coworkers, colleagues and UIA members, unable to reach out to them with a handshake or comforting embrace. Like earthquakes, we all knew epidemics were possible, but none of us imagined one so powerful could happen like this to us, so abruptly, slapping us with such sudden, radical change in our professional and personal lives.

I recall, however, my first encounter with optimism in the face of the harsh new reality. It came like a flash, not from lawyers, but from our fellow professionals: doctors, nurses and medical staff. Of course the first and most urgent need in a pandemic is the physical: to take care of the sick. The biological reality of hundreds of thousands of infections across the world, with the most vulnerable among us hospitalised and isolated, imposed extraordinary demands on health workers. And that demand is being met. Our fellows in the medical world, from surgeons to admission clerks, have risen up, put themselves at mortal risk, worked days at a time without sleep and away from their families, and have kept the world informed of the day-to-day needs they see, the governmental deficiencies they fight against, and the human suffering they witness. They are the front line against this virus. And they are professionals. I find inspiration in their sacrifice and cannot measure my gratitude.

But I also know this: our day is coming. We are also professionals. We have long enjoyed our hard-earned privileges as lawyers, yet we have profound obligations as well, to our law firms, to our clients, to our co-workers, to our profession, to each other, and to our fellow citizens. We are about to be tested in an unprecedented manner. The challenge we face is a second wave after they physical one, no doubt, but even if secondary, it will be daunting, long-lasting, and critical to our national and international communities. Because we are guarantors of the fundamental precepts of democratic society, of the Rule of Law, and of protection of those whose voices may not be heard.

Do not misunderstand: We already are rising to the challenge in many ways. Within days of the stay-at-home orders and closure of offices and courts, lawyers have been adapting. Many created virtual law firms within days, delivering hardware to staff at home, hosting legal and administrative meetings online, and issuing substantive bulletins on their websites. While some lawyers' work has slowed, others has exploded – one employment lawyer member of UIA told me that her firm is addressing several hundred new inquiries per day, and a colleague who practices bankruptcy law says she has had to turn away clients because of the overwhelming demand. Judges have presided over and criminal lawyers have attended criminal court hearings in person (an exception to the general rule of exclusively online proceedings), often at risk to themselves and their families, to ensure that incarcerated defendants receive due process. And I am proud that UIA, within weeks of the onset of the crisis that struck at the core of our attachment to personal contacts and collegial gatherings, has been able to reconstitute itself by organizing online meetings, developing webinars and social media campaigns, and finding ways to make a substantive contribution to the need for new ways to practice law and to advise clients.

This is only the beginning however. Our challenges will be more permanent will fully emerge only with the passage of time. The virus wave will recede and we will face a new legal landscape. My conversations with our members make clear that the changes we should anticipate are profound, and the demands imposed on us will be formidable.

At the substantive level, legal relationships have been forever altered. Employment law will have to adapt to waves of lay-offs, furloughs, and new working arrangements that practitioners have not had to deal with before. Contract lawyers will need to work through a cascade of questions that will descend upon virtually every part of the economy – should obligations be excused, delayed or erased? Should deadlines and statutes of limitation be waived as a matter of law? What is the legal liability of an employer engaged in an essential service whose worker becomes infected? New technologies that have vaulted to the

forefront are facing serious questions about data privacy and reliability. We have begun to hear answers to these questions, but they are only nascent and will be playing out for years to come. And every lawyer will face the obligation, the challenge, to discard old ways of thinking and open their minds and spirits to brand new methods of approaching traditional legal doctrines.

Within law firms, managers will need to face different realities as well. Will employees expect to work at home more, will travel be disfavored and avoided, and will clients expect firms to adopt more advanced technologies to respond to inquiries, investigate facts and provide advice? Before the virus, many lawyers struggled with the implications of artificial intelligence and whether it would replace some of the functions they normally perform; those concerns about AI can only be aggravated in a world where human contact may be viewed suspiciously and virtual interaction becomes the norm. I have no doubt that every law firm around the world will have to reconsider longstanding practices when the virus cloud lifts, that some will adapt more flexibly than others, and that the constellation of firms, government agencies and courts will shift.

Most important, I worry deeply about the Rule of Law. No doubt many of the restrictions imposed on lawyers and the practice of law have been necessary. Courts and firms had to close, hearings had to be delayed, and executive authority had to be asserted with limitations required on the other branches of government. But that is a treacherous path for open societies founded on fundamental values such as the separation of powers and reliance on equal application of laws fairly and transparently enacted. We already have seen excesses, some very troubling. Delays of legal cases means justice is delayed. That can be frustrating in a civil case where a party deserving of compensation is told to wait indefinitely for resolution of its claims. In a criminal case, it is nothing short of devastating. Some national leaders have used the excuse of the virus to outlaw and clamp down on criticism, throwing opposition leaders and journalists in jail. Writs designed to ensure the liberty of those unjustly accused have been curtailed. A judiciary that is not meeting regularly and has less contact with the public is by definition weaker. And the same goes for lawyers – if we remain isolated from one another for too long, our ability to ensure our own independence and to protect our fellow lawyers who face persecution around the world is diminished.

Our path is clear. While the virus rages, we must continue to run our firms, our courts, our system of justice as best we are able, from the protection of our homes and computer screens. We must answer our clients' demands and stay on top of legal developments as they change rapidly around us. And we must guard against restrictions on our practice that are excessive and irrational, that tend to consolidate power in the hands of a few without the protections that the Rule of Law ensures. But make no mistake, as the virus subsides, and our fellows in the medical world regain a moment to rest and reflect, our work will only be getting going. We have to be ready to help society pick up the pieces, find legal answers to unprecedented questions, figure out how law firms and courts move forward in a sensible but adapted way, and make sure that constraints imposed on our freedom and on the Rule of Law, are publicized, confronted, and resolved in a way that takes account of the lessons we have learned from this difficult experience but that look forward to a brighter future.

And so I leave you with this, a call to arms, a petition of sorts that all lawyers prepare themselves to redouble their commitment to their profession, their clients, their professional obligations, and their extraordinary potential to help rebuild our communities. We have a huge amount of work to do – individual lawyers, law firms, courts, bar associations and professional associations like UIA. The baton of urgency is still in our doctors' hands, but they have run the race mightily, and soon it will pass to our grip. Let's be ready to grab it and push ourselves forward with collegiality, intelligence, dedication and clarity of purpose.

Suffice it to say, this was not the presidential mandate I expected nor the message I thought I would be imparting. I envisioned a year of stages, meetings, conference rooms, and travel during which I could spread word of our cherished association. But it is the UIA presidency I face. And in some ways I am heartened because the mission has become profoundly more significant. And I remain even more committed to seeing our organization, our membership, and our profession soar to unexpected heights after emerging from unanticipated depths.

Please be well and stay safe.

Jerome ROTH
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Editorial du Président

Un appel aux armes : le monde médical est en première ligne mais le monde juridique doit se préparer à son rôle

Jerome ROTH

Bien sûr, nous, les avocats, sommes sous le choc. D'une semaine à l'autre, le sol s'est brutalement dérobé sous nos pieds. En Californie, nous savons que les tremblements de terre peuvent être des secousses rapides ou de longs roulements. Celui-ci a été les deux.

Le 29 février, j'étais sur scène dans un théâtre bondé de Belgrade, m'adressant en tant que Président de l'UIA à la communauté juridique serbe pour célébrer leur journée du droit. Quelques jours plus tard, lors d'une table ronde, je rencontrais des confrères à Liège, en Belgique, pour discuter du rôle des barreaux internationaux. Et le 4 mars, je prenais le métro parisien, côte à côte avec mes compagnons de voyage, pour commencer mon périple de retour à San Francisco afin de préparer les réunions institutionnelles de l'UIA et un séminaire sur le contentieux international.

Le 11 mars, le monde s'était écarté de son orbite. Le virus traversait le globe comme une ombre, fermant l'Asie, décimant l'Iran, puis l'Italie, l'Espagne, la France, se répandant à travers les États-Unis. Après une nuit d'intense réflexion, j'ai annulé nos réunions - juste à temps. Notre gouverneur et maire nous ordonnait de rester confinés chez nous. Mon cabinet d'avocats, comme la plupart des autres, a fermé physiquement ses portes et est devenu virtuel. Les avocats du monde entier se sont vus confrontés à la même dure réalité. Et depuis cette semaine fatidique, des économies se sont effondrées, des entreprises ont fermé, des travailleurs ont lutté et nous nous sommes tous réveillés chaque jour pour entendre des nouvelles parlant de maladies et de décès. Se mêler à nos confrères dans un auditoire bondé, être assis l'un à côté de l'autre dans une salle de conférence, voyager debout sans protection dans un wagon de métro complet - tous ces événements banals semblent aujourd'hui inconcevables, nous manquent profondément, mais sont hors de question pour le moment. En quelques semaines, nous sommes devenus de petits visages isolés se réunissant sur un écran d'ordinateur avec notre famille, nos amis, nos collègues de travail, nos confrères et les membres de l'UIA, incapables de leur tendre la main ou de les étreindre de manière réconfortante. Comme les tremblements de terre, nous savions tous que des épidémies étaient possibles, mais aucun d'entre nous n'imaginait qu'une épidémie aussi puissante puisse nous arriver comme ça, si brutalement, nous infligeant un changement aussi soudain et radical dans notre vie professionnelle et personnelle.

Je me souviens cependant de ma première rencontre avec l'optimisme face à la dure réalité nouvelle. C'est arrivé comme un éclair, non pas via des avocats, mais via d'autres professionnels : médecins, infirmières et personnel médical. Bien sûr, le premier et le plus urgent besoin dans une pandémie est d'ordre physique : prendre soin des malades. La réalité biologique de centaines de milliers d'infections à travers le monde, où les plus vulnérables d'entre nous se voient hospitalisés et isolés, a imposé des exigences extraordinaires aux travailleurs de la santé. Et cette demande est en train d'être satisfaite. Le monde médical, des chirurgiens aux préposés à l'admission, se sont levés, se sont mis en danger de mort, ont travaillé des jours entiers sans dormir et loin de leur famille, et ont tenu le monde informé des besoins quotidiens qu'ils constatent, des carences gouvernementales contre lesquelles ils luttent et des souffrances humaines dont ils sont les témoins. Ils sont en première ligne contre ce virus. Et ce sont des professionnels. Leur sacrifice m'est source d'inspirations et ma gratitude est infinie.

Mais je sais aussi ceci : notre jour est proche. Nous aussi sommes des professionnels. Nous jouissons depuis longtemps en tant qu'avocats de privilèges durement gagnés, mais nous avons aussi de profondes obligations, envers nos cabinets, nos clients, nos collègues, notre profession, les uns envers les autres et envers nos concitoyens. Nous sommes sur le point d'être mis à l'épreuve d'une manière sans précédent. Certes le défi auquel nous sommes confrontés vient après celui auquel doit faire face le corps médical, mais bien que secondaire, il n'en sera pas moins intimidant, durable et crucial pour nos communautés nationales et internationales : parce que nous sommes les garants des préceptes fondamentaux de la société démocratique, de l'État de droit et de la protection de ceux dont la voix ne peut être entendue.

Ne vous méprenez pas : Nous relevons déjà le défi à bien des égards. Quelques jours après l'entrée en vigueur des prescrits de confinement et la fermeture de nos bureaux et des tribunaux, les avocats se sont adaptés. Beaucoup ont créé des cabinets virtuels en quelques jours, livrant du matériel au personnel à domicile, organisant des réunions juridiques et administratives en ligne et publiant des bulletins de fond sur leur site web. Alors que le travail de certains avocats a ralenti, d'autres ont vu leur quantité de travail exploser – une avocate spécialisée en droit du travail et membre de l'UIA m'a dit que son cabinet traitait plusieurs centaines de nouvelles demandes par jour, et une consœur qui pratique le droit des faillites dit avoir dû refuser des clients en raison de la demande écrasante. Des juges ont présidé des audiences pénales et des avocats pénalistes y ont pris part en personne aux audiences (une exception à la règle générale des procédures exclusivement en ligne), souvent au péril de leur vie et de celle de leur famille, pour s'assurer que les prévenus incarcérés bénéficient d'une procédure régulière. Et je suis fier que l'UIA, dans les semaines qui ont suivi le début de la crise qui a frappé au cœur notre attachement aux contacts personnels et aux rassemblements collégiaux, ait pu se reconstituer en organisant des réunions en ligne, en développant des webinaires et des campagnes de médias sociaux, et en trouvant des moyens de contribuer de manière substantielle à la nécessité de trouver de nouvelles façons de pratiquer le droit et de conseiller les clients.

Mais ce n'est que le début. Nos défis seront plus permanents et ne prendront toute leur

mesure qu'avec le temps. La vague virale va refluer et nous serons confrontés à un nouveau paysage juridique. Mes conversations avec nos membres montrent clairement que les changements que nous devons anticiper sont profonds et que les exigences qui nous seront imposées seront formidables.

Sur le fond, les relations juridiques ont été modifiées à jamais. Le droit du travail devra s'adapter à des vagues de licenciements, de congés et de nouvelles modalités de travail auxquelles les praticiens n'ont pas eu à faire face auparavant. Les avocats spécialisés en matière contractuelle devront répondre à une cascade de questions qui se poseront dans pratiquement tous les secteurs de l'économie : les obligations doivent-elles être excusées, suspendues ou supprimées ? Se voit-on exonéré de plein droit des échéances et délais de prescription? Quelle est la responsabilité juridique d'un employeur qui fournit un service essentiel et dont un travailleur est infecté ? Les nouvelles technologies qui se sont hissées au premier plan sont confrontées à de graves questions en termes de confidentialité et de fiabilité des données. Nous avons commencé à entendre des réponses à ces questions, mais elles ne sont que naissantes et se poseront pendant des années. Et chaque avocat sera confronté à l'obligation, au défi, de se débarrasser de ses anciennes façons de penser et requis d'ouvrir son esprit à de toutes nouvelles méthodes d'approche des doctrines juridiques traditionnelles.

Au sein des cabinets, les gestionnaires devront eux aussi faire face à des réalités différentes. Le personnel souhaitera-t-il travailler davantage à domicile, les déplacements seront-ils déconsidérés et évités, et les clients s'attendront-ils à ce que les cabinets adoptent des technologies plus avancées pour répondre aux demandes de renseignements, enquêter sur les faits et fournir des conseils ? Avant le virus, de nombreux avocats se débattaient avec les implications de l'intelligence artificielle et se demandaient si elle allait remplacer certaines de leurs fonctions habituelles. Ces préoccupations concernant l'IA ne peuvent être qu'aggravées dans un monde où les contacts humains peuvent susciter la méfiance et où l'interaction virtuelle devient la norme. Il me paraît évident que tous les cabinets d'avocats du monde entier devront reconsidérer leurs pratiques de longue date lorsque le nuage de virus se lèvera, que certains s'adapteront avec plus de souplesse que d'autres et que la constellation des cabinets, agences gouvernementales et tribunaux changera.

Plus important encore, je suis profondément préoccupé par l'État de droit. Il ne fait aucun doute que nombre des restrictions imposées aux avocats et à la pratique du droit ont été nécessaires. Tribunaux et cabinets ont dû fermer, les audiences ont dû être retardées, le pouvoir exécutif a dû s'affirmer en imposant des limitations aux autres branches du gouvernement. Mais c'est là une voie périlleuse pour les sociétés ouvertes fondées sur des valeurs fondamentales telles que la séparation des pouvoirs et le recours à une application égale de lois adoptées de manière équitable et transparente. Nous avons déjà constaté des excès, dont certains sont très inquiétants. Les retards dans les affaires judiciaires signifient que la justice est retardée. Cela peut être frustrant dans une affaire civile où une partie ayant droit à une indemnisation se voit dire d'attendre indéfiniment la résolution du litige. Dans une affaire pénale, c'est tout simplement dévastateur. Certains dirigeants nationaux ont utilisé l'excuse du virus pour mettre hors la loi et réprimer la critique, jetant en prison des dirigeants de l'opposition et des journalistes. Des ordonnances visant à garantir la liberté de personnes injustement accusées ont été réduites. Un pouvoir judiciaire qui ne se réunit pas régulièrement et qui a moins de contacts avec le public est par définition plus faible. Il en va de même pour les avocats : si nous restons trop longtemps isolés les uns des autres, notre capacité à assurer notre propre indépendance et à protéger nos confrères qui sont persécutés dans le monde entier sera réduite.

Notre voie est claire. Pendant que le virus fait rage, nous devons continuer à gérer nos cabinets, nos tribunaux, notre système de justice du mieux que nous pouvons, en protégeant nos maisons et nos écrans d'ordinateur. Nous devons répondre aux demandes de nos clients et rester à l'écoute des évolutions juridiques, car le changement est rapide autour de nous. Et nous devons nous garder de restrictions excessives et irrationnelles de notre pratique, qui tendent à consolider le pouvoir entre les mains de quelques-uns sans les garde-fous assurés par l'État de droit. Mais ne vous y trompez pas, lorsque le virus s'estompera et que le monde médical retrouvera un moment de repos et de réflexion, notre travail ne fera que commencer. Nous devons être prêts à aider la société à recoller les morceaux, à trouver des réponses juridiques à des questions sans précédent, à comprendre comment les cabinets d'avocats et les tribunaux avancent de manière sensée mais adaptée, et à faire en sorte que les contraintes imposées à notre liberté et à l'État de droit soient rendues publiques, confrontées et résolues d'une manière qui tienne compte des leçons que nous avons tirées de cette expérience difficile mais qui nous permet d'espérer un avenir meilleur.

Je vous laisse donc avec ceci, un appel aux armes, une sorte de pétition pour que tous les avocats se préparent à redoubler d'engagement envers leur profession, leurs clients, leurs obligations professionnelles, et leur extraordinaire potentiel pour aider nos communautés à se reconstruire. Nous avons un travail énorme à faire – les avocats travaillant seuls, les cabinets d'avocats, les tribunaux, les barreaux et les associations professionnelles comme l'UIA. Le corps médical, qui a fait avec force la course de l'urgence en tête, nous passera bientôt le témoin. Soyons prêts à l'attraper au vol et à prendre le relai avec collégialité, intelligence, dévouement et clarté d'objectif.

Ce n'est rien de dire que je ne m'attendais pas à ce mandat présidentiel ni à vous transmettre un tel message. J'envisageais une année de réunions, de salles de conférence et de voyages pendant laquelle je pourrais faire connaître notre chère association. Mais c'est à la présidence de l'UIA que j'ai à faire face. Et d'une certaine manière, je suis encouragé parce que la mission est devenue profondément plus importante. Et je reste encore plus déterminé à voir notre organisation, nos membres et notre profession atteindre des sommets inattendus après être sortis de profondeurs inattendues.

Prenez soin de vous et restez en sécurité.

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Editorial del Presidente

Una llamada a filas: Con el mundo médico en el frente, el mundo jurídico debe prepararse para su papel

Jerome ROTH

Naturalmente, los abogados estamos conmocionados. De una semana para otra, el suelo se ha movido violentamente bajo nuestros pies. En California sabemos que los terremotos pueden manifestarse en sacudidas rápidas o series largas. Este lo tiene todo.

El 29 de febrero me encontraba en un concurrido auditorio en Belgrado, hablando como Presidente de la UIA a la comunidad jurídica serbia para celebrar su día del derecho. Unos días después me reuní en una mesa redonda con abogados de Lieja (Bélgica) para hablar del papel de las asociaciones de abogados internacionales. El 4 de marzo tomé el abarrotado metro de París para iniciar mi viaje de vuelta a San Francisco con el fin de preparar las reuniones institucionales de la UIA y un seminario sobre litigios internacionales.

El 11 de marzo el mundo se tambaleó. El virus cruzaba el globo como una sombra, paralizando Asia, diezmando Irán, y después Italia, España, Francia, y extendiéndose por Estados Unidos. Tras una tensa noche de reflexión, cancelé nuestras reuniones. Justo a tiempo. Nuestro gobernador nos ordenó quedarnos en casa. Mi despacho, como muchos otros, cerró sus puertas físicas para prestar sus servicios de forma virtual. Los abogados de todo el mundo se enfrentaron a la misma dura realidad. Desde aquella semana fatídica, las economías se han desplomado, algunas empresas han cerrado, los trabajadores han tenido dificultades, y todos nos hemos despertado cada día con informes de recuentos de contagiados y fallecidos. Juntarnos en un auditorio abarrotado con nuestros compañeros abogados, sentarnos codo con codo en una sala de conferencias, viajar sin protección en un vagón del metro atestado de gente: todos estos escenarios habituales parecen inconcebibles, los echamos de menos, pero por el momento hemos de abandonarlos. En pocas semanas, nos hemos convertido en pequeñas caras aisladas en una pantalla con nuestros familiares, amigos, compañeros de trabajo, colegas y miembros de la UIA, incapaces de tocarlos para darles la mano o un abrazo reconfortante. Al igual que los terremotos, todos sabíamos que las epidemias eran posibles, pero nadie imaginaba que pudiera sobrevenirnos una tan potente, de forma tan abrupta, azotándonos con un cambio tan repentino y radical en nuestras vidas profesionales y personales.

Sin embargo, recuerdo mi primer encuentro con optimismo ante esta nueva y cruda realidad. Llegó como un fogonazo, no de abogados sino de profesionales como nosotros: médicos, enfermeras y el resto del personal sanitario. Por supuesto, la necesidad más apremiante en una pandemia es física: cuidar de los enfermos. La realidad biológica de cientos de miles de contagios en todo el mundo, con los más vulnerables hospitalizados y aislados, imponía una exigencia extraordinaria a los trabajadores de la salud. Y está exigencia se está cumpliendo. Nuestros homólogos del mundo médico, desde los cirujanos hasta los celadores, se han puesto en pie, han puesto su vida en riesgo, trabajado día tras día sin descanso, lejos de sus familias, y han mantenido al mundo informado de las necesidades que ven, de las deficiencias gubernamentales con las que luchan, y del sufrimiento humano al que asisten. Son el frente contra el virus. Y son profesionales. Su sacrificio me parece inspirador y no tengo palabras para expresar mi gratitud.

Pero también sé que va a llegar nuestro momento. También somos profesionales. Como abogados, hemos disfrutado de unos privilegios que nos hemos ganado, pero también tenemos profundas obligaciones, con nuestros despachos de abogados, con nuestros clientes, con nuestros compañeros de trabajo, con nuestra profesión, unos con otros, y con nuestros conciudadanos. Esta situación nos va a poner a prueba como nunca. El reto al que nos enfrentamos es una segunda oleada que sigue a la física, sin duda, pero aunque sea secundaria, será abrumadora, duradera y crítica para nuestras comunidades nacionales e internacionales. Porque somos garantes de los preceptos fundamentales de una sociedad democrática, del Estado de derecho y de la protección de aquellos cuyas voces quizá no se oigan.

No me malinterpreten: Ya estamos afrontando el reto de muchas maneras. Durante los días de confinamiento y cierre de despachos y tribunales, los abogados se han estado adaptando. Muchos han creado despachos de abogados virtuales en pocos días, con equipos informáticos para trabajar en casa, organizando reuniones jurídicas y administrativas por Internet, y publicando boletines importantes en sus páginas web. Aunque el trabajo de algunos abogados se ha ralentizado, el de otros se ha disparado: una abogada laborista, miembro de la UIA, me contó que su despacho está atendiendo varios cientos de nuevas consultas al día, y una compañera que trabaja en derecho concursal dice que ha tenido que rechazar clientes porque la demanda era agobiante. Algunos jueces han presidido y algunos abogados penalistas han asistido a vistas judiciales penales en persona (una excepción a la regla general de celebrar procesos únicamente en línea) —poniéndose a menudo en riesgo ellos mismos y a sus familias— para asegurarse de que los acusados encarcelados tengan un proceso justo. Estoy orgulloso de que la UIA, a las pocas semanas del comienzo de la crisis que ha dado un vuelco a los contactos personales y reuniones profesionales que tan importantes son para nosotros, ha sido capaz de reconstituirse organizando reuniones virtuales, desarrollando seminarios web y campañas en las redes sociales, y encontrando el modo de hacer una contribución inestimable a la necesidad de ejercer el derecho y asesorar a los clientes de una forma novedosa.

Pero esto es solo el principio. Nuestros retos serán más permanentes y solo emergerán totalmente con el paso del tiempo. La oleada del virus se desvanecerá y nos enfrentaremos a un panorama jurídico nuevo. Por mis conversaciones con nuestros miembros, está claro que los cambios que

tenemos que anticipar son profundos, y las exigencias que se nos impongan serán tremendas.

En sustancia, las relaciones jurídicas se han visto alteradas para siempre. El derecho laboral tendrá que adaptarse a oleadas de despidos, permisos y nuevos acuerdos de trabajo que los abogados todavía no habían tenido que afrontar. Los abogados especializados en contratación deberán trabajar a través de una cascada de preguntas que se extenderán a prácticamente todas las áreas de la economía: ¿se deberá exonerar del cumplimiento de las obligaciones o se deberán aplazar o eliminar? ¿Se deberán dejar sin efecto por ley los plazos en general y los plazos de prescripción en particular? ¿Cuál es la responsabilidad legal de un empleador que se ha comprometido a prestar un servicio esencial y cuyo trabajador esté contagiado? Las nuevas tecnologías que ahora están en primera línea se enfrentan a serios cuestionamientos en materia de privacidad de datos y fiabilidad. Hemos empezado a oír respuestas a estas preguntas, pero son solo el principio y se irán desarrollando durante muchos años. Y todos los abogados se enfrentarán a la obligación, el reto, de desechar la forma antigua de pensar y abrir su mente y su espíritu a formas absolutamente nuevas de encarar las doctrinas jurídicas tradicionales.

Dentro de los despachos de abogados, los directivos tendrán que enfrentarse también a realidades distintas. ¿Los empleados esperarán trabajar más en casa? ¿Se evitarán los viajes? ¿Los clientes esperarán que los bufetes adopten tecnologías más avanzadas para responder a sus consultas, investigar los hechos y asesorar? Antes del virus, muchos abogados se debatían ante las implicaciones de la inteligencia artificial y se preguntaban si sustituiría algunas de las funciones que normalmente realizan ellos; esta preocupación sobre la IA no puede sino agravarse en un mundo en el que el contacto humano puede verse con recelo y la interacción virtual se convierte en la norma. No tengo ninguna duda de que todos los despachos de abogados del mundo tendrán que reconsiderar unas prácticas arraigadas cuando desaparezca el nubarrón del virus, que algunos se adaptarán con más flexibilidad que otros, y el panorama de bufetes, agencias gubernamentales y tribunales cambiará.

Lo que me preocupa profundamente es el Estado de derecho. No cabe duda de que las restricciones impuestas a los abogados y el ejercicio del derecho han sido necesarias. Los tribunales y despachos han tenido que cerrar, los juicios se han tenido que aplazar y el poder ejecutivo ha tenido que afirmarse con la imposición de limitaciones en otras áreas del gobierno. Pero es un camino peligroso para las sociedades abiertas basadas en valores fundamentales, como la separación de poderes y la dependencia de la aplicación equitativa de unas leyes promulgadas con justicia y transparencia. Ya hemos visto excesos, algunos de ellos muy preocupantes. Con el aplazamiento de los asuntos legales, la justicia se ve aplazada. Esto puede ser frustrante en un asunto civil donde a la parte que merece una compensación se le pide que espere indefinidamente a que se resuelva su demanda. En un asunto penal, puede tener efectos devastadores. Algunos dirigentes nacionales han aprovechado la excusa del virus para ilegalizar y frenar las críticas, llevando a los líderes de la oposición y periodistas a prisión. Las órdenes judiciales destinadas a garantizar la libertad de quienes han sido acusados injustamente se han restringido. Un poder judicial que no se reúne regularmente y tiene menos contacto con el público es, por definición, más débil. Y lo mismo sucede con los abogados: si permanecemos aislados unos de otros demasiado tiempo, nuestra capacidad para garantizar nuestra propia independencia y proteger a otros abogados que son perseguidos en el mundo se reduce.

Nuestro camino está claro. Mientras el virus haga estragos, debemos seguir haciendo funcionar nuestros despachos, nuestros tribunales, nuestro sistema judicial lo mejor que podamos, desde la protección de nuestros hogares y las pantallas de nuestros ordenadores. Debemos responder a la demanda de nuestros clientes y estar al tanto de los últimos avances jurídicos a la misma velocidad a la que evolucionan a nuestro alrededor. Y debemos protegernos de las restricciones a nuestro ejercicio que sean excesivas e irracionales, que tiendan a consolidar el poder en manos de unos pocos sin el amparo que ofrece el Estado de derecho. Pero no nos equivoquemos: cuando el virus vaya desapareciendo y nuestros compañeros del mundo médico puedan descansar y reflexionar, empezará nuestro trabajo. Debemos estar listos para ayudar a la sociedad a reparar los daños, hallar respuestas jurídicas a unas preguntas sin precedentes, averiguar cómo avanzan los despachos de abogados y tribunales de un modo sensible pero adaptado, y asegurarnos de que las limitaciones impuestas a nuestra libertad y al Estado de derecho, sean anunciadas, confrontadas y resueltas de un modo que tenga en cuenta las lecciones aprendidas de esta difícil experiencia, pero que miren hacia un futuro mejor.

Les dejo pues con esto, una llamada a filas, una petición de que todos los abogados se preparen para redoblar su compromiso con la profesión, sus clientes, sus obligaciones profesionales, y su extraordinario potencial para contribuir a reconstruir nuestras comunidades. Tenemos mucho trabajo por hacer —abogados, bufetes, tribunales, colegios de abogados y asociaciones profesionales como la UIA. El testigo de la urgencia está aún en manos de los médicos, ellos han recorrido su parte incansablemente y pronto tendremos que recogerlo nosotros. Debemos estar listos para agarrarlo y mantenernos firmes con profesionalidad, inteligencia, dedicación y claridad de miras.

Ni que decir tiene que este no era el mandato presidencial que esperaba ni el mensaje que pensaba que iba a darles. Imaginaba un año de representaciones, reuniones, salas de conferencias y viajes, difundiendo el mensaje de nuestra querida asociación. Pero es la presidencia de la UIA a la que me enfrento. Y, en cierto modo, eso me anima porque ahora la misión es mucho más significativa. Y estoy más comprometido que nunca a ver nuestra organización, a nuestros miembros y nuestra profesión volar muy alto tras emerger de unas profundidades imprevistas.

Por favor, cuídense mucho.

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Message from the Editor-in-Chief

Nicole VAN CROMBRUGGHE

Whether we call it Coronavirus or Covid-19, it has become part of our everyday lives, challenges our certainties and accomplishes, at random, without logic, a work of mass destruction, breaking the heart of those who remain.

For the European Union, it was and still is an opportunity to prove itself to be a human community and not just an economic area. Unfortunately, the first days of the crisis saw the prevailing inward-looking climate take over and solidarity did not seem to be part of the Union's vocabulary. No doubt the "rush for shelter" and "every man for himself" of the first days must be attributed to a state of shock, but the European Union seemed to be on the verge of missing this new rendezvous with History. Today, we can see that its leaders are reacting and that means seeking to help the citizens economically affected by the health crisis are gradually being put in place. In a recent forum published in the Italian press, the President of the European Commission, Ursula von der Leyen, even courageously expressed her regrets to Italy for the EU's late reaction to the pandemic.

The exact extent of the crisis we were entering into was difficult for many of us and for many leaders to gauge. Today we have done so, even though the spring sun may sometimes tempt us to throw our hats over the windmills, even if only for a weekend.

The ordeal that we are currently going through on a planetary scale affects us deeply and our hearts tighten as we think of all the victims of this "filthy" virus and their loved ones. But it is also a formidable challenge that forces us to put our mad rush on hold for a moment and to be creative in order to limit the negative repercussions as much as possible. On condition that we are willing to put our fears and anxieties aside for a moment, whatever their nature, economic, health or other, this crisis is a unique opportunity to take a moment to reflect, not necessarily to search our soul, but to reshuffle our priorities just as we put our cupboards in order. Fear is always a bad counsellor, as we see today when it leads some people to eject members of the health care staff from their homes for fear of contagion, to look for a scapegoat, someone to blame.

For us lawyers, this crisis is obviously a professionally intense moment. It raises a number of questions in terms of organization and sustainability. It also brings about an acceleration of the integration of modern means of communication that will allow firms to continue their activity despite the social distancing. It also highlights the digital divide that is present in our professions also and the backwardness of the judiciary in this respect in some countries, often due to a lack of budgetary resources, resulting in hearings for so-called "non-urgent" cases being postponed indefinitely to the great displeasure of those subject to trial. It has finally (without the list being in any way exhaustive) put the State authorities but also our Bar authorities to the test, as is shown by the contribution that the Hong Kong Bar Association has kindly sent us.

As lawyers, we are also called upon to sound out the legal arsenal at our disposal in order to extract from it the tools that can enable our clients to meet the challenges that they face due to these very special circumstances, but also to ensure that we ourselves take the measure of our responsibility for the safety of our employees, our clients and anyone who comes into contact with us.

The Editorial Team of the *Jurist* has wished to contribute to your information by devoting a special dossier to some of the implications of the interference of the Corona virus in our lives and practice. We wanted to put it in your hands as soon as possible, which is why most articles are written in English. We apologize to our non-English speaking readers for this.

We would also like to thank the various authors for their availability and their reactivity to our requests and for taking the time to point out the consequences of Covid-19 in their field.

Special thanks go to Barbara B. Gislason whose efforts have more than greatly contributed to making this special dossier possible, but also, once again, to Marie-Pierre Richard, Anne-Marie Villain and Marie-Pierre Liénard who, despite the many tasks they have to face, have been able to produce this dossier devoted to the "Law in the Time of Covid-19 "as one of the members of our Association, Jim Robinson, recently called it, paraphrasing Gabriel Garcia Marquez.

We wish you a pleasant reading. But above all take good care of yourself!

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Message du rédacteur en chef

Nicole VAN CROMBRUGGHE

Qu'on l'appelle Coronavirus ou Covid-19, il est entré dans notre quotidien, remet en question nos certitudes et accomplit, au hasard, sans logique, une œuvre de destruction massive, saccageant au passage la vie de ceux qui restent.

Pour l'Union européenne, c'était, et c'est encore, une occasion de se révéler une communauté humaine et pas seulement économique. Les premiers jours de la crise voyaient malheureusement le climat ambiant de repli identitaire prendre le dessus et la solidarité ne semblait pas faire partie du vocabulaire de l'Union. Sans doute faut-il attribuer les 'sauve qui peut' et 'chacun pour soi' des premiers jours à un temps de sidération mais toujours est-il que l'Union Européenne semblait en passe de rater ce nouveau rendez-vous avec l'Histoire. On constate aujourd'hui un sursaut de ses dirigeants et des moyens visant à aider les citoyens affectés économiquement par la crise sanitaire, sont progressivement mis en place. Dans une tribune parue récemment dans la presse italienne, la présidente de la Commission européenne, Ursula von der Leyen, a même courageusement exprimé ses regrets à l'Italie pour la réaction tardive de l'UE face à la pandémie.

La mesure exacte de la crise dans laquelle nous entrions a été prise difficilement par beaucoup d'entre nous et par de nombreux dirigeants. Aujourd'hui c'est chose faite même si le soleil du printemps peut parfois susciter la tentation de jeter nos bonnets par-dessus les moulins, ne fut-ce que le temps d'un week-end.

L'épreuve que nous traversons actuellement à l'échelle planétaire nous affecte profondément et nos cœurs se serrent en pensant à toutes les victimes de ce virus « immonde » et à leurs proches. Mais c'est aussi un formidable challenge qui nous oblige à mettre un instant notre course folle sur pause et à faire preuve de créativité afin de limiter au maximum les retombées négatives. Pour autant que nous voulions bien mettre un instant de nos côtés nos peurs, nos angoisses, quelle qu'en soit la nature, économique, sanitaire ou autre, cette crise est une opportunité unique de prendre un temps de réflexion, non pas nécessairement de faire un examen de conscience, mais de mettre de l'ordre dans nos priorités comme nous mettons de l'ordre dans nos armoires. La peur est en tout temps mauvaise conseillère, comme nous le voyons aujourd'hui lorsqu'elle conduit certains à éjecter des membres du personnel soignant de leur logement par peur de la contagion, à chercher un bouc émissaire, un « responsable ».

Pour nous avocats, cette crise est évidemment un moment professionnellement intense. Elle suscite nombre d'interrogations en termes d'organisation, de pérennité ainsi qu'une accélération de l'intégration des moyens de communication modernes permettant de poursuivre son activité malgré la distanciation sociale. Elle met ainsi le doigt sur la fracture numérique présente aussi dans nos professions et sur le retard pris à cet égard par la Justice dans certains pays, souvent faute de moyens budgétaires, avec pour résultat des audiences pour des affaires dites 'non urgentes' remises sine die au grand dam des justiciables. Elle a enfin (sans que la liste se veuille d'aucune manière exhaustive) mis les autorités étatiques et nos autorités ordinales à rude épreuve, ainsi qu'en témoigne la contribution que le Barreau de Hong Kong nous a fait l'amitié de nous transmettre.

En tant que juristes, nous voilà aussi sommés de sonder l'arsenal juridique à notre disposition afin d'en extraire les outils pouvant permettre à nos clients de faire face aux défis auxquels les circonstances très particulières qu'ils traversent les confrontent, mais aussi de veiller à prendre nous-mêmes la mesure de notre responsabilité quant à la sécurité de nos collaborateurs, de nos clients et de toute personne entrant en contact avec nous.

Le Comité de rédaction du *Juriste* a souhaité contribuer à votre information en consacrant un dossier spécial à quelques-unes des implications de l'interférence du Coronavirus dans nos vies et notre pratique. Nous avons tenu à le mettre entre vos mains le plus rapidement possible, ce qui explique que la grande majorité des articles qui le composent soit rédigée en langue anglaise. Nous nous en excusons auprès de nos lecteurs non anglophones.

Nous remercions aussi vivement les différents auteurs pour leur disponibilité et leur réactivité devant nos sollicitations et d'avoir pris le temps de pointer les conséquences du Covid-19 dans leur domaine.

Un merci tout particulier va à Barbara B. Gislason dont les efforts ont plus que grandement contribué à rendre possible la réalisation de ce dossier spécial, mais aussi, une fois encore, à Marie-Pierre Richard, Anne-Marie Villain et Marie-Pierre Liénard qui, en dépit des nombreuses tâches auxquelles elles doivent faire face, ont été en mesure de réaliser ce dossier consacré au « Droit au temps du Covid-19 » comme le nommait récemment l'un des membres de notre association, Jim Robinson, en paraphrasant Gabriel García Marquez.

Bonne lecture et surtout prenez bien soin de vous !

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Mensaje del Redactor Jefe

Nicole VAN CROMBRUGGHE

Lo llamemos Coronavirus o Covid-19, ha irrumpido en nuestra vida diaria haciendo tambalearse nuestras certezas y está llevando a cabo, al azar, sin lógica, una obra de destrucción masiva, destrozando a su paso la vida de quienes se quedan.

Para la Unión Europa, era y es una ocasión para mostrarse como una comunidad humana y no solo económica. Los primeros días de la crisis asistíamos por desgracia a un clima de repliegue identitario, y la solidaridad no parecía formar parte del vocabulario de la Unión. Sin duda, hay que achacar los «sálvese quien pueda» y «cada uno a lo suyo» de los primeros días a la estupefacción inicial, realmente la Unión Europea parecía a punto de fracasar en esta nueva cita con la Historia Hoy vemos que sus dirigentes están reaccionando y poco a poco se están poniendo en marcha medios para ayudar a los ciudadanos que se ven afectados económicamente por la crisis sanitaria. En una tribuna publicada recientemente en la prensa italiana, la presidenta de la Comisión Europea, Ursula von der Leyen, expresó con coraje a Italia que lamentaba la reacción tardía de la UE frente a la pandemia.

A muchos de nosotros – y también a muchos dirigentes – nos ha costado entender exactamente la magnitud de la crisis en la que estábamos entrando. Hoy ya lo entendemos aunque el sol primaveral pueda a veces tentarnos a rendirnos, aunque solo sea un fin de semana.

La prueba a la que estamos siendo sometidos actualmente en todo el planeta nos afecta profundamente y se nos encoge el corazón pensando en todas las víctimas de ese virus «inmundo» y en sus seres queridos. Pero es también un magnífico reto que nos obliga a parar temporalmente nuestro trajín diario desenfrenado y ser creativos para limitar al máximo las repercusiones negativas. Pero si estamos dispuestos a dejar a un lado por un momento nuestros miedos, nuestras preocupaciones, ya sean de tipo económico, sanitario o como sean, esta crisis es una oportunidad única para reflexionar, no necesariamente para hacer examen de conciencia, sino para ordenar nuestras prioridades igual que ordenamos nuestros armarios. El miedo no es buen consejero, como vemos ahora cómo lleva a algunos a echar de su vivienda a los cuidadores por miedo al contagio, a buscar un chivo expiatorio, un «responsable».

Como abogados, para nosotros esta crisis es un momento profesional intenso. Suscita muchas preguntas en cuanto a organización y perennidad, y provoca una aceleración de la integración de los medios de comunicación modernos, que nos permiten continuar con la actividad a pesar de la distancia social. Además pone el dedo en la fractura digital que existe también en nuestras profesiones y en el retraso que, en este sentido, acusa la Justicia en algunos países —a menudo por falta de presupuesto— y que tiene como resultado el aplazamiento *sine die* de las audiencias de los asuntos clasificados como «no urgentes», en perjuicio del justiciable. Por último (aunque esta lista es mucho más extensa), ha puesto a las autoridades estatales y a nuestras autoridades colegiales a prueba, tal como demuestra la contribución que el Colegio de Abogados de Hong Kong ha tenido la amabilidad de transmitirnos.

Como juristas, nos vemos obligados a sondear el arsenal jurídico que tenemos a nuestra disposición para extraer las herramientas que puedan permitir a nuestros clientes afrontar los retos a los que les enfrentan las circunstancias particulares que atraviesan, pero también nos vemos obligados a asumir nosotros mismos nuestra responsabilidad en cuanto a la seguridad de nuestros colaboradores, de nuestros clientes y de cualquier persona que se ponga en contacto con nosotros.

El Comité de Redacción del *Juriste* ha querido contribuir a informarles dedicando un reportaje especial a algunas de las implicaciones que tiene la interferencia del coronavirus en nuestras vidas y en nuestro ejercicio profesional. Hemos querido ponerlo a su disposición lo antes posible, lo cual explica por qué la mayoría de los artículos que lo componen están redactados en inglés. Rogamos a los lectores no angloparlantes nos excusen por ello.

Agradecemos efusivamente a los distintos autores su disponibilidad y lo rápido que han respondido a nuestra petición y que se hayan tomado el tiempo necesario para señalar las consecuencias de la Covid-19 en su ámbito.

Muchísimas gracias en especial a Barbara B. Gislason, cuyos esfuerzos han contribuido enormemente a hacer posible la realización de este reportaje especial, pero también, una vez más a Marie-Pierre Richard, Anne-Marie Villain y Marie-Pierre Liénard que, a pesar de las múltiples tareas a las que deben hacer frente, han sido capaces de realizar este reportaje dedicado al «derecho en tiempo de la Covid-19», tal como lo llamaba recientemente uno de los miembros de nuestra Asociación, Jim Robinson, parafraseando a Gabriel García Márquez.

¡Disfruten de la lectura y cuídense mucho!

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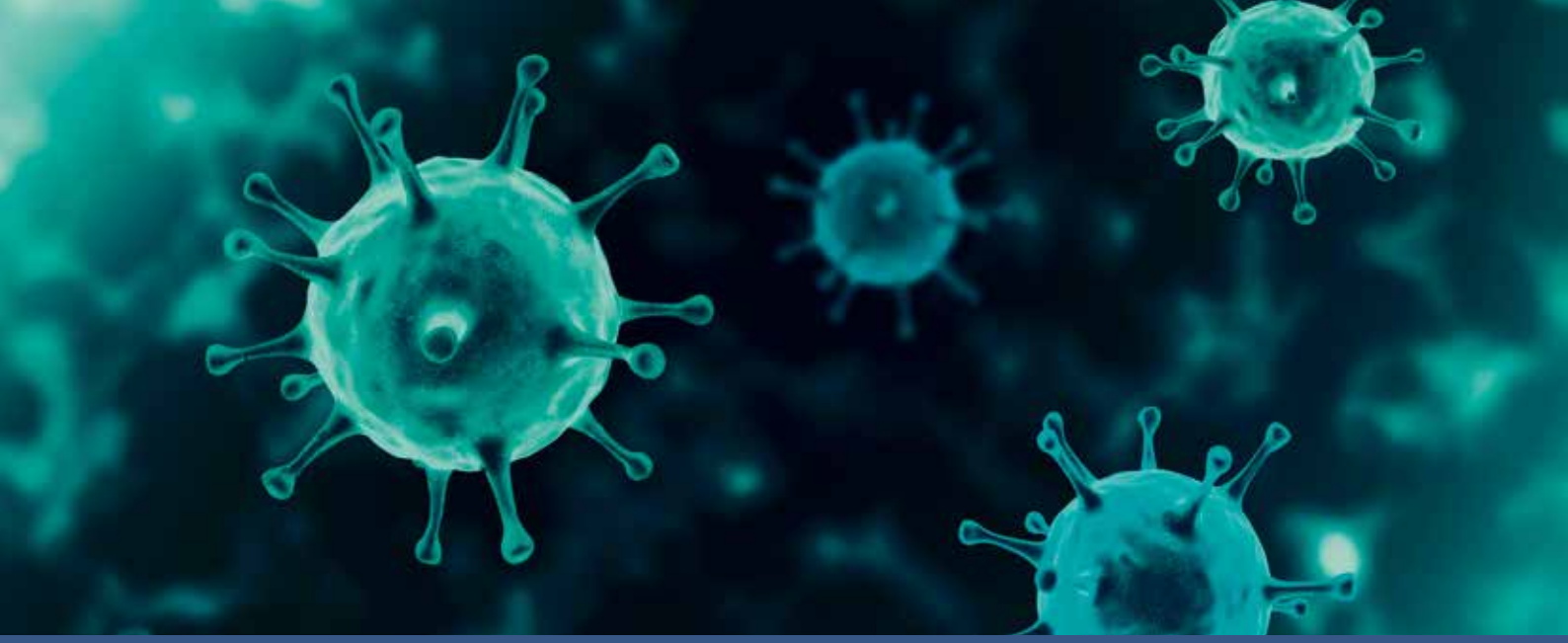

Special section on Covid-19
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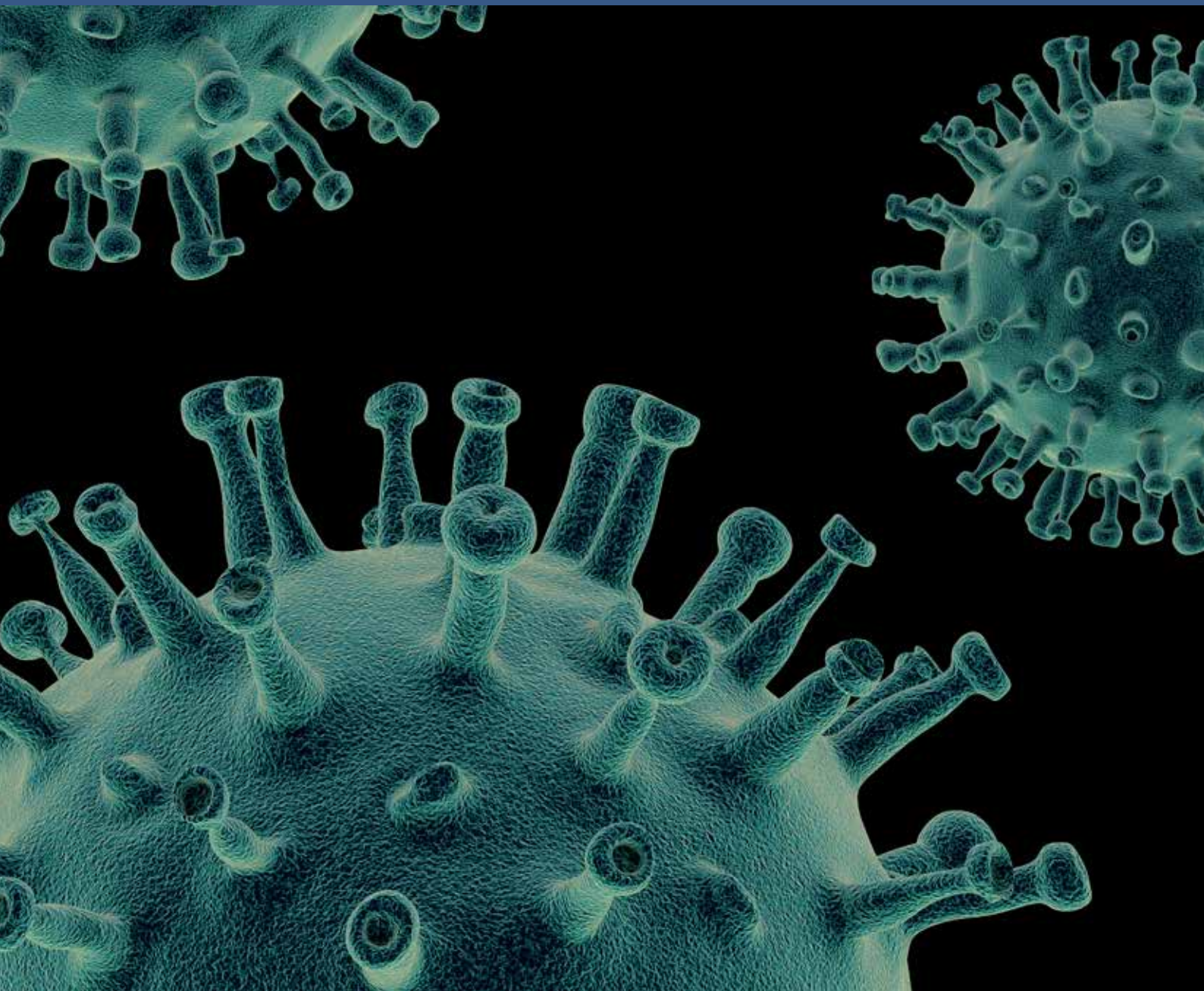


L'immonde coronavirus

Jean-Pierre LEBRUN

« Et s'il nous fallait avoir le courage de regarder les choses en face et de reconnaître que le monde sans limite auquel nous « collaborons » depuis près d'un demi-siècle ne pouvait qu'aboutir à produire cet « immonde sans limite » dont nous nous lamentons aujourd'hui. (…) *Nous sommes confrontés actuellement aux conséquences d'un raz-de-marée en profondeur dont l'origine serait l'estompement dans le discours sociétal, voire même l'effacement, de la négativité inscrite dans la condition de l'être parlant.* [1]»

Ces deux phrases qui commencent mon dernier livre « Un immonde sans limite » paru il y a deux mois, - près de vingt-cinq ans après avoir publié « Un monde sans limite » - se sont retrouvées tragiquement rejointes par l'actualité. Car le coronavirus peut être lu comme une figure de l'immonde, : comme le retour dans le réel de cette limite que notre monde postmoderne s'est évertué à faire disparaître dans le symbolique.

Depuis quelques dizaines d'années, en effet, le « sans limite » a été régulièrement mis au programme dans nos sociétés néolibérales au point même qu'il en est souvent devenu un slogan publicitaire – pensons aux offres pour nos portables qui vantent le « limitless » à tout crin – affiché aux murs de notre quotidien.

Plus précisément, tout le monde convient aujourd'hui que l'épidémie du coronavirus a un rapport étroit avec la destruction sans vergogne des écosystèmes – via la déforestation, l'urbanisation et l'industrialisation effrénées - pour assurer « sans limite » un maximum de rentabilité et l'exploitation de nouveaux possibles[2].

Autrement dit, la limite, sous l'influence de ce que permet le développement de la science et des techniques qui l'accompagnent - n'a progressivement plus été perçue que comme un empêchement, un barrage, un obstacle, une entrave au développement des possibles, aussi bien qu'au déploiement de 'mon' individualité.

Dans le même mouvement, se sont trouvés d'emblée discrédités tous ceux qui avaient la tâche de rappeler concrètement ladite limite et de contribuer à sa transmission. Effectivement, aujourd'hui, on trouve de moins en moins de candidats pour consentir à occuper les fonctions qui impliquent d'user de son autorité pour indiquer, rappeler, voire imposer la limite. Ceci s'étend des directeurs et coordinateurs aux enseignants ou titulaires de classe, aux chefs de service, aux maires de communes… toutes fonctions qui impliquent nécessairement, à un moment ou un autre, de rappeler la limite.

Un exemple parmi d'autres : sur la large place publique réservée aux piétons devant mon domicile, des signalisations claires interdisent l'usage de la planche à roulettes ; certains jeunes viennent néanmoins y faire du skateboard sans se soucier des interdits pourtant on ne peut plus explicites.

Il est très rare de voir un passant leur rappeler l'interdiction en cours, certainement parce que celui qui voudrait leur signifier l'existence de ladite règle ne se sentirait plus soutenu par la communauté pour ce faire ; de plus, il prendrait le risque d'être sérieusement rabroué par les jeunes.
Régulièrement, l'endroit est fréquenté par des patrouilles de police, mais jusqu'à récemment, aucune ne s'arrêtait jamais pour rappeler à ces jeunes l'interdiction en cours, comme si celle-ci n'était pas vraiment de mise.

Les « gardiens de la paix » se comportaient plutôt comme s'ils ne voyaient pas l'infraction commise sous leurs yeux, ce qui n'a pas manqué d'avoir pour effet l'arrivée d'adolescents de plus en plus nombreux, venus profiter de la place pour leurs ébats en planches à roulettes.

Mais, paradoxe très révélateur, il a fallu le confinement lié au coronavirus pour que, cette fois, des policiers interviennent auprès de ces jeunes et les renvoient dans leurs foyers respectifs. C'est là que l'on peut percevoir, d'abord, à quel point il est toujours nécessaire de pouvoir se référer à une légitimité pour intervenir. Ensuite, que la légitimité symbolique dont la police disposait effectivement a dû se trouver de plus en plus affaiblie au cours de ces dernières années, au point de l'amener à renoncer à toute intervention. Enfin, qu'il a suffi d'une nouvelle légitimité, cette fois réelle, celle du risque lié à la pandémie, pour qu'elle s'autorise à nouveau à intervenir.

Cette petite histoire fait très concrètement percevoir un fait souvent aujourd'hui dénié : l'affaiblissement, en quelques dizaines d'années, de l'autorité symbolique et, par voie de conséquence, celui de la transmission nécessaire de la limite.

Bien sûr, on pourra aussitôt rétorquer que notre nouvelle manière de faire consiste à mettre chacun en demeure de prendre désormais la mesure de cette nécessité, en quelque sorte de s'autolimiter, mais ce serait ne rien vouloir savoir de ce dont l'enfant a besoin des représentants de la génération d'avant pour intégrer les traits de la condition humaine. Nous y reviendrons.

Relevons maintenant que si cette limite n'est plus perçue que comme appauvrissement de nos possibles, il ne peut que s'ensuivre qu'on ne perçoive plus sa fonction constituante, bord délimitant un réel inaccessible, borne à partir de laquelle quelqu'un peut se construire, amarre à laquelle le sujet peut arrimer son ek-sistence – comme le disait Lacan -, absence à partir de laquelle il peut y avoir de la présence.

Il en est d'ailleurs de même pour les interdits fondamentaux de l'anthropophagie, de l'inceste et du meurtre. Ceux-ci ne sont pas là en premier lieu pour restreindre l'homme mais pour le constituer. C'est parce que ces interdits sont acceptés et intégrés – Freud rappelait que pour le premier, c'était évident, un peu moins pour le deuxième, mais que quant au troisième, tous les moyens étaient bons pour le contourner - que l'humanité s'est transmise de génération en génération depuis des lustres.

Ainsi que l'écrit l'essayiste Olivier Rey : (Ces interdits) portent et signifient l'existence du tiers, et il n'y a pas d'être humain hors cette reconnaissance. Le tiers a d'abord besoin d'être reconnu dans la mesure où il est potentiellement absent : la troisième personne, dans la langue, le « il » ou le « elle » désigne celui ou celle dont on parle, et qui n'est pas là. La troisième personne est également ce qui permet aux deux autres d'exister : c'est parce qu'il y a de l'absence qu'il peut y avoir de la présence. Autrement dit, c'est parce que le tiers existe que deux sujets peuvent être en présence – au lieu d'un entrelacement indistinct, où une partie est toujours en passe de dévorer l'autre[3].

Tout ceci fait clairement entendre que la limite, loin d'être seulement une limitation, est la condition irréductible pour qu'existe du tiers, de la tiercéité.

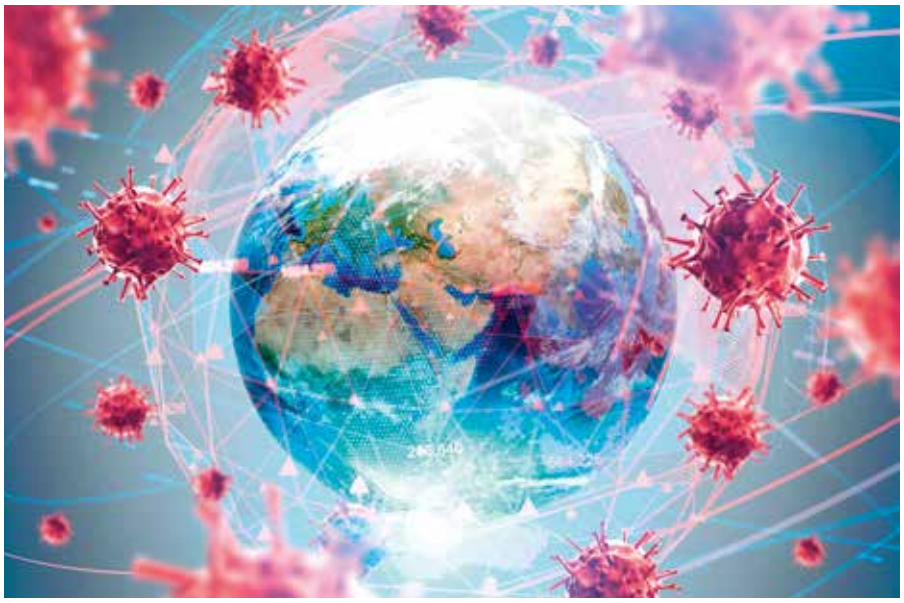
Or, en l'espace de deux générations, sous le coup des possibilités sans précédent dont nous disposons désormais – pensons à l'inédit d'avoir un enfant sans en passer par une relation sexuelle - nous nous sommes débarrassés de la pertinence de la limite ; celle-ci a été littéralement jetée par-dessus bord, et seule est encore acceptée l'approbation à ce que le vœu de chacun ait le droit de se développer et même de se déployer, au nom de ce que le bonheur - entré en politique avec Saint Just - était devenu ce que l'on pouvait, en toute légitimité, espérer de la vie humaine.

Double méprise à l'œuvre depuis un demi-siècle, d'abord parce pas de singulier sans lien étroit au collectif. S'il en fallait une seule preuve, je rappellerais qu'un enfant ne parle que s'il entend la langue des autres autour de lui. Dépendance radicale donc, propre à l'animal humain, le seul à être doué de la faculté de langage.

Ensuite, parce que l'accès légitime au bonheur – état de complet bien-être physique, mental et social selon l'Organisation Mondiale de la Santé - ne fait malheureusement pas partie de la condition humaine. Ce qui caractérise celle-ci est plutôt un inexorable malaise, pas pour autant malheur d'ailleurs, ou alors malheur simplement banal, celui du commun des mortels, de tout le monde. Malaise dont nous constatons quotidiennement les effets : un sujet toujours divisé, incertain, à jamais privé de vérité absolue, sans certitude ultime, toujours confronté à de l'impossible, et inexorablement en proie au symptôme.

Mais ce malaise, à quoi tient-il ? Précisément à ce que parler implique : à ce que nous sommes des êtres parlants et que cette capacité qui définit notre humanité suppose d'emblée la *dé-coïncidence,* comme le dit François Jullien[4], le d*ésadhèrement*, comme le dit Valère Novarina[5].

Mieux encore, c'est la langue qui est notre tiers commun à tous. Ce sont les mots qui constituent cette tiercéité dont nous ne venons de dire qu'elle est définitoire de notre humanité. Autrement dit, les mots sont en eux-mêmes des limites, et l'appareil psychique de tout un chacun n'est rien d'autre que la tiercéité en acte.



On voit le paradoxe très bien énoncé par le sociologue Hartmut Rosa : *cette forme de vie que nous qualifions de moderne est l'idée, le vœu et le désir de rendre le monde disponible. Mais la vitalité, le contact et l'expérience réelle naissent de la rencontre avec l'indisponibilité.*[6]

Cette indisponibilité – cette négativité - qui nous constitue est portée par la langue elle-même. Du seul fait de parler, d'être parlant, nous sommes porteurs d'un trou à l'intérieur de chacun de nous. C'est même ce trou que nous portons qui nous fait savoir, très tôt dans l'existence, que la mort est au bout du chemin.

Ceci ne peut être mieux dit que par le poète : *La parole est le signe que nous sommes formés autour d'un vide, que nous sommes de la chair autour d'un trou, l'entourant, et que le trou n'est pas devant nous mais dans nous, mais dedans, et que nous sommes non pas ceux qui ont le néant pour avenir - ça c'est le sort des animaux - mais ceux qui portent le néant à l'intérieur. (…) De tous les animaux, nous sommes les seuls qui avons ce trou à porter.*[7]

Ce trou, nous n'avons que trois façons de le traiter : le refouler, le dénier, le forclore. Le refouler, c'est faire comme s'il n'existait pas tout en sachant bien qu'il est là, autrement dit ne pas vouloir le savoir ! Le dénier, c'est savoir qu'il est là mais quand même … faire comme s'il n'y était pas. Et le forclore, c'est le faire disparaître, l'effacer.

L'effet de cette dernière possibilité, c'est que ce qui est ainsi forclos du Symbolique, de la pensée, revient dans le réel.

Le diagnostic peut être alors fait à rebours : si aujourd'hui, la limite revient ainsi aujourd'hui dans le réel, c'est bien qu'elle a été forclose, c'est-à-dire que l'ensemble du discours courant qui l'avait refoulée pendant des siècles, était cette fois parvenu à l'escamoter, la gommer, l'abolir, autrement dit, l'avait fait littéralement ne plus exister dans nos esprits.

Au point même qu'à celui qui était construit dans le modèle d'hier, il arrivait souvent de ne pas vouloir savoir qu'il allait mourir,

alors que celui qui se trouve confronté aujourd'hui à l'imminence de la mort pourrait presque être en droit de se plaindre de ce que l'on ne l'ait pas prévenu.

Or, depuis maintenant deux générations que cela se passe, la conséquence est évidente : la troisième génération, celle des jeunes d'aujourd'hui, risque bien souvent de se retrouver psychiquement « sous-équipée » pour se confronter aux effets de la limite et à l'immonde que produit sa forclusion.

Ce sous-équipement s'infiltre dans leur existence de manière insidieuse : la différence générationnelle ne leur apparaît plus comme allant de soi ; la mort devrait pouvoir n'être plus au programme[8] ; la rencontre de toute limite va susciter leur colère et leur violence et ils doivent trouver des responsables à ce qu'ils ne peuvent vivre que sur le mode de la victimisation, l'exigence de satisfaction est insatiable et les pousse à la fuite en avant permanente, toute frustration devient intolérable, l'immédiateté est à tous leurs programmes, se retrouver devant leur propre énonciation ne suscitera que de l'angoisse, l'incertitude leur paraît intolérable, la décision impossible à prendre, le déroulement de la temporalité n'est plus de mise, la confiance en soi leur manque toujours, bref un ensemble de traits qui indiquent à quel point leur psyché est édifiée sur du sable, faute de cette limite sur laquelle ils auraient dû se construire.

La question pourrait alors bien être : mais en quoi cela concerne-t-il le monde du droit ? Mais précisément, la fonction anthropologique de ce dernier n'est-elle pas de tenir compte de ce qu'exige la transmission de notre humanité commune pour en assurer la pérennité ?

D'où la question : que fait le droit quand, plutôt que de s'en tenir à cette exigence irréductible, il ne se soucie plus que des intérêts privés à défendre ? S'agit-il d'une dérive du droit, d'un pervertissement ? D'une acceptation à oublier ses fondements ? D'une manière de céder aux pressions des lobbies ?

S'il en fallait un seul exemple, je citerais la décision récente (19 juin 2019) de la Cour constitutionnelle belge d'annuler plusieurs articles de la loi transgenre récemment en application, qui permettait depuis le début 2018 de modifier par simple déclaration l'enregistrement de son sexe à l'officier de l'état civil de sa commune. Depuis cette date, il suffisait en effet que la personne ait la conviction que le genre mentionné dans son acte de naissance ne correspondait pas à son identité vécue pour acter ce changement. Plus besoin ni de certificat médical attestant un suivi psychologique, plus besoin d'intervention chirurgicale de changement de sexe. Seul le ressenti désormais suffisait.

Ceci a été salué par les associations LGBT (lesbiennes, gays, bisexuels et transgenre) comme une avancée, mais en même temps déclarée insuffisante, au titre de ce que la loi restait ainsi imprégnée d'une vision binaire de l'identité de genre. Ces associations ont dès lors déposé auprès de la Cour Constitutionnelle un recours en annulation partielle pour mettre fin à la discrimination envers les personnes non binaires.

Et, en effet, la Cour a considéré qu'il s'agissait d'une lacune de la loi de janvier 2018 de limiter l'enregistrement du sexe dans l'acte de naissance aux catégories « homme » ou « femme ». Elle a dès lors demandé au législateur de trouver une solution en vue de remédier à cette inconstitutionnalité.

De plus, la Cour constitutionnelle a été jusqu'à annuler les dispositions qui rendaient cette déclaration de changement de sexe irrévocable en ne permettant qu'une seule fois un changement de prénom pour des raisons de trans-identité. Elle a admis que cette annulation discriminait les personnes transgenres « fluides ».

Exemple paradigmatique de ce que la limite se trouve entièrement désavouée dans sa pertinence fondatrice.

Disons-le tout de suite : ce n'est pas à nous de trancher, c'est aux juristes et au législateur ; nous ne sommes là que pour rappeler ce à quoi ils ne peuvent éviter d'avoir à se confronter, aussi animés soient-ils des meilleures intentions.

L'enjeu est néanmoins de taille et est loin d'être gagné d'avance.

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Covid-19: The Law Society of Hong Kong in Action

Hong Kong

Everyone around the world is working hard to keep Covid-19 under control and to minimize its rippling effects on different aspects of life. The Law Society of Hong Kong ("LSHK") is doing the same and taking steps to assist the profession in these difficult times.

The LSHK has given advice to law firms on management issues that may arise during the outbreak of Covid-19. For example,

1. For adequate precautions to protect their staff and people attending their offices, law firms are referred to the Centre for Health Conl for useful guidance on infection control measures.

2. It is important to ensure that clients' interests are protected at all times. The management issues that may arise in the current public health situation vary from firm to firm depending on many factors such as the client base, type of work handled, money held in clients' accounts, management of cheque books and accounts, number of clerks, time limits due, etc. Firms are reminded that should practitioners wish to work from home, depending on whether the physical offices of their law firms can still fulfil the supervision requirements under the relevant provisions in the Solicitors' Practice Rules, they will need to consider closing the offices to the public if the statutory minimum supervision standards are not met.

3. In the event that law firms have decided to temporarily close their offices, the LSHK provides a facility via the members' zone of our website to inform all members of any special arrangement regarding the opening hours and dates of law firms.

4. Practitioners have also been urged to be sympathetic to requests for reasonable extensions of time, subject to clients' instructions, in these extraordinary circumstances.

5. Law firms are reminded to prepare themselves for the possibility of infection or close contact with an infected person within their own staff, or a quarantine order being imposed under the Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation Cap. 599C, or other measures taken by the Government following the Covid-19 infection. These possible scenarios will have major impact upon the operation of law firms.

6. Law firms are reminded to enquire from the Building Management what steps they will take to disinfect an office and how long that will take and how rapidly it can be completed after notification. For sole proprietors, it may be necessary to consider taking active steps to set up a "buddy system", i.e. to set up a relationship with another firm so as to provide timely support to each other in the event that either firm is suddenly prevented from practising for some days. In such a fluid situation, we have to be well prepared with a contingency / business continuity plan that fits the needs of our own practices, ensuring that there are adequate arrangements in place to cope with difficulties that may arise.

The LSHK has also distributed an aide memoire to assist members to formulate a Disaster Recovery Plan to meet individual needs.

Owing to public health considerations, continuing professional development ("CPD") courses have been suspended in February and March. To address the concern that practitioners may be left with fewer choices of CPD activities for compliance with the relevant statutory obligations due to the temporary suspension of courses, the LSHK will be implementing measures that will effectively allow members more time to complete their obligations.

The supply of surgical masks has been tight as the demand is so high. The LSHK has been trying hard to source surgical masks for members as a member benefit. We are very grateful to the kind referrals received from friends both locally and abroad who have been immensely helpful to us in our attempts to source supplies of surgical masks. Such is the power of mutual support and assistance within the LSHK's well established global network of legal connections.

For the protection of the health of all court users, there has been a general adjournment of court proceedings in Hong Kong since 29 January 2020. The Judiciary has been working out the resumption arrangements and the general adjournment period will end from 23 March.

We hope that the outbreak of Covid-19 will be under control soon and we will continue to strive hard to assist our members to sail through the challenge.

Note: This article was written in March 2020.

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Lessons about Law at Life's End: Rethinking Advance Directives in the Shadow of a Pandemic

Susan P. SHAPIRO

Desde que fueron introducidas en los Estados Unidos hace medio siglo las directivas anticipadas han sido adoptadas en varios países alrededor del mundo. Sin embargo, cabe la pregunta por el impacto de dichos instrumentos en la práctica. La primera investigación empírica que mide a gran escala el uso de directivas anticipadas a favor de pacientes sin capacidad para decidir revela que su impacto, cuando lo tienen, es menor. Este artículo describe estos hallazgos, considera sus implicaciones para la vida profesional y personal de abogados y analiza cómo pueden responder mejor aquellos a los retos de dichas directivas.

"This is so difficult. I tell people to do powers of attorney all the time. I didn't know how difficult this is. I don't want to kill her, but – I am flummoxed. What keeps me up at night – We have been talking about this pretty much nonstop since this happened. That is pretty much all we talk about... I never realized what a burden it is to be a power of attorney."

This tortured lament comes from a lawyer serving as power of attorney for health care for her elderly mother who had suffered a traumatic brain injury after a fall. She knew her mother well, lived nearby, had frequent conversations about her mother's end-of-life treatment preferences, and had reviewed the instructions documented in her mother's advance directive. She was about as prepared for this responsibility as anyone I can imagine. And yet even she was flummoxed, distraught, and overwhelmed.

Advance directives are legal documents in which we provide instructions regarding medical decision making on our behalf should we lose capacity in the future. Although the laws, terminology, and forms vary from jurisdiction to jurisdiction, advance directives generally have two components: proxy directives (sometimes called durable powers of attorney for health care) that name the decision maker to speak on our behalf, and instructional directives (sometimes called living wills) that specify the type or amount of treatment we desire. In the half century since advance directives were first introduced in the United States, this legal innovation has been adopted in many – but by no means all – countries across the world. Just as the particulars vary across the states in the U.S., they vary considerably from country to country as well. Perhaps what these disparate jurisdictions have most in common is the disinclination of their citizens to take advantage of advance directives, despite considerable efforts (at least in the U.S.) to convince them to do so.

But is the effort worth it? In the throes of a pandemic, will our failures to encourage the preparation of advance directives result in even greater harm to those whose lives hang in the balance? Was this an opportunity lost? The answer requires assessing whether patients without advance directives fare any differently than those who prepared them. And whether loved ones armed with these documents have an easier time bearing the daunting responsibility to speak on patients' behalf, as advocates of advance directives promise.

> About half of these ICU patients without capacity reportedly had prepared an advance directive, though for only a quarter was a copy available.

The first large-scale empirical investigation of how advance directives are used day-to-day in medical decision making on behalf of patients without capacity suggests that their impact, if any, is small.[1] In this article, I describe findings of the very limited role of advance directives, at least in two intensive care units in the U.S., and explain why this is likely to be the case in other national and institutional settings as well. I then address the implications for lawyers – in their personal and professional lives – and how they might best address these challenges.

Perhaps the anguish of the daughter quoted above should have prepared me for the findings I would later gather that cast doubt on the value of advance directives. For more than two years, a medical social worker and/or I spent our days in two intensive care units (ICU) in a large urban hospital that serves a very diverse population of patients. There we observed medical decision making on behalf of patients without decision-making capacity, day after day, from admission to discharge. Observations over the course of each patient's ICU stay tracked when anyone asked about or referred to an advance directive, how the directive was used in conversations or decisions day-to-day, and the correspondence between the patient's treatment preferences expressed in the directive and the host of decisions made on his or her behalf.

About half of these ICU patients without capacity reportedly had prepared an advance directive, though for only a quarter was a copy available. (The percentages were far lower for other ICU patients still able to decide for themselves and therefore excluded from the study.) Yet, in more than 1,000 encounters and family meetings that we observed between almost 300 health care providers and more than 700 patient friends and family, for only a quarter of patients who reportedly had advance directives did anyone ever ask about treatment preferences expressed in the document, let alone describe them – ever. And for every directive that helped honor patient wishes – providing information, clarification, corroboration, or closure, fostering consensus, or assuaging guilt – another failed to do so – its instructions flouted, ignored, misunderstood, providing insufficient guidance or directions inconsistent with patient preferences.

Of course, advance directives do not have to be invoked, described, or even mentioned to affect medical decisions. But, if instructional directives, or the conversations their completion occasions, provide information, guidance, authority, reassurance, or absolution to decision makers or health care providers, one would expect them to play a role in the decision-making process, even if no one ever mentioned them. Yet the study found little difference (holding constant patient characteristics and severity of illness) in how decision makers armed with directives and those without them proceed.

Across almost three dozen aspects of the decision-making process, outcomes, or impact – from whether and how participants reprised patient wishes or spoke about their personalities or values, to the decision criteria considered, how quickly decisions were reached, the amount of conflict that ensued, the emotional burden experienced by family members, responses of health care providers, even the decisions themselves (from refusing an intervention to withdrawing life support) – only one significant difference could be found. Family members of patients with directives were more likely to initiate discussions of goals of care, although they were no more likely to have such conversations. In all other respects, the two groups were indistinguishable. Treatment decisions were not different; they were made no faster; they weighed similar criteria; they triggered no less conflict; and they appeared to be no less burdensome for families.

In short, it was difficult to find evidence that advance directives made much difference in the two ICUs. Perhaps directives are keeping patients out of hospitals altogether. But once patients have been admitted to an intensive care unit, loved ones – like the daughter who opened this essay – face a torrent of complex decisions about a host of interventions, not only for the problem that brought patients to the ICU, but for all of the complications that develop along the way. Many of these choices are nested in technical, nuanced, probabilistic, inconclusive, bewildering information – or none at all – and mixed messages offered by different specialists. These decisions could hardly be anticipated in a menu of boilerplate checkboxes or scripted instructions in an advance directive written in better times when many would-be patients could not envision the medical crisis that would bring them to an ICU or the excruciating choices their loved ones might someday face.

These limitations of advance directives that I observed have little to do with the particulars of legal doctrine or the drafting of forms or even differences in local culture or values. Instead they reflect universal challenges—the impossibility of anticipating or planning for complex unforeseen events as well as the difficulty of making life-and-death decisions with imperfect information or of preparing decision makers to negotiate the agonizing choices that they face. For that reason, I expect that the findings limited to these two ICUs in a single U.S. city will generalize to many locations and legal systems across the globe.

These limitations of advance directives that I observed have little to do with the particulars of legal doctrine or the drafting of forms or even differences in local culture or values.

What, then, can one take away from these findings? Should lawyers be completing or advising clients, family, or friends to complete the instructional directive forms that failed, betrayed, or proved irrelevant for so many of the patients in the ICU study? Moreover, do we want to send the message to healthy individuals that writing instructions with the blessing of their lawyer or physician is all they need to do to ensure fidelity to their wishes and protect their loved ones at life's end? As citizens of the world face the terror of a pandemic bearing down, is this the time finally to complete those boilerplate forms they have avoided for years?

Scripted instructions can play an important role when patients face a known imminent terminal illness.[2] But the rest of us – lawyers, their families, and their clients alike – must eschew writing scripts for events we cannot foretell and that might lock those who speak on our behalf into inappropriate and unwelcome treatment decisions. Instead, we ought to reflect with loved ones on process: What decision criteria are most important; how should they be weighed, and tradeoffs balanced? How to evaluate probability, risk, or prognostic uncertainty? How long to pursue aggressive interventions before changing the goals of care from cure to comfort? How much suffering along the way is tolerable? What constitutes an acceptable quality of life? What fates are worse than death? How much weight to give to the needs of the family?

Perhaps most important, how should we choose the most effective proxy decision makers and prepare them for what many characterize as the most difficult role of their life? Because so much of speaking for another is not about following instructions but about asking questions, analyzing complex information, drawing inferences, exercising judgment, improvising, forging consensus, and simply being there, the importance of choosing an effective proxy cannot be overstated.

The most effective decision makers I observed knew the patients really well, had communicated frequently with them in recent years, and understood their values, preferences, and fears. But knowing the patient's wishes is far from enough. Effective decision makers were also good listeners and communicators, were intelligent, had an open mind, were decisive, could process complex, incomplete, sometimes conflicting information, and were able to see the forest as well as the trees. They were effective advocates and took the initiative to engage health care providers, gather information, and ask difficult questions. They were not easily intimidated or distracted; they stood up to doctors and even family members, when necessary, but were also consensus builders. They were sensitive about separating their interests from those of the patient. They were willing to take on these responsibilities and able to devote considerable time to visit the hospital repeatedly, observe the patient, and meet with varied teams of physicians, often waiting long stretches for the latter to show up. And they inspired trust among the patient's significant others.

Lawyers should assist their clients in identifying who in their circle of friends or family best meets this job description, ensure that he or she is willing and up to the task, document the choice of proxy in an advance

directive, and encourage them to grapple together and with other friends and family on the sorts of questions about process raised earlier.[3] And lawyers should do the same for themselves and for those they love. Fortunately, there are numerous free online resources available that lawyers might pass along to help jumpstart these difficult, awkward conversations among their clients' friends and family as well as their own.[4] In moments of collective vulnerability, as we draw close to those we love, what better time to begin these conversations?

A national study found that, among Americans over age 60 who required treatment decisions in the final days of life, 70% lacked decision-making capacity. So the probability that the biggest life-and-death decisions of our lives and of those we love will be made by someone else is very real. And so are the incentives to prepare ourselves, our clients and our loved ones for this demanding responsibility.

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1. The findings presented in this article come from Shapiro, Susan P., *Speaking for the Dying: Life-and-Death Decisions in Intensive Care* (University of Chicago Press, 2019).

2. Patients close to death know better the sorts of end-of-life medical interventions they face and about which they can leave instructions. Therefore, many states in the United States have adopted the POLST (Physician Orders for Life Sustaining Treatment or variations on this name) paradigm. POLST forms are not legal documents like advance directives, but medical orders prepared by physicians or other health care providers that specify the patient's treatment preferences. The orders are limited to patients facing life-threatening illness or are so frail that health care professionals would not be surprised if they died within a year (https://polst.org). For analysis of the possible adoption of this paradigm outside the U.S., see Vania F.S. Mayoral, et al., *Cross-Cultural Adaptation of the Physician Orders for Life-Sustaining Treatment Form to Brazil*, 21 *Journal of Palliative Medicine* (2018).

3. For resources on how lawyers can counsel their clients effectively on these matters, see American Bar Association Commission on Law and Aging, *Advance Directives: Counseling Guide for Lawyers*, 2018. https://www.americanbar.org/content/dam/aba/administrative/law_aging/lawyers-ad-counseling-guide.pdf.

4. Id.

Covid-19 and Force Majeure: International Ramifications

Steven M. RICHMAN

Introduction

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") is a treaty governing contract formation, breach, and remedy issues that meet its criteria. It applies to contracts which are preponderantly for the sale of commercial goods (Article 2) and involves parties whose places of business are in different signatory states. (Article 1). The Convention's purpose is the promotion of uniformity in such international contracts. Unless specifically disclaimed (Article 6), its terms will apply if the criteria for applicability are met. Simply specifying a choice of law will not satisfy the disclaimer requirement. The CISG's terms may also be derogated from or varied, subject to certain limitations (Article 6).

This article focuses on the effect of the Covid-19 virus and its impact on international contracts governed by the CISG. It covers some, but not all, aspects of force majeure, legal impossibility or impracticality, frustration of purpose, and other applicable concepts.

Article 79

Article 79 of the CISG states:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

The clause is listed under Section IV of the CISG, titled "Exemptions." Breaking down Section (1) of Article 79, the following elements need to be proven to qualify:

(i) an impediment **and**

(ii) beyond the party's control **and**

(iii) not reasonably
  (a) expected to be taken into account at conclusion of contract **and**
  (b) cannot be avoided or overcome

The word "impediment" is used but not defined. The exemption from performance lasts only as long as the impediment exists, and there must be reasonable notice. Nothing precludes a claim to other damages. Moreover, if the non-performing party's failure to perform is due to a third party engaged to perform some or all of the contract, then the exemption only applies if the same criteria applied to the third party.

CISG Advisory Council Opinion N. 7 ("Opinion 7") addresses Article 79, and also does not define 'impediment." It notes that:

> A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance

absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79.

In discussing "impediment," the opinion rejects an interpretation that the term was meant to be the equivalent of hardship, and that there must be absolute impossibility. The word "impediment" was used to avoid using words or concepts like "hardship" or "impossibility." Opinion 7 noted different legal concepts across multiple jurisdictions seeking to address the issue of justifiable non-performance, but at its core, the concept is to exempt liability for "unforeseeable and extraordinary change of circumstances rendering a contractual obligation extremely burdensome though not absolutely impossible," and may involve not just avoidance, but even "revision" or "adaptation" of the contract or pertinent clauses. While noting disagreement as to whether "hardship" that is less than a complete impossibility is covered, others note that there should be no relief based on "economic hardship." So, while the word "hardship" does not appear in the black letter language of Article 79, it does appear in this opinion.

The Principles of European Contract Law utilizes a comparable principle:

> PECL Article 8:108 [Excuse Due to an Impediment]
>
> (1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

The PECL also provides for a temporal aspect to the suspension of performance if the impediment is temporary.

In *Scafom International BV v. Lorraie Tubes S.A.S.*,[1] the Belgian Supreme Court held that an unexpected price increase in steel of 70% was to be addressed under CISG Article 79 and not under French domestic law, as reflected in the appellate court opinion described below. The Court noted that CISG Article 7 urges recognition of the international character of the CISG, and the need to refer to general principles of international trade where the question is uncertain or presents a gap in uniform interpretation. In this regard, it also noted the UNIDROIT Principles of International Commercial Contracts, and held that the party invoking the claim of "changed circumstances that fundamentally disturb the contractual balance, as mentioned in paragraph 1," is also "entitled to claim the renegotiation of the contract" if the condition is met. The Court found these facts were sufficient under Article 79, and therefore required the parties to renegotiate the contract in good faith. The Court also relied upon, *inter alia*, Opinion 7. The recommendation of the annotator was to include specific provisions in the contract to address such fluctuations.

Another relevant consideration is the extent to which intervening government action affects the ability to perform. In *Macromex Srl. v. Globex International Inc.*,[2] Globex agreed to sell Macromex, the buyer, chicken leg quarters. Following the execution of the agreement, the price of chicken "increased very substantially" and Globex's supplier failed to timely ship. While Globex too certain actions that in essence reduced its ability to satisfy its customers by instead, there was also action by the Romanian government to ban product importation "with virtually no notice" due to an avian flu outbreak. In other words, Globex made certain logistical choices that affected sales to its customers. While there was pending the resetting of a delivery date to Macromex, the Romanian government acted as noted before that date was set.

The problem was that Globex did not load its chickens within an allowable window to get them to Macromex and was unable to timely certify its chickens. As a result, its delivery was deficient. By way of defense, Globex claimed the exemption of performance under CISG Article 79 as a legal excuse. After discussing other provisions relating to delivery and reasonable delay, the arbitrator identified the four factors (generally identified above) to be met: (1) impediment beyond control, (2) not reasonably taken into account at time of contracting, (3) impediment could not be reasonably overcome, and (4) causation (the non-performance attributable to the impediment).

While the arbitrator found that the Romanian government's act was beyond Globex's control (the fourth factor), and it was not a reasonably anticipated risk, and the failure to perform was attributable causally to the government's act, the pivotal question was whether Globex's delay in performance precluded it from claiming the exemption. The arbitrator found inconclusive CISG case law and commentary as to "whether a seller in non-fundamental breach is barred from proving causation when the impediment would not have resulted in fundamental breach had the non-fundamental breach not occurred."

However, on the third factor, finding no clear CISG authority, the arbitrator looked to, among other things, UCC Section 2-614(1), which provides that "(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted."

In discussing "impediment," the opinion rejects an interpretation that the term was meant to be the equivalent of hardship, and that there must be absolute impossibility.

Ultimately, the arbitrator found that Globex had a duty to utilize certain ports that would have increased its cost but would have allowed a commercially reasonable substitute. Consequently, Globex did not satisfy the third factor and failed to prove that the impediment could not be reasonably overcome. While an intervening act of the government can be an "impediment" under the CISG, that is one element of the proofs and is not enough in and of itself.

The American Restatement and the UCC

Compare the above analyses with the U.S. treatise, the Restatement (Second) of Contracts § 261 (1981):

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Like Article 79 of the CISG, the use of the word "impracticable" does not mean absolute impossibility. "The term 'impracticable' has, over the years, acquired a fairly specific meaning. Although earlier cases required that performance be physically impossible before the promisor would be excused, strict impossibility is no longer required."[3] The Restatement also requires that the non-occurrence of the act claimed to defeat performance was a "basic assumption" of the contract. Article 79 does not use that phrase. Comment (b) to the Restatement Section 261 does not define "basic assumption" but references that it has the same meaning as in Section 2-615 of the U.S. UCC.

Recall that the UCC applies only to contracts predominantly for the sale of goods; the Restatement is applicable to all contracts. In UCC Section 2-615, justifiable non-performance exists "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid." Comment 3 to UCC Section 2-615 states that "The additional test of commercial impracticability (as contrasted with 'impossibility,' 'frustration of performance' or 'frustration of the venture') has been adopted in order to call attention to the commercial character of the criterion chosen by this Article."

The comments to Section 2-615 further make clear that increased costs or market fluctuation are not enough in and of themselves, but severe shortages caused by catastrophic events, decimation of supply, or acts of governments can be. Note that UCC Section 2-615 requires allocation among customers and partial performance where the event does not render full performance impracticable.

It has been held in courts in the United States that economic issues are not in and of themselves the kind of event that justified application of the force majeure exemption. In comparison to the *Scafom* case noted above, courts in the United States apply comparable analyses and are reluctant to excuse performance based on economic factors unless it is catastrophic. Cost increases alone, though great in extent, do not render a contract impracticable.

In *Bernina Distributors, Inc. v. Bernina Sewing Machine Co.,*[4] the court held that "cost increases alone, though great in extent, do not render a contract impracticable," citing, *inter alia,* UCC Section 2-615, Comment 4 ("Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance is within the contemplation of this section." On the other hand, under certain extreme circumstances, economic hardship may be sufficient if "especially severe and unreasonable."[5]

Government regulation, by way of statutory enactment, "jawboning" and change of law can constitute legitimate grounds under a force majeure clause, or under common law concepts of impracticability or impossibility of performance.[6]

Force Majeure Contractual Clauses

Force majeure, or unanticipated and uncontrolled events, is a legal concept to excuse performance, either in whole or in part, and forever or for a limited time, with force majeure clauses an attempt to draft around strict adherence to the contract and liability for breach.[7]

Even where the clause specifies acts of government as an exemption for non-performance, causation remains critical. In *Kyocera Corp. v. Hemlock Semiconductor, LLC*,[8] where there was a force majeure clause that specified government acts as an event covered by the clause as an excuse for non-performance, the court nonetheless found on the facts that the government act was not the causal factor: "Plaintiff does not allege any 'act[ ] of the Government' that directly prevented its performance under the contract. It merely alleges that the depression of prices in the solar panel market caused performance by plaintiff to become unprofitable or unsustainable as a business strategy."

The force majeure clause is a risk allocation clause, and the court will (or should) interpret it to give effect to the parties' intentions.

The Covid-19 (Coronavirus) Situation

The Covid-19 pandemic does not change the basic principles of force majeure, either under the CISG or the UCC, or the U.S. common law or the PECL. If one has a contractual force majeure clause that covers pandemics or epidemics, then the advantage is that there is no additional requirement of foreseeability, (unless the clause itself makes non-foreseeability a condition). This is important to note. The force majeure clause is a risk allocation clause, and the court will (or should) interpret it to give effect to the parties' intentions. However, even when the event (impediment) occurs, the question will be whether that occurrence is the actual causative factor. It may not be. In other words, if one can materially perform notwithstanding a "shelter in place" order, then that is not sufficient in and of itself. However, if the causation factor is such a "shelter in place" orders by the government that precludes movement and assembly necessary to perform, then it becomes a causal factor that cannot be overcome. Those, as noted above, can be

exemptions that satisfy the common law or even contractual definitions.

To illustrate these comments, consider another set of cases regarding poultry. In *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*,[9] Rembrandt, an egg producer, contracted with Dahmes to purchase an industrial egg dryer to facilitate Rembrandt's supply to third party Kellogg.

Rembrandt scuttled the construction project and stopped paying Dahmes. Rembrandt claimed the Avian Flu caused Rembrandt to eliminate over a million chickens that had the effect of cutting its egg production in half. Dahmes contended Rembrandt failed to take precautionary measures and increased its risk with an in-line production model. Due to its lost capacity, Rembrandt relied on force majeure to excuse its non-performance in paying for the egg dryer. The court ruled against Rembrandt, stating: "Rembrandt contends it lost other business and profits as a result of the Avian Flu outbreak and the market repercussions the outbreak caused. Dahmes contends that Rembrandt's problems were partly self-inflicted."

The contractual force majeure clause stated:

> Force Majeure. Neither party shall be liable to the other for failure or delay in performance of the Work caused by war, riots, insurrections, proclamations, floods, fires, explosions, acts of any governmental body, terrorism, or other similar events beyond the reasonable control and without the fault of such party ("Force Majeure Event") . . .

Dahmes argued that the FM clause superseded common law remedies and did not apply. The court disagreed. Having lost on the force majeure clause, the court then considered whether there was a frustration of purpose: "Rembrandt argues that its purpose was thwarted by the Avian Flu outbreak." Applying Minnesota law, the court identified the factors to prove this legal theory: (1) the party's principal purpose in making the contract is frustrated, (2) without that party's fault, and (3) by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. It held on the facts that Rembrandt could not establish moment and cause of frustration of purpose.

A premature or legally defective force majeure defense may not suffice to quality as adequate assurance.

A similar result occurred in another Rembrandt egg case. In *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*,[10] buyer sought a declaration that it was excused from buying eggs due to "significant and unexpected reduced consumer demand." There were initial shipments in October 2016, but the eggs were of poor quality. In January 2017, there was a Mycoplasma gallisepticum (MG) outbreak. MG is a bacterium which causes chronic respiratory disease in chickens. In March 2017, there were emails expressing concern about the chickens. In April 2017, chickens were being euthanized. Between April and June 2017, there was continued poor egg quality. In June 2017, the buyer repudiated the contract in reliance on the contractual force majeure clause, although it cited market conditions and not disease-caused issues. In July-September 2017, seller depopulated several barns due to MG. The force majeure clause stated, "Any delay or failure of either party to perform its obligations under this Agreement shall be excused if, and to the extent that the delay or failure is caused or materially contributed to by force majeure or other acts or events beyond the reasonable control of a party hereto."
The court noted that the case differed from prior situations involving Rembrandt in which it had actually attributed non-performance to the disease and its effect on chickens. That causal effect was not present here. The court held, "This case bears no real resemblance . . . to [seller's] earlier dealings where it invoked the force majeure clause in response to the avian flu epidemic. In both instances, the seller faced a dramatic drop in supply due to forces which could not reasonably be anticipated. Neither maps on to this case, where [buyer] asserts that it faced a drop in market demand."

It should also be briefly noted that both the CISG and the UCC, as well as common law, contemplate anticipatory breach. In CISG Articles 71-73, a party may suspend performance "if it becomes apparent that the other party will not substantially perform as a result of" certain specified events, and if it becomes "clear that one party will commit a fundamental breach of contract, the other side may declare the contract avoided" and provide reasonable notice to request adequate assurance, unless that other party has declared its non-performance.

Similarly, UCC § 2-609 provides that if a party has reasonable grounds for insecurity of the performance of the other party,

it may demand adequate assurance. As between merchants, the grounds are judged by commercial standards. UCC § 2-610 provides that when a party repudiates the contract regarding performance that substantially impairs the value of the contract, the other party may: (1) await performance for a commercially reasonable time, (2) resort to remedies for breach, and (3) suspend its own performance. Repudiation can be retracted in a timely fashion in accordance with UCC § 2-610. The PECL also provide for anticipatory breach in Article 9:304, titled Anticipatory Non-Performance, which states, "[w]here prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it the other party may terminate the contract."

Therefore, there can be consequences for a notice of impossibility or force majeure if it is legally deficient. It may be taken as a repudiation of the contract or a statement of future non-performance. A premature or legally defective force majeure defense may not suffice to quality as adequate assurance.

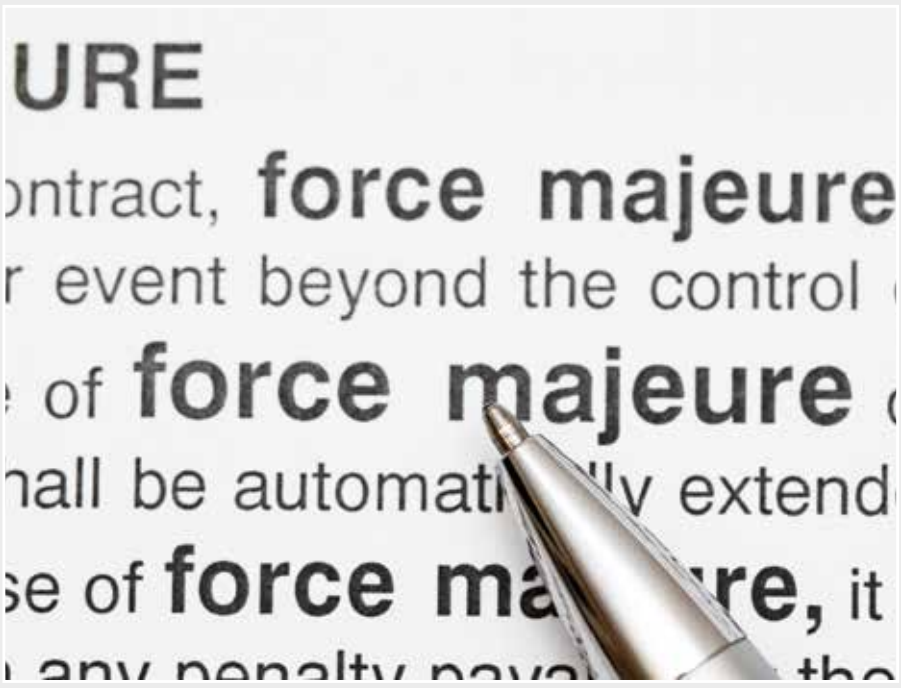
In *Kaiser-Francis Oil Co. v. Producer's Gas Co.,*[11] "Kaiser–Francis also sought assurance that PGC intended to perform its take-or-pay obligation... PGC responded by reiterating that the failure of market demand constituted "force majeure" and that it intended to fulfill the obligations of the contract." The court held that, without specific discussion on force majeure, the purported assurances were inadequate.

Of similar import is *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*,[12] where the court held that "[i]n any event, even if we were to accept Phillips' contention that its time for performance had not arrived because Tradax had failed to tender conforming documents, Phillips' earlier refusal to pay on the grounds of force majeure constituted an anticipatory breach of the contract."

Finally, and just to mention it, the PECL, UCC, and CISG have principles that require the parties to act in good faith, and most jurisdictions in the United States (as well as the Restatement (Second) of Contracts § 205 (1981)) recognize the duty of good faith and fair dealing in contracts. Whether a force majeure notice constitutes a statement of non-performance or a good faith assertion under a contract may be another issue.

Concluding Remarks

The impact of Covid-19 is pervasive and crosses practice and industry areas. Choice of law will become an important consideration as to whether the CISG or other national law will apply. At least in Europe and the United States, basic principles are equivalent. As long as non-performance is (1) attributable to the types of events described above or in the force majeure clause, (2) is not simply a product of market vicissitudes, (2) is the result of the event, i.e., was caused by the identified occurrence, the exemption should apply. However, as noted, this is the exception and not the rule. Where economic hardship is a factor, it must be more than a simple downturn in economic conditions. Courts will look at the force majeure event, whether under the contract term, statutes/treaties, or common law or other established principles in civil law jurisdictions, to see if it meets the definitional elements and make a determination as to the ability to overcome it.



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EU Cross-Border Employment in Times of Covid-19

Kato AERTS

La crise de Corona a un impact majeur sur le paysage du travail. Les États Membres ferment leurs frontières. Cela a des conséquences sur l'application des règles de désignation du droit européen de la sécurité sociale en cas d'emploi transfrontalier. En outre, le fonctionnement du marché intérieur est également mis à l'épreuve. L'Europe prend des mesures pour assurer la libre circulation des biens et des travailleurs.

Telehomework is the (Temporary) New Normal

The Corona outbreak confronts many companies with strong and unforeseen changes in the work pattern of their workers. In most European countries, working from home has become the new normal for the time being.

In Belgium for instance, companies are urged to have their employees work from home until at least April 5, 2020 (likely to be extended) by introducing the new term "telehomework" with a Ministerial Decree published to combat the outbreak of the virus. The Ministerial Decree confirms the temporary measures imposed by the Belgian government and further distinguishes essential from non-essential companies.

Essential companies are companies rendering essential services or who are active in crucial industries where continuity is necessary to protect the vital interests of the country and its population. These services and industries are listed exhaustively in an annex to the Ministerial Decree. Examples are medical institutions, telecom services, and the pharmaceutical industry. Companies deemed non-essential are not mentioned in the list.

Non-essential companies must organize telehomework for all employees whose job content allows work from home. With regard to employees who cannot work from home, the employer must take the appropriate health measures, including sufficient ventilation and the availability of alcohol-based hand sanitizers, and must ensure compliance with the rules on social distancing. These rules dictate that at least 1.5m distance should be maintained between each individual. If non-essential companies cannot guarantee compliance with these rules, they must close. Essential companies must implement telehomework and comply with the rules on social distancing insofar as possible. Social audits are currently being carried out to verify whether companies comply with the aforementioned rules.

Employees' Rights and Obligations during Telehomework

Long before the outbreak of the Coronavirus, working from home was a legal possibility in Belgium already. It is known as "homework" or "telework," to which a different set of rules applies. As said, the temporary measures now impose the new term "telehomework," outside of the existing legal frameworks.

As a consequence, employers are recommended to sign an individual addendum, or at least send some general instructions to their workforce by e-mail, relating to the following topics:

- The duration of the temporary telehomeworking (to avoid that this would create an acquired right to homeworking in the future);
- The tools made available by the employer;
- The time frames during which employees are supposed to be available. (This is also relevant for work accidents. Reference can be made to normal working time schedules);
- Termination of the telehomework at the request of the employer or ultimately at the end of the temporary measures;
- The reimbursement of homeworking expenses (on a lump sum basis as accepted by the tax authorities) and possibly temporarily suspending existing monthly cost reimbursements since, for instance, the employee does not incur any travel expenses while working from home.

No Adverse Effect on the Coordination System of Social Security Laws within the EU

A significant number of employees carry out professional activities across the territory of one or more Member States, while residing in another. Since these employees are now mandatorily working from home, this might impact the applicable rights and obligations in terms of Social Security if the normal rules would continue to apply.

Indeed, for cross-border employment within the EU, the Social Security Regulation (N° 883/2004) and the Implementation Regulation (N° 87/2009) coordinate the Member States' Social Security laws to avoid conflicts of law. For each scenario involving intra-EU cross border employment, the Regulation contains a set of rules designating the applicable Social Security laws.

Hence, for employees active outside their country of residence, the temporarily imposed telehomework could lead to a change in the applicable Social Security laws.

In principle, the applicable Social Security laws are the law of the land where the employee carries out their work (the so-called work state principle). Exceptions to this principle are:

- Temporary secondments during which the employee remains socially insured in the Member State where the employee habitually carries out their work while temporarily performing activities abroad

(provided certain stringent conditions are met); and

- Simultaneous employment on the territory of two or more Member States whereby the employee remains socially insured in their state of residence provided the employee performs at least 25% of their working time in the state of residence. If less than 25% of the work is performed in the state of residence, a set of rules determines the applicable Social Security laws. This would be, for instance, those of the country where the employer is located if the employee works for one employer only.

Hence, for employees active outside their country of residence, the temporarily imposed telehomework could lead to a change in the applicable Social Security laws. Think of an employee who normally works 10% of their working time in their country of residence (Belgium), 60% of their working time in France (where the employer is located), and 30% of their time in Germany. Due to the temporary measures and the mandatory telehomework, the applicable Social Security laws would temporarily switch from France to Belgium.

Any such changes in the working patterns would be directly and exclusively linked to the measures to curb the outbreak of the Coronavirus. By nature, these measures are limited in time and linked to an exceptional situation. A change in applicable Social Security laws on the basis of these measures would cause an adverse effect on the carefully designed coordination of Social Security systems in Europe and is therefore, highly undesirable.

On this basis, the competent Belgian ministers have decided that the periods of telehomework performed on Belgian territory by cross-border workers due to the temporary measures to combat further outbreak of the coronavirus will not be taken into account for the purpose of determining the applicable Social Security laws. As a consequence, the employee's temporarily increased or decreased presence on Belgian territory will not impact the affiliation with the Social Security system as designated by the Regulation for the employee's "normal" working pattern.

This decision is effective from March 13, 2020 until at least April 5, 2020, or beyond that date in the likely event the temporary measures are extended, or until a different policy point of view is adopted.

No further action is required from employers or employees. For obvious reasons, the decision only applies to modified work patterns due to the Corona crisis and requires normalization of the initial work pattern as soon as possible after the crisis.

The Belgian Social Security Administration has noticed that other Member States, such as France, Germany, Luxembourg, and Denmark, seem to share Belgium's approach.

Do note that if the cross-border employment situation involves countries outside the European Economic Area or Switzerland, employers must inform the Belgian Directorate of international relations about the changed work pattern and each individual file will be treated separately.

The European Internal Market Put to the (Corona) Test

The measures to limit the outbreak of the Corona virus do not only impact intra-EU cross-border employment but are likely to affect the EU's internal market and free movement in general. To limit the outbreak, some Member States are temporarily limiting EU nationals, other than their own residents, from crossing the EU internal borders or are closing down some border passages altogether.

To streamline these initiatives and safeguard the internal market, the European Commission has launched the *"Guidelines for Border Management Measures to Protect Health and Ensure the Availability of Goods and Essential Services"* on March 16, 2020. These guidelines focus on five pillars: (1) transport of goods and services, (2) supply of goods, (3) health-related measures, (4) internal borders, and (5) external borders.

Amongst others, the guidelines state that the transport and mobility sector is deemed essential to ensure economic continuity. Therefore, it may not be undermined by the Member States' measures and supply chains must be guaranteed, especially in relation to essential goods.

Member States were requested to put in place priority lanes for freight transport (e.g. via 'green lanes'), for which the Commission issued further practical advice on March 23, 2020. It urges Member States, without delay, to designate all relevant internal border-crossing points on the trans-European transport network (TEN-T) as "green lane" border crossings. They should be open to all freight vehicles for whatever goods they are carrying. Crossing the border, including any checks and health screenings, should not take more than 15 minutes.

Moreover, Member States may refuse an individual's entry at external EU borders and may introduce temporary border controls at internal borders if justified for the reasons of public policy or internal security. Member States should, however, admit and facilitate the crossing of frontier workers, in particular for those working in health care, the food sector, and other essential services (e.g. child care, elderly care, critical staff for utilities), to ensure continued professional activity.
In this respect, some Member States are now issuing "need to cross the border" certificates that must be filled out by both the employer and employee. The Belgian and Dutch government have issued a vignette to be used by employees working in essential companies (put behind the windscreen of their car) to facilitate Belgian-Dutch border crossing and avoid queuing.

It is clear the global outbreak of the Coronavirus is hugely impacting many aspects of our lives, both at home and in the workplace. While governments worldwide are imposing highly necessary safety measures at short notice to fight this pandemic, things may prove particularly challenging for European Member States where many employees make use of their right to free movement and cross internal borders on a daily basis. The initiatives taken so far seem to be adequately protecting the EU's single market premise for the time being while we are all eagerly waiting to return to life (and cross-border employment) as we knew it.

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Managing Health Privacy and Other Legal Risk in the Age of the Coronavirus

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In the midst of the worldwide Coronavirus pandemic, the U.S. government has recently taken steps to decrease the risk of liability under the Health Insurance Portability and Accountability Act (HIPAA) and related statutes to allow health care providers to better treat patients stricken by the virus. A review of these new safeguards provides a framework for institutions that wish to assist in efforts to combat Covid-19 while maintaining regulatory compliance as well as immunity from liability. These safeguards include protections from liability under the Public Readiness and Emergency Preparedness (PREP) Act, waivers under section 1135 of the Social Security Act, and waivers of penalties against hospitals that violate the HIPAA Privacy Rule. In addition, General Data Protection Regulation (GDPR) countries are looking to public health processing permissions as the basis for disclosures to government health authorities to support tracking of the epidemic.

As health care institutions move into the uncharted territory of testing and treating patients in the middle of a worldwide pandemic, they are facing mounting opposing pressures for information transparency and remote communication with patients and fellow providers – while still protecting individual health information. This has led to increased risk of liability under medical privacy and related statutes.

As discussed in greater detail below, the United States federal government and governments of other nations have recently taken steps to decrease that risk for those institutions combating the Coronavirus. A review of these new safeguards provides a framework for institutions who wish to assist in national and local efforts to combat this disease while maintaining regulatory compliance, as well as immunity from suit and liability.

I. Changes to Health Care Laws in the United States

As part of its initial response to the growing Coronavirus pandemic, Congress passed legislation allowing the United States Department of Health and Human Services (HHS) to issue waivers under section 1135 of the Social Security Act. Retroactive to March 1, 2020, these waivers specifically remove limitations for virtual and other health care in order to better treat sick patients stricken by the virus.

In addition, on March 13, 2020, President Trump issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease Outbreak under the National Emergencies Act. The Emergency Proclamation authorizes HHS to offer health care providers additional waivers, affording them increased flexibility to navigate the ongoing Covid-19 outbreak and the anticipated influx of ill patients.

A. Protections from Liability Under the PREP Act

On March 10, 2020, Secretary of HHS Alex Azar issued a declaration, effective February 4, 2020, under the PREP Act, 42 U.S.C. § 247^{d}-6^{d}, which authorizes the Secretary to declare that certain "covered countermeasures" are necessary to beat back a public health emergency such as Covid-19. Although the PREP Act became

law in 2005, its invocation has been rare and never on a scale so potentially far-reaching.

Secretary Azar's Covid-19 declaration specifically affords immunity for "the manufacture, testing, development, distribution, administration, and use of the Covered Countermeasures." The declaration defines "Covered Countermeasures" as "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate Covid-19... or any device used in the administration of any such product," limited to activities concerning federal agreements or to "activities authorized in accordance with the public health and medical response" of state or local public agencies.

B. Section 1135 Waivers and Blanket Waivers

1. Section 1135 Waivers Remove Limitations on the Provision of Telehealth Services

Section 1135 waivers authorize health care providers to be exempt from specified statutory requirements of the Social Security Act and associated regulations. Invoking this authority, the Centers for Medicare & Medicaid Services (CMS) has waived, effective March 6, 2020, limitations on Medicare coverage for telehealth during the Covid-19 outbreak so that hospitals and doctor's offices are not overrun with patients. As a result, Medicare will now cover telehealth visits the same as ordinary, in-person visits, and pay for such visits at the same rate as in-person visits.[1]

2. Blanket and Case-By-Case Waivers Relax Requirements on Other Health Care Providers.

In addition, in the wake of the President's Emergency Proclamation, CMS issued several nationwide blanket emergency waivers which are immediately available, through the duration of the crisis, to health care providers on the frontlines of the fight against the novel virus. These include waiving the so-called Skilled Nursing Facility (SNF) three-day rule, meaning that Medicare beneficiaries can now be transferred to an SNF without a three-day prior inpatient hospitalization, waiving CMS requirements that out-of-state providers be licensed in the state where they are providing services when they are licensed in another state, and relaxing some enrollment and administrative appeals requirements in connection with Medicare.

Moreover, the Emergency Proclamation allows HHS to waive, on a case-by-case basis, other requirements related to Medicare, Medicaid, and other federal health programs. It is up to health care providers (and their counsel) to evaluate their needs and identify the need for any federal laws to be waived in order to facilitate the treatment of patients diagnosed with Covid-19. For example, providers, in consultation with counsel, could analyze whether to seek specific waivers of, among other federal laws, the Emergency Medical Treatment & Labor Act (EMTALA) (e.g., to allow the transfer or relocation of patients to receive medical screening at an off-campus location which would otherwise not be in accordance with the EMTALA) and Medicare/Medicaid requirements related to conditions of participation.

> CMS issued several nationwide blanket emergency waivers which are immediately available, through the duration of the crisis *[…]*.

C. HIPAA Privacy Rule Waivers

Effective March 15, 2020 and throughout the duration of the Coronavirus pandemic, HHS has waived penalties against covered hospitals that fail to comply with the following provisions of the HIPAA Privacy Rule:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care;
- the requirement to honor a request to opt out of the facility directory;
- the requirement to distribute a notice of privacy practices;
- the patient's right to request privacy restrictions; and
- the patient's right to request confidential communications.

HHS has stressed that these penalty waivers only apply: (1) in the emergency area identified in the public health emergency declaration; (2) to hospitals that have instituted a disaster protocol; and (3) for up to 72 hours from the time the hospital implements its disaster protocol.

When the Presidential or Secretarial declaration terminates, a hospital must then immediately return to compliance with all the requirements of the Privacy Rule for any patient still under its care, even if 72 hours have not elapsed since implementation of its disaster protocol.

D. How Health Care Institutions Can Benefit from the U.S. Changes

To take advantage of a section 1135 waiver, health care providers must submit waiver requests to both their State Survey Agency and their CMS Regional Office. The waiver request should include detailed information about the facility and a short statement explaining the asserted justification for the waiver and should be made in consultation with capable legal counsel. While waivers under section 1135 may provide critical tools to manage increased demand, health care providers and counsel should also bear in mind applicable state and local laws, including whether their state governor has already declared a state-wide emergency and thereby relaxed health care regulations pursuant to applicable state law.

On the other hand, health care providers do not need to submit individualized requests to be entitled to rely on the blanket emergency waivers. Rather, providers should review their operations to determine if and to what extent any increased flexibilities associated with these waivers could better assist treating Covid-19 patients in their locales.

Although providers may find that some of the blanket waivers enhance their treatment of Covid-19 patients, many health care providers will likely need to submit a specific waiver request, in consultation with legal counsel, to take advantage of the full scope of benefits available under section 1135.

To take advantage of the additional waivers in disaster areas, hospitals need to ensure that they fall within the emergency area

identified in the public health emergency declaration and have instituted a disaster protocol.

II. Health Care Disclosures in GDPR Countries

GDPR countries are looking to public health processing permissions in the General Data Protection Regulation as the basis for disclosures to government health authorities to support tracking of the epidemic. Several European countries affected by the epidemic have issued either guidance or laws clarifying or establishing processes for such data-sharing. The International Association of Privacy Professionals has compiled Covid-19-related guidance issued by the signatory authorities and will be updating that compilation on a regular basis (https://iapp.org/resources/article/dpa-guidance-on-Covid-19/).

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1. Further detail and discussion of the various changes to telemedicine in response to Covid-19 can be found in a recent Legal Update from Adam Laughton, *More Changes to Telemedicine and Health Care Regulation in Response to Covid-19 Pandemic*, https://www.seyfarth.com/news-insights/more-changes-to-telemedicine-and-health-care-regulation-in-response-to-covid-19-pandemic.html.

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U.S. Courts Unified in Spirit: State Criminal Courts Respond to Covid-19

Tracie A. TODD

For decades, state criminal justice systems in the United States have demonstrated diverse levels of preparedness to the ever-changing demands of legislative policy and public expectations. The onslaught of the Covid-19 pandemic instantly exacerbated deficiencies in state court systems' ability to adequately and uniformly respond in a time of crisis. Consequently, jurists and legal practitioners in states and territories across the U.S. rushed to implement or develop court continuity plans subject to ongoing revisions as circumstances evolve.

All 50 states and five inhabited territories implemented varying, and in some instances, contrasting, criminal justice solutions to the crisis. Decision makers within these hierarchies continue to contend with inherent institutional criminal justice features such as: constitutional and statutory considerations, overcrowded jails and prisons, underdeveloped technology resources, and independent operation of key agencies. Undoubtedly, judges across the U.S. are unified in the spirit of justice. Unfortunately, the inherent features of state criminal justice systems in the U.S. create distinct challenges for courts responding to the Covid-19 pandemic.

One of the most critical stages in criminal justice is the determination of bail for incarcerated defendants.

Constitutional and Statutory Considerations

In 2016, almost 18 million criminal cases were filed in U.S. state court systems. Roughly 30,000 state judges, compared to 1,700 federal judges, are tasked with resolving 95% of these types of cases filed in the U.S.[1] Because state courts operate independently, there is no unified plan for addressing emergencies such as the Covid-19 pandemic using a nationwide approach. This reality has the effect of causing many states to develop local strategies for the administration of justice without contributing to the spread of the virus.

State-by-state and territory-by-territory, decision makers have implemented a mélange of policies in response to the current pandemic. Approximately 40 state courts have announced statewide pandemic response plans that require closure or limited public access to court buildings. Almost 10 state courts remain at least partially open to conduct business, with recommendations like those promulgated by the Arizona court, for giving *"priority to matters necessary to protect health, safety, and liberty of individuals."* Most courts have suspended trials and other non-emergency hearings. Some state courts have entered administrative orders tolling statute of limitations and motions deadlines in criminal cases. A majority of state courts, like Minnesota, have issued directives that acknowledge the courts' role in the "preservation of access to justice and the protection of constitutional rights."[2]

The necessity of executing social distancing and containment measures creates a constitutional conundrum for those implementing both federal and state criminal jurisprudence. The Fifth Amendment of the United States Constitution provides that *"No person… shall…be deprived of life, liberty, or property, without due process of law..."* The Sixth Amendment further provides that *"In all criminal prosecutions, the accused shall enjoy the right to a speedy... trial."* The Eighth Amendment prohibits the imposition of **excessive bail**, excessive fines, or **cruel and unusual punishments**.

Lastly, the Fourteenth Amendment holds that *"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."* In addition to these constitutional considerations, each state and territory has statutorily mandated procedural rules to contemplate while developing response plans. The Covid-19 pandemic has impelled state courts to consider not only the right to a speedy trial, but the right to be present at trial.

The American Bar Association (ABA) Criminal Justice Standards (Standards) serves as one of few unifying guides for American courts during this crisis. The ABA Standards, established in 1964, give guidance for executive, legislative, and judicial decision makers. In this instance, both federal and state courts may rely on the Standards' instruction for functioning under these extraordinary circumstances within the stringent framework of the Constitution.

Prior to the Covid-19 pandemic, most state courts had already adopted some form of Standards 15-3.1. advising that *"The defendant should have the right to be present at every stage of the trial proceedings, including selection and impaneling of the jury, all proceedings at which the jury is present, and return of verdict… No trial or proceeding on the merits of the case should commence without the physical presence of the defendant, unless the defendant has personally waived physical presence in the courtroom."*

A defendant also has the right under the Constitution to be judged by a jury of peers. However, most state courts are deciding to suspend trials and other non-emergency proceedings because these measures are necessary and permissible in the interest of justice and public safety. Standard 12-2.3 supports this conclusion by allowing suspension of *"reasonable periods of time when circumstances warrant exclusion of the time upon good cause shown or upon a determination by the court that the interests of justice served by excluding a period of time from the speedy trial time limit outweigh the defendant's right to have the trial held within the originally prescribed time limits."*

Criminal Justice Ground Zero – Jails and Prisons

When viewed in the context of the Constitution, the criminal justice process is laden with critical stages that are negatively impacted by a delay of any sort. As the U.S. braces for consecutive Covid-19 outbreaks across the country, court closures and suspensions of proceedings will likely require orders extending return dates. The likelihood of prolonged court closings will almost certainly prompt Constitutional challenges to effectuate state court response plans, valid or not.

One of the most critical stages in criminal justice is the determination of bail for incarcerated defendants. According to the Prison Policy Initiative, the U.S. incarcerated 2.3 million people in 2019, more than any other country. Each year, county and city jails admit roughly 10.6 million defendants on a rotating basis. The Covid-19 pandemic has accelerated discussions about the uniquely American mass incarceration crisis. To counter a crisis within a crisis, state courts are urgently instituting directives to release non-violent and medically vulnerable inmates. Most state courts are complying in some form with Standard 12-2.7. by ordering *"that [ ] defendants be released from detention under conditions set in accordance with the ABA Criminal Justice Standards on Pretrial Release that best minimize the risk of flight and the risk of danger to the community or any person, and set the trial to begin on a date within the speedy trial time limit period for defendants on pretrial release."*

The release of non-violent offenders is an urgent priority for many states. Most prison populations in the U.S. are without the capacity to form effective practices of social distancing. This stark reality makes prison facilities especially vulnerable to a rampant spreading of Covid-19 among their prison populations. The Standards addressing *"Treatment of Prisoners"* advises that, *"Correctional officials should provide for the voluntary medically appropriate testing of all prisoners for widespread chronic and serious communicable diseases and for appropriate treatment, without restricting the availability of treatment based on criteria not directly related to the prisoner's health."*

According to the Bureau of Justice, *"Prisoners and jail inmates are more likely than the general population to ever report having a chronic condition or infectious disease"* as a general matter. The Pew Charitable Trusts reports that in 2016, 11% of the 1.45 million people in state and federal prisons were over the age of

Most state courts have issued directives suspending restrictions on video and audio usage in the courtroom to encourage remote or virtual hearings.

55. To combat the spread of Covid-19, many of the almost 1,800 state prisons have enacted restrictions banning visitors and volunteers.

Live-Streaming Justice

Adherence to expert recommendations to implement socially distancing is an obvious obstacle to regular criminal justice operations. The most effective tool for the continued administration of justice in the midst of the Covid-19 crisis is through the use of low-cost technology solutions.

Over the years, integrated technology experts have recommended more robust streaming and electronic systems for court operations. Most courts in the U.S. have employed some form of electronic filing systems that is operated and managed by a designated administrative office. Although the judicial branches of state governments have the power of the pen, state legislative branches have the power of the purse. Therefore, development and upgrades in court technology systems historically have been limited by legislative allocations, leaving many state court technology tools underdeveloped. In some instances, this limitation created cost barriers for some courts to develop or upgrade streamlined virtual hearing capabilities.[3]

Along with funding challenges, court policy decisions often require months or years of analysis and group consultations. Limits on spending and protracted decision-making processes restricts the agility of courts to implement necessary action plans in ordinary circumstances. However, in response to the Covid-19 pandemic, state courts in the U.S. have exhibited unprecedented agilities in an effort to keep courts operational. Most state courts have issued directives suspending restrictions on video and audio usage in the courtroom to encourage remote or virtual hearings.

In the State of Florida, notaries are authorized, under certain requirements, to administer an oath via audio-video communications. The State of Alabama completed a technology system overhaul by integrating a video/audio conferencing platform into the court's statewide electronic court management system. Other state courts procure video conferencing subscriptions for use by judges. These technology solutions furnish judges, judicial staff, parties, and other relevant agencies with the ability to conduct urgent hearings and bench trials. In addition to practicing necessary social distancing measures, technology solutions allow judges to address the critical issues relating to jail and prison inmates.

Criminal Justice System Silos

The response efforts by state courts is also formed through navigation of the many silos in the U.S. Criminal Justice System. To address the necessity of releasing non-violent offenders, state courts must coordinate with state departments of corrections, local sheriffs, police, prosecutors, private defense counsel, and public defenders' offices.

Successful implementation of technology systems during this pandemic is heavily reliant on administrative oversight and management. In 46 states, sheriffs are elected to two-, four-, or six-year terms, as reported by the National Sheriffs' Association. Forty-five states elect the chief prosecutors.[4] The National Association of Counties determined that county clerks are elected in 24 states. Effective assistance of counsel for defendants is primarily within the purview of public defenders nationwide who are mostly appointed officials. Additionally, offices of pardons and paroles and other court-related agencies are often under the supervision of independently operating officials or branches or government. In some instances, the independence of these silos can create obstacles for necessary and expeditious responses.

The segmentation of the criminal justice system makes a comprehensive response to any crisis a challenging feat. This stark reality is on display in states like Tennessee, where approximately 1,600 prisoners who have been granted parole remain in custody because of the suspension of a mandatory administrative re-entry course. In other instances, however, independent officeholders have assisted court systems by proactively implementing policies aimed at reducing incarceration rates during the Covid-19 crisis. The Prison Policy Initiative reports that police departments in Los Angeles County, California; Denver, Colorado; and Philadelphia, Pennsylvania are employing cite and release practices that delay arrest and the need for offenders to be processed through local jails. In Seattle, King County, Washington, jails have suspended booking protocols for certain misdemeanor charges.[5]

Conclusion

For decades, state courts have arguably been sluggish in creating proactive policies that provide instructions for continual operation during an emergency or crisis. Many state courts created emergency response plans for the first time as a direct result of Covid-19. Each day, judges, staff, and attorneys brave the possibilities to ensure that there is "justice for all." As state courts in the U.S. rise to the occasion, making valiant efforts to convert sometimes dawdling systems into nimble justice centers, both real and virtual, it has become clear that the Covid-19 pandemic has fundamentality changed state courts for the foreseeable future, like everything else in the world.

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2.This information was derived from a compilation found in *Criminal Justice Responses to COVID-19,* National Council of Legislators, https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-and-COVID-19.aspx; *The Coronavirus & the Courts,* National Center for State Courts (updated March 27, 2020), https://www.ncsc.org/Newsroom/Public-health-emergency.aspx.

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5. *The Investigators: Prisoners granted parole may not be released during COVID-19 pandemic.* By Jessica Jaglois, March 27, 2020 at 10:56 PM CDT - Updated March 28 at 2:46 pm, https://www.wmcactionnews5.com/2020/03/28/investigators-prisoners-granted-parole-not-going-be-released-during-COVID-pandemic/.

6. Tracie A. Todd is a member of the ABA CJS Standards Committee.

Coronavirus 2019: Response and Implications for the Bankruptcy Courts in the United States

Jennie D. LATTA

The coronavirus pandemic of 2019 is now affecting and will continue to affect every aspect of life in the United States and throughout the world. Although the United States Congress has agreed upon a $2.2 trillion stimulus package that was signed by the President on March 27, 2020, it is not difficult to predict that bankruptcy filings will rise very quickly in the coming months. This article discusses the responses to the pandemic that have been made by the U.S. bankruptcy courts to date and some of what may be anticipated in the future.

Introduction

The bankruptcy courts in the U.S. have struggled with other courts around the world to maintain essential functions and services while keeping their employees and constituents safe during the coronavirus pandemic. The judges and clerks have turned to technology and previously prepared what is called a Continuity of Operations/Business Continuity Plan (aka "COOPs") to continue operations remotely. I live in Memphis, Tennessee, which in addition to being the home of Elvis Presley and the Blues, is known as a place where a large number of consumers turn to the federal bankruptcy laws for financial relief. The experience in Memphis is typical of that of the other bankruptcy courts throughout the U.S. who are struggling to maintain critical functions while anticipating the expected onslaught of bankruptcy filings resulting from the disruption caused by the pandemic.

Bankruptcy in Memphis

At the end of 2019, there were 22,988 bankruptcy cases pending in the Western District of Tennessee.[1] In an article from 2016, Shelby County, Tennessee (where Memphis is located), topped the list of counties with the highest rates of bankruptcy filings. According to the authors, it had 1,285.83 filings per 100,000 persons in 2015-2016. The next highest county was Clayton County, Georgia (south of Atlanta), with 1,096.05 filings per 100,000 persons.[2]

There are a number of reasons for this high filing rate in Shelby County, but one of them is the level of poverty in Memphis, its largest city. The overall poverty rate for Memphis in 2019 was 27.8%. In the wider metropolitan statistical area, it is 18.8%.[3] This translates into a lot of people who seek bankruptcy relief when some part of their fragile safety net snaps.

The bankruptcy laws in the U.S. are federal laws with regional variations arising from state laws concerning foreclosure, wage garnishment, and exemptions. Memphis has previously been described as being the center of a "perfect storm" for bankruptcy filings – high levels of poverty, relatively narrow exemptions, and the availability of wage garnishment, together with the habits of the local legal culture have been cited as contributors to this storm. The majority of the consumer cases filed in West Tennessee are filed under Chapter 13, which allows reorganization, rather than Chapter 7, where liquidation occurs. Chapter 13 is thought to be good in that it allows consumers to avoid repossession and eviction, but has certain negative consequences, too. Chief among these is the fact that in Chapter 13, the discharge is delayed until all plan payments are paid, usually at the end of five years. Many debtors simply are not able to maintain their payments for that length of time as the result of job loss, illness, or injury.

Covid-19 in the U.S.

The first known case of Covid-19 in the U.S. was confirmed on January 20, 2020. This was a man who had returned from Wuhan, China, five days before his test. The Centers for Disease Control and Prevention tracks cases from their first appearance in the U.S. on January 21. On January 31, President Donald J. Trump declared a public health emergency and restricted travelers arriving from China. At that time, there were only seven reported cases in the U.S., and all were travel related. It was not until February 26 that the first case was reported for a person who had no known exposure to the virus through travel or close contact with an infected individual. Since that time, the number of reported cases has increased to 85,356 as of March 27, with 1,246 deaths.

The Covid-19 Issues Tracking Form consisted of a spread sheet listing issues, the date, the time, the agency, the person from whom they were received, and the response.

The Response of the U.S. Courts

The first communication about the coronavirus that the federal judges received from the Administrative Office of the U.S. Courts arrived through email on January 31, 2020. It was a memorandum from Melanie F. Gilbert, Chief, Facilities and Security Office, who advised that "The immediate health risk from 2019-nCoV is currently considered low." At that time, there were six reported cases in the U.S. The first fatality was days away. On February 27, our clerk, Kathleen A. Ford, wrote to everyone in our office:

Justin has sent out a few bulletins from the Centers For Disease Control over the last few weeks giving facts and updates about the Coronavirus outbreak worldwide. If you have not read those, please go back and take a look at them. You can also visit cdc.gov for the latest updates. Up to now, there have only been two instances of person-to-person contamination in this country, but the possibility of the outbreak that we

have seen world-wide reaching the US is very real. I just wanted to take a minute to remind everyone of the importance of staying home when you are ill. Now more than ever, we need to be mindful of the effect of our own health on those around us. Sometimes our culture gives mixed messages about the "heroism" of soldiering on when we aren't feeling well. Many of you already know that in reality the true heroes are the ones who stay home, take care of themselves, and take precautions not to infect others. I just want to emphasize that point. Please be considerate of your fellow employees and stay home, get well and then come back to work. Your co-workers will thank you.

The Administrative Office of the U.S. Courts sent its second memorandum concerning Covid-19 on March 6. This memo came from the Director, James C. Duff, and discussed the use of decentralized funds to purchase hand sanitizer and disinfectant wipes for use in common areas, facial tissues, and disposable nose/mouth face masks for those displaying symptoms. The memorandum also addressed court-related travel.

At that time, the Director left decisions concerning travel to the discretion of judges and unit executives, but recommended the use of teleconferencing, webinars, and conference lines whenever possible. The Director also announced the establishment of a Covid-19 Task Force to assist the courts, federal public defender organizations, and the Administrative Office in maintaining essential functions and services. It seems impossible that it was less than a month ago when our major concerns were obtaining hand sanitizer and tissues for public areas, but that is merely a reflection of the insidiousness of this disease.

The first cases of Covid-19 in Tennessee were reported in Davidson, Williamson, and Shelby Counties, all on Sunday, March 8. The first case in Shelby County was quickly followed by a second, related case; two persons who had traveled together to New Orleans.

The clerk and judges of the Bankruptcy Court in West Tennessee began discussing our response on Monday, March 9. At that time, Ms. Ford proposed that she move to a full-time skeleton crew to cover the front counters in Memphis and Jackson, Tennessee, using volunteers, and that everyone be permitted to telework "until things settle down." The assumption then was that court hearings would continue as normal with courtroom deputies coming in only to cover actual hearings. The judges quickly agreed.

The next day, Ms. Ford provided the judges with a copy of an email sent to Unit Executives by Robert Downey of the Administrative Office that included: (1) a copy of General Order No. 01-20 entered March 6, in the District Court of Western Washington, (2) an Entrance Protocol adopted by the Court of Appeals for the Second Circuit and the District Court for the Southern District of New York, and (3) the Judiciary Covid-19 Task Force Issues Tracking Form.

alert a Court Security Officer prior to entering the screening area in preparation for entering the federal courthouses in New York City.

The Covid-19 Issues Tracking Form consisted of a spread sheet listing issues, the date, the time, the agency, the person from whom they were received, and the response. At that time, the Tracking Form listed issues, but not responses.

Unlike the Second Circuit and the Southern District of New York, our bankruptcy court in Memphis occupies space in a public building. Ms. Ford posted an entrance protocol at the entrances to our spaces on the fifth, sixth, and ninth floors.

As I left the building on March 9, one of the Court Security Officers asked whether it would be possible to communicate with the lawyers who had matters set the following day to ask them to keep their clients at home unless absolutely necessary. I assured him that I would do what I could. The Court Security Officers often are persons who have retired from other positions in law enforcement and thus tend to be over the age of 60, one of the groups identified by the CDC as being especially vulnerable to the coronavirus. The judges and clerk discussed this, and we reached out to the President of the Bankruptcy Section of the Memphis Bar Association to ask him to communicate with all its members on our behalf.

> The judges were concerned that with our high volume of consumer filings, this would mean a huge backlog of cases when virus-related restrictions were lifted.

Western Washington had become the first epicenter of Covid-19 in the U.S. when patients and later health care providers in The Life Center of Kirkland developed the illness. The order of Chief Judge Martinez: (1) continued all in-person hearings in civil and criminal matters in Seattle and Tacoma until further order, (2) continued all grand jury proceedings until further order, (3) announced a specific exception for all criminal matters to the Speedy Trial Act finding that "the ends of justice served by ordering continuances outweigh the best interests of the public and any defendant's right to a speedy trial, pursuant to 18 U.S.C. § 3161(b)(7)(A)," (4) provided for case-by-case exceptions in non-jury matters at the discretion of the court after consultation with counsel, and (5) did not affect the court's consideration of civil or criminal motions that could be resolved without oral argument.

The Entrance Protocol notified persons who had traveled to certain countries within the prior 14 days, or who had been in close contact with someone who had traveled to those countries in the prior 14 days, or had been asked to self-quarantine, or had been diagnosed with Covid-19, to

On Tuesday, March 10, Ms. Ford sent the following email to all of her employees with copies to the Administrative Office, the Clerk of the District Court, and the Clerk of the Court of Appeals for the Sixth Circuit:

There was so much going on yesterday, I did not get a chance to send out a general email to the entire staff explaining what we are doing and why, so I'll just take a minute to make sure you are all hearing the same information directly from

me. Lisa and I consulted with the Judges yesterday and agreed that we wanted to be proactive and err on the side of caution in order to both guarantee we can keep the Court open and serving the public, but also protect everyone's health to the extent we can. Therefore, effective immediately, everyone who falls in the high risk category for complications from the Coronavirus is directed to move to a full-time telework schedule. According to the CDC those in the high-risk category are anyone who is:

- Age 60 and older
- Has serious chronic medical conditions like: heart disease, diabetes and lung disease including respiratory issues
- Has a permanently or temporarily compromised immune system

Court hearings and 341 meetings will continue as normal, and we will be keeping the intake counters open in both Jackson and Memphis utilizing skeleton crews in both locations. Both intake counters have a good supply of hand sanitizer and wipes. When you are working at the counter please practice good hand hygiene and wipe surfaces as often as necessary.

We have also posted the attached notice on the 5th and 6th floors of the building in Memphis and the 1st and 3rd floors of Jackson. The CSOs cannot enforce these guidelines, but it is our hope that folks will read them and take them to heart. The bar has also been sent this notice and is asked to talk to their clients about these guidelines and stay home if appropriate.

Each department manager is coordinating coverage issues for their department, so if you have questions, please go to your immediate supervisor first, but as always I remain happy to discuss or answer any questions.

We ask that everyone exercise caution and care. While there is no need for panic, we are hoping that by exercising caution now, we can avoid larger problems in the future. We are fortunate that we have a robust telework program, and thus are able to implement a program such as this without sacrificing service to the bar and public. Thank you all for your cooperation.

Looking back, even this notice seems quaintly naïve.

On the same day, I reached out to the Assistant United States Trustee, Sean M. Haynes, to see what could be done to limit the number of persons who would have to attend meetings of creditors. The United States Bankruptcy Code requires that all debtors appear in person for a meeting of creditors shortly after their petition is filed. *See* 11 U.S.C. § 341(a). Because of the high number of consumer filings in Memphis, especially Chapter 13 filings, meetings of creditors' days can be quite full. There are two Chapter 13 trustees in Memphis and two Chapter 7 trustees. I was able to reach one of each.

The Chapter 13 trustee reported that through March 26, there was an average of 118 cases set for meetings of creditors each week involving an average of 20 attorneys. Some portion of those cases are filed by married couples, raising the real possibility that more than 100 persons would be gathered in the meeting of creditors room. At that time, the CDC was cautioning planners of "mass gatherings and large community events" to prepare for the possibility of outbreaks in their communities. It seemed like overkill at the time, but I asked Mr. Haynes to consider the possibility of moving away from in-person meetings of creditors for the time being. He agreed to talk with his superiors and get back to me.

On March 11, Mark Theriault, Circuit Executive for the Sixth Circuit, wrote to all the clerks of the court for the circuit, transmitting his communication to the judges of the Sixth Circuit as well as concerning the Sixth Circuit Pandemic Protocol. He also included the plan developed by Ms. Ford for our office, citing it as a "really thoughtful plan … tailored to the highest risk individuals in her office."

The Administrative Office sent its third general memorandum on March 13. The Director announced that as of Monday, March 16, all Administrative Office offices would telework until further notice. The Director suggested that "courts may wish to consider similar actions." Also, on March 13, the Tennessee Supreme Court declared a state of emergency for the Judicial Branch of the Tennessee government, which had the effect of suspending all in-person court hearings until March 31.

On Thursday, March 12, the Shelby County Schools announced that they would close a day early for their scheduled spring break and remain closed for an extra week. Schools in the surrounding area quickly followed suit. Moreover, every child in Shelby County Schools receives free meals each day. Suddenly parents had to figure out how to care for and feed their children amidst fears that their jobs would soon be lost (if indeed they still had one). The immediate impact on the bankruptcy court was a heightened concern that requiring attendance at a hearing could force parents to choose between providing adequate care for their children, losing work if they still had a job, or having their case dismissed for failure to appear. On the same day, Mr. Haynes reported that the United States Trustee could not consent to a move away from in-person meetings of creditors.

On Monday, March 16, the bankruptcy judges came together for a hastily called judges' meeting, some in person, others by telephone. Mr. Haynes stated that since his last report to us of only a few days ago, the position of the Executive Office of the United States Trustee had changed. They now favored continuing all meetings of creditors for some period of time. The judges were concerned that with our high volume of consumer filings, this would mean a huge backlog of cases when virus-related restrictions were lifted.

At that time, the CDC was urging a halt to all meetings in excess of 50 people for the next eight weeks. The judges decided that rather than continue all meetings of creditors and other hearings, they would temporarily suspend all in-person hearings, and urge the trustees and attorneys to use written and telephone communication to settle the matters they could and to submit other matters to the court for decision on the pleadings. With respect to meetings of creditors, the court ordered that, effective Tuesday, March 17, 2020:

1. All U.S. Trustee's staff, trustees and their staffs, attorneys, debtors, creditors, and other parties in interest are encouraged to conduct their business in writing or telephonically. If requesting a telephonic appearance, the party shall notify the appropriate courtroom deputy no later than the day before the hearing.

2. The judges will freely grant continuances as requested and encourage the parties to reach consensual resolution of their dispute whenever possible.
3. All in-person hearings are suspended.
4. If an evidentiary hearing is required, the parties shall notify the chambers of the presiding judge to request a hearing. The individual presiding judge will determine whether and how to conduct requested hearings.

This order will remain in effect pending further order of the court.[4]

With respect to meetings of creditors, the court ordered that, effective Tuesday, March 17, 2020:

1. All debtors in Chapter 7, 12, and 13 cases are excused from attending in-person meetings of creditors, and case administration may proceed notwithstanding the requirements of 11 U.S.C. § 341(a).
2. As needed, the United States Trustee, case trustee, creditor, or other interested party may proceed to obtain additional information from the debtor by any of the following methods:
   a. Written interrogatories;
   b. Telephonic conference;
   c. Rule 2004 examination;
   d. Objection to confirmation in Chapter 12 and 13 cases.

This order will remain in effect pending further order of the court.[5]

Before the orders could even be entered, the recommendation concerning the number of people who could safely gather had been reduced from 50 to 10. It was subsequently reduced to five.

On March 19, the Director of the Administrative Office issued the third memorandum from that office urging the courts to follow their COOPs and the advice of courts from areas that had been hardest hit by the pandemic. Director Duff noted that the judiciary had doubled its Information Technology (IT) capacity in order to meet the need for increased telework. Indeed, the Director "strongly urge[d all chief judges and unit heads] to exercise flexibility and compassion in accommodating staff needs." Judges were directed to conduct in-person court proceedings only when absolutely necessary and jury trials only in exceptional circumstances to comply with social distancing and restrictions on gatherings of more than 10 people. The Administrative Office has gathered a number of resources for courts on its internal website, JNet.

Even though we were prepared to conduct hearings by telephone if needed, all of my scheduled Chapter 13 hearings for Thursday, March 19 were handled by continuance, agreement, or decision on the pleadings. On Friday, I thought that we had things pretty well in hand. But then, Ms. Ford wrote to tell us that at least three other bankruptcy courts in the circuit had moved to close their front counters. Would we want to do the same?

The bankruptcy courts of the U.S. moved to electronic filing some 20 years ago, but most courts make an exception for persons who are not represented by an attorney.

The bankruptcy courts of the U.S. moved to electronic filing some 20 years ago, but most courts make an exception for persons who are not represented by an attorney. Pro se debtors are permitted to bring their papers to our intake counter either in person or by mail, where their pleading is scanned and filed. For obvious reasons, the bankruptcy courts are especially sensitive to the needs of the indigent, who often do not have access to technology.

Ms. Ford proposed that we at least be prepared to move to receiving filings by drop box in Memphis and by mail in Memphis and Jackson. She suggested that if Jackson's mail could be forwarded to Memphis for scanning, no employees in Jackson, and only two at a time in Memphis, would be required to come into the office to handle the drop box and mail pleadings. We learned that the mail to Jackson could be delayed 4-5 days, so we initially scrapped that part of the plan in favor of having two employees from Jackson also come in to handle the mail.

This plan did not last long, however. Late on Monday, March 23, we learned that the Jackson courthouse was ordered closed by Chief District Judge S. Thomas Anderson, effective 2:00 p.m., that day. Unrepresented litigants with access to email were instructed to submit their filings to an email address, and those without were told to mail their pleadings to the clerk of court. Unlike Memphis, the Jackson bankruptcy court is in the federal courthouse. Chief Judge Anderson's decision effectively closed the Jackson bankruptcy clerk's office to the public as well.

Our situation in Memphis further changed when the Mayor of Memphis, Jim Strickland, ordered all non-essential businesses to close and all residents to stay at home for two weeks beginning at 6:00 p.m., Tuesday, March 24. This gave rise to further conversations among the judges and clerk concerning any further measures that should be taken to comply with the Mayor's order and keep our co-workers, trustees, attorneys, creditors, and debtors safe at home. The Chapter 13 trustees decided that they would continue all hearings and meetings of creditors until later in April.

One of our Chapter 7 trustees, Bettye S. Bedwell, reported to me that she attempted to move forward with meetings of creditors on Wednesday, March 25. She said that she had 85 cases set that day and sent interrogatories to each of those debtors in response to the court's prior order. She said that 21 sets of interrogatories were returned. Ms. Bedwell reports that she has 147 cases set for April 8, 60 of which were continued from prior settings. This, unfortunately, confirmed the judges' fear that simply continuing meetings of creditors would result in unwieldy dockets. We hoped that attorneys would quickly adjust to the new procedures.

Two of our concerns for conducting hearings by telephone or video conference was that we needed to swear witnesses and to produce a written transcript. Unlike the district court, the bankruptcy courts use electronic court recorders rather than

actual court reporters to record their proceedings. And unlike the district courts, the bankruptcy courts tend to "deep set" a number of hearings at the same time knowing that many of them will be resolved without the need for an actual hearing. On March 19, for example, I had more than 400 matters set for hearing at 10:00. None of them resulted in the need for a hearing. The following week, I had 21 Chapter 7 and 11 matters set for hearing. With some hard work by court staff, the trustees, and the attorneys, all of them were resolved or continued save one, which I was able to decide on the pleadings.

We were ready, however, should the need for a hearing arise. After a little investigation, Ms. Ford recommended that we use the telephonic system that we sometimes use for routine administrative hearings with a court reporter added to the line. I have not had to conduct a hearing requiring a reporter yet but know that there are a number of bankruptcy courts, especially in the west where distances between courthouses are vast, who routinely conduct hearings by telephone.

Another concern that has arisen is the need to have the debtors actually sign a copy of their bankruptcy petition Although we require electronic filing for all debtors represented by an attorney, our local rules (and those of most bankruptcy courts) require that the attorneys obtain an actual, "wet" signature on a paper copy of the petition which they are to maintain in their files for five years after the case is closed. This rule is intended in part to protect debtors' attorneys. Under present conditions, however, the requirement for a wet signature may endanger attorneys and their employees. We have received a number of calls about this requirement and are in discussions with the assistant U.S. trustee concerning whether to modify this requirement at least temporarily.

Looking Ahead

We are as uncertain as anyone about how long the current state of affairs will continue. The Shelby County Schools, like many school districts, will remain closed indefinitely. The Mayor's Safer at Home Order remains in effect until midnight, April 7. The Tennessee Governor declared a state of emergency on March 12, but so far has stopped short of issuing a state-wide Shelter in Place Order.

We know that many people in west Tennessee are out of work and may not be able to pay their routine bills. Ordinarily, this would mean a sharp rise in bankruptcy filings. Instead, we have seen a decline in filings. For the first 26 days of February, we saw 655 Chapter 13 petitions filed in the Western District. For the same period in March, there were 610 filed, and 415 of those were filed on or before March 15. There were 144 cases filed March 13-19, but only 87 filed March 20-26.

We think this filing decline has resulted from a couple of things. The people of West Tennessee are staying home, and there has been an outpouring of offers of help from many different quarters. Most landlords realize that some of their tenants may not be able to pay the rent on April 1 and are planning accordingly. On March 25, the Tennessee Supreme Court issued an Order extending its suspension of in-person court hearings through April 30. This includes the civil divisions of the General Sessions courts, where eviction actions and "small claims" actions, including most consumer collection matters, are filed. This slow down should provide relief to potential bankruptcy debtors for another six weeks or more but could have the unavoidable consequence of putting a financial strain on lawyers and their employees.

In addition, as I am writing, the Congress has just approved a $2.2 trillion economic stimulus package that was signed by the President. In addition to providing direct relief to citizens and businesses, it will temporarily modify the Bankruptcy Code in ways thought to be helpful to consumers and small business owners. Here is a summary of those provisions provided by the National Conference of Bankruptcy Judges:

- Amends the Small Business Reorganization Act to increase the eligibility threshold to file under subchapter V of chapter 11 of the U.S. Bankruptcy Code to businesses with less than $7,500,000 of debt.
- Amends the definition of income in the Bankruptcy Code for Chapters 7 and 13 to exclude coronavirus-related payments from the federal government from being treated as "income" for purposes of filing bankruptcy.
- Clarifies that the calculation of disposable income for purposes of confirming a Chapter 13 plan shall not include coronavirus-related payments.
- Explicitly permits individuals and families currently in Chapter 13 to seek payment plan modifications if they are experiencing a material financial hardship due to the coronavirus pandemic, including extending their payments for up to seven years after their initial plan payment was due.

Subchapter V of Chapter 11 only became effective on February 22, 2020. We have very little experience with it thus far. The current debt limit is only $2,725,625. The raising of the debt limit to $7,500,000 will make the provision available to a wider range of debtors. One interesting feature of the subchapter is the automatic appointment of trustees in every case. Persons have been identified to serve as Subchapter V trustees in each of the federal judicial districts, but I think it is safe to say that there was no anticipation of the larger numbers of cases that could be filed under the subchapter under the new debt limit.

We have no experience with the extension of Chapter 13 plans beyond five years. The existing experience we do have tells us that it is often very difficult for a debtor to complete five years of payments in order to obtain a discharge. While the extension of existing plans seems helpful on its face, it may do no more than postpone a plan default.

Another provision of the stimulus package will allow homeowners affected by the

Most landlords realize that some of their tenants may not be able to pay the rent on April 1 and are planning accordingly.

pandemic to suspend mortgage payments for up to 12 months. This provision may help to soften or at least delay the expected waive of consumer bankruptcy filings.

Conclusion

There is no doubt that the federal judiciary is swimming in uncharted waters in its response to the coronavirus pandemic. In these early days, our response in the bankruptcy court has focused on keeping our employees, trustees, attorneys, creditors, and debtors safe. I think the response in the federal and state courts has been amazing.

As we move beyond the immediate health crisis, however, we will have to determine how best to respond to the economic crisis spawned by the pandemic. The economic stimulus package is a first step, but the ultimate outcome remains to be seen.

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1.The vast majority of these were consumer cases and my focus in this article will be on consumers and, to a lesser extent, small businesses. I will leave it to those who practice in Delaware and Southern New York to anticipate the impact of the pandemic on public company bankruptcy filings.

2. Miller & McMullen, "States and Counties with the Highest Bankruptcy Rates" NerdWallet, https://www.nerdwallet.com/blog/credit-cards/highest-bankruptcy-rates-states-counties/. Their research was based upon the Caseload Statistics Data Tables maintained by the United State Courts. https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

3. Delavega and Blumenthal, "2019 Memphis Poverty Fact Sheet," University of Memphis, https://www.memphis.edu/socialwork/research/2019povertyfactsheet.pdf.

4. General Order Concerning Hearings, General Order No. 20-0001 (Bankr. W.D. Tenn. March 17, 2020).

5. General Order Concerning Meetings of Creditors, General Order No. 20-0002 (Bankr. W.D. Tenn., March 17, 2020).

6. Jennie D. Latta, J.D., Ph.D., is a United States Bankruptcy Judge for the Western District of Tennessee.

Trace, Test, and Treat Covid-19: A Tale of Two Cultures and Health Care Futures

Janice F. MULLIGAN & Diego SALUZZO

Authors from Italy and the United States discuss the impact of Covid-19 not only on patients' lives, but also their medical systems. In just a few months, this virus is already upending established freedoms in the name of survival. This article describes lessons already learned from this pandemic and detail how the use of telemedicine is quickly becoming an effective tool in maximizing access to health care.

Introduction

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, …" So writes Charles Dickens in *A Tale of Two Cities*, as the author compares two cities' responses to the upheaval of the French Revolution. While we are only in the opening chapter of the Covid-19 epidemic, the fallout has already resulted in worldwide and dramatic changes to life, liberty, and yes, even the pursuit of happiness. We put a spotlight on the Italian and American responses to this virus to illustrate how it is already wreaking havoc with established norms in the first months after it was declared a pandemic.

How is Covid-19 affecting people's rights and what are the appropriate measures to contain the infection through tracing, testing, and treatment? Compared to the medieval plague, we have learned from centuries of scientific progress how to fight the current pandemic. However, our cherished democracies and rules of law risk stifling meaningful responses and paradoxically, may foster inequalities. And instead of profitably utilizing the Internet and its timely information as a method to curtail this virus, circulating fake news makes it difficult to discern what reliable information is.

The Covid-19 pandemic is bringing even the healthiest countries to its knees. Two of the most affected countries to date, Italy and Spain, were the world's healthiest countries according to the 2019 Bloomberg Healthiest Country Index.[1] Out of the 169 economies ranked on overall health, the American public health system came in at 35. Unfortunately, neither good, nor even great health scores render these countries immune from the virus' contagion.

Origins

How did it begin? COVID-19 was first reported to the World Health Organization (WHO) on December 31, 2019 by the Peoples Republic of China when anomalous medical cases in the city of Wuhan led to the closure of the Huanan Seafood Wholesale Market. On January 23, WHO stated that the outbreak did not constitute a public emergency of international concern. China was asked to provide more information on: (1) cross-government risk management measures, (2) enhanced surveillance measures, and (3) active cases across China. With cases already reported in South Korea, Japan, Thailand, and Singapore, WHO asked these countries "to place particular emphasis

on reducing human infection, prevention of secondary transmission and international spread."[2] WHO also issued an intermediate level of alert.

The city of Beijing cancelled its events for the Lunar New Year on January 25 and officials reported the first death outside Hubei province. By month's end, WHO declared a "public health emergency of international interest."[3]

Curfews, Closures, and Quarantines

For now, community isolation measures are the best way to reduce person-to-person transmission as adherence to these prevention and control measures could reduce the risk of Covid-19 spread. Rules similar to military laws, as well as curfews, are being adopted.

The Italians' Experience

On January 30, after WHO declared a public health emergency in China, Italy was the first European country to block all flights to and from China.[4] For most Italians, the magnitude was felt on February 21 when the heart of the Lombardy region was the first to be declared a "red zone."

The virus impacted the North first, and then started to appear in other areas. On March 4, the government closed schools and universities, a measure extended for an unlimited period. By March 9, a decree was enacted to expand the "red zone" to isolate the entire country.

To many, fighting a pandemic is like waging a war, and comparable rules should apply. For Covid-19, the primary strategic objective has been to avoid human loss. In Italy, safety measures included limiting the free movement of people to work, providing elderly assistance, continuing healthcare, and addressing other necessities, including grocery shopping. As of March 22, two of the more affected regions, Lombardy and Piedmont, extended closures to all non-essential activities. By that time, Italy had more than 70,000 confirmed cases and close to 7,000 deaths, the highest percentage globally thus far. Measures were thereafter adopted at the national level.[5]
Italy's state of emergency declaration for the coronavirus epidemic initiated a chaotic phase of emergency regulatory procedures. Problems arose concerning the protection of citizens' fundamental rights, including freedom of movement and association, as governed by the Italian Constitution. It is dangerous to infringe on these fundamental freedoms without a clear strategic objective shared at the national level.

Looking to the motto of the French revolution, it is not just a matter of compromising "*liberté*" and, to a certain extent, due to force majeure occurrences, "*égalité*." It is also – as per Robespierre's draft Declaration of 1793 – an issue of *sûreté* and, in a capitalist system both in Europe and in the U.S., a matter of *propriété*. This is because both human lives and the lives of our economic systems must be safeguarded. Doubts arise in assessing the scale of importance, if it exists, between safeguarding health and safety on one hand, and property, freedom, and legality on the other. Often, the latter is unjustly shelved, with society waiting to resume the rule of law.

To many, fighting a pandemic is like waging a war, and comparable rules should apply.

Nobody likes curfews, especially lawyers. Lawyers are professionally committed to adhering and respecting legal rules issued by public authorities for safeguarding public health. Lawyers passionately carry out information and recommend activities to their clients. But surely it is difficult for lawyers to be barred from their office and not trusted to use their own judgment and professional ethics to decide when it is essential for them to return to their office to work.

Lastly, many Italians have asked what slowed the response. Many believe that unreliable news about the spread of the outbreak, as well as the promotion of necessary and successful methods to combat it, contributed to the horrific scene unfolding before us.

The United States' Experience

The key to success in combating a pandemic is a comprehensive plan that includes early intervention, meticulous tracking, effective quarantines, and the implementation of painstaking social distancing measures. While Italy may have been delayed with its initial response, it has gained a unified government approach going forward. Unfortunately, unlike Italy, while America also had no such plan in place at the start of the epidemic, President Trump's previous actions hindered getting one off the ground, and American law created a further boundary to the implementation of a unified federal response plan.

Even if the epidemic in Wuhan was ignored, there should have been no ignoring the fact that on January 21, the first known American case of Covid-19 was reported in Washington State. No one seemed to be in charge at the national level because in 2018, President Trump had eliminated the National Security Council office and its staff that focused on pandemics.[6] The American medical epidemiologist embedded in China's disease control agency left her post in July 2019.

So, what did the U.S. federal government do to counter the pandemic? President Trump belatedly formed a task force charged with creating a crisis-management plan. The U.S. partially closed its borders, banning most foreigners from entering, while allowing Americans, as well as goods, to continue to cross the border. While the State Department raised its global travel advisory to its top warning, level 4, on March 19, it was a recommendation – not a requirement – that Americans either remain in place or return home from abroad.

Why didn't the U.S. just ban Americans from traveling? Freedom of movement across borders is recognized as a fundamental Constitutional right, and the ability to enforce curfews on Americans is related to when martial law can be imposed. Article 1, Section 9, of the U.S. Constitution states, "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when …the public safety may require it." Because of the potential abuses that would arise after the suspension of civil liberties in the name of martial law,

the Posse Comitatus Act forbids federal military involvement in domestic law enforcement without Congressional approval.

Because of constitutional due process rights, individual Americans cannot be isolated without reasonable suspicion of infection, and even then, they cannot be subjected to forced treatment. The federal government has authority, through the Centers for Disease Control and Prevention (CDC), to monitor and respond to the spread of infectious diseases across national or state borders. CDC's authority to exercise quarantine and isolation powers to combat specific diseases is derived from the federal Public Health Service Act and most recently, a series of presidential executive orders.

Because broad based "police power" curfews are reserved for the individual 50 states, a patchwork of rules has sprung up across the nation, where only some state governors are imposing martial law on their citizens, and select mayors are adding regulations. Over 100 million Americans are subject to a stay-in-place order. Many states continue to have no such restrictions.

In California, employees in "essential" jobs can work outside the home, but all others must stay at home, except for mainly trips to the grocery store and pharmacy. While parks and beaches are closed, walks outside are permitted while practicing social distancing, and restaurant deliveries continue. Unlike Italy, it is clear in California that at least *some* lawyers are deemed to have "essential" jobs, and while many remain home, some lawyers are venturing to their offices on a limited basis. In California, "essential services" exempt from the stay-in-place order include "[p] rofessional services, when necessary to assist in compliance with legally mandated activities and critical sector services." What kind of California lawyers does this include? No one really knows.

People in the United States have continued to travel between states with no restrictions, but they may be limited by regional orders, if any, upon arrival. For example, until the Florida governor shut down such activities in late March, several hundred youth from around the nation frolicked together on crowded beaches during spring break.

Enforcement of these orders and penalties for violating the restrictions they impose vary from state to state. Violations in California can result in "a misdemeanor punishable by a fine, imprisonment, or both."[7] Length of quarantines also vary. In California, emergency regulations remain in effect for 180 days, unless the state's Office of Administrative Law approves a re-adoption, which can only be done twice, each for 90 days.[8]

This pandemic creates a difficult choice: either wreck the economy or potentially lose millions of lives. Restrictions to reduce the virus' spread are already having a devastating economic effect. Shattering previous records, over 3,300,000 Americans applied for unemployment benefits in a single week. In March, stock markets fluctuated wildly despite Congress' $2 trillion stimulus bill. Economists predict a sharp contraction in economic growth and warn that millions of jobs are at risk.

The virus is deepening the economic divide. As more white-collar workers with benefits are able to keep their jobs and work from home, the growing ranks of the unemployed, as well as uninsured hourly workers, are outraged by the potentially fatal gap between the haves and the have nots.[9] Covid-19 has also become a lightning rod for hate crimes against Chinese people in the U.S. The outbreak has escalated tension between generations as well, with some youth referring to the virus as the "#BoomerRemover" because it is most deadly in senior citizens.

While all people are filled with dread and uncertainty about the effects of the pandemic, few are at greater risk than our nursing home residents. Governments are barring all visitors to these homes in an effort to slow viral transmission. Even so, state nurse evaluators are deemed non-essential. This combination of isolating nursing home residents with lack of oversight is likely to dramatically increase resident neglect.[10]

Protecting the homeless is another challenge. California already has the largest homeless population in the country, with about 108,000 homeless across the state. The now growing ranks of homeless people could be impacted by the coronavirus in the next eight weeks. California has allocated $200 million to help move the homeless who have no viral symptoms into shelters, and to use trailers and hotel rooms as temporary housing for homeless who exhibit signs of Covid-19. While admission to the shelters is voluntary, priority is given to the elderly or medically fragile. Some express fear that the shelters will become a breeding ground for the virus due to social distancing issues. While plans are in place to offer food, providing adequate medical support for the homeless is difficult. For example, 4,000 single-use thermometers have been purchased, but they are on back order.

Lawyers are professionally committed to adhering and respecting legal rules issued by public authorities for safeguarding public health.

Tracing Covid-19 Using Artificial Intelligence: An Issue of Ethics in Both Europe and the U.S.

It seems reasonable that the technology and artificial intelligence (AI) methods used in China, South Korea, and Israel to trace the virus would be followed by other countries. If the purpose of these processes is to identify and test the infected persons, and if necessary, isolate them by keeping track of every personal contact, it would seem reasonable and feasible to ask mobile operators to make data in their possession available to track these potential virus spreaders' individual movements. This approach is not too difficult given that the tool to reveal the users' GPS location is already embedded in many popular apps like Facebook, Google Maps, or Uber.

In order to conduct a case study, WHO adopted what is called the "Korean" model. On February 26, two weeks after the adoption of the "Corona 100[m]" app – exactly the incubation time of the virus – the infection peak occurred (800 per day), then slowly declined.

While the state of current technology may allow for this tracking to be done

on a mass scale, there are considerable privacy rights at stake. However, at least according to the GDPR regulation adopted by the European Union, the protection of privacy is not necessarily an obstacle to the processing of personal data when dealing with emergencies in the public interest. Thus, in the fight against coronavirus, the use of data to track people's movements without their consent could therefore be authorized, but only through legislative measures adopted by Parliament which ensure: (1) proportionality, (2) adequacy, and (3) respect for the basic principles of a democratic society. These measures would need to strike a balance between transparency, public health, and the preservation of democratic principles.

The issue is not in itself the abdication of the government's responsibility to protect personal data in the case of emergency or the endangerment of national security, as certainly this has happened with Covid-19. Instead, the issue is the way in which abdication of privacy laws take place, particularly when initiatives are undertaken by local level administrations, which in totality create a disparity between areas and citizens of the same nation. These wide discrepancies raise doubts as to the enforceability of enactments by local authority, even if endorsed and justified at a national level at a later stage.

Under the guise of quelling the pandemic, individual rights and the rule of law are at risk of annihilation from wholesale use of such technology. The information gleaned from the tracking app could be easily subject to abuse as a surveillance tool, allowing the government to track the whereabouts of people who do not have the virus and have a chilling effect on their freedom of association.

Unless the rule of law is preserved, we must recognize that the virus may not only be deadly for health systems and human beings, but also for democracies. Yet, the counter argument is that less democratic jurisdictions may have better opportunities to survive the pandemic than democracies simply because of their ability to suspend the rule of law at will.

Silicon Valley has yet to help America use AI technology to fight this epidemic by tracing infected people. Talks between the U.S. federal government and Facebook, Google, and other tech companies could harness location data anonymously to combat the virus. But any such efforts should face major technical, practical, legal, and ethical hurdles similar to those in the EU.

Testing: American Supply and Demand Problems[11]

Far from being able to trace infected individuals, the U.S. has had trouble even identifying infected people. Over 80,000 Covid-19 cases have been reported in the U.S., but this number is known to be artificially low due to a lack of sufficient testing kits. Because asymptomatic people can be contagious, testing is crucial so carriers can be identified and quarantined. As a result of limited testing and tracking, no one knows how many Americans have been infected and where they are located. This is vital information necessary to achieve successful containment that will save lives. As increased testing occurs, according to the American Hospital Association, 96 million Americans could be infected, and 480,000 die. Projections continue to rise.

Lack of test kits has not been universal. While America and South Korea both reported their first cases of Covid-19 on the very same day in January, there was a stark contrast between the two countries' ability to test their populations. A week after its first reported case, South Korea approved diagnostic tests. By late February, South Korea, a country of 51 million, had erected drive-through screening centers and was able to test thousands daily. A country of 330 million, the U.S. performed 60,000 tests in the same time frame that Korea tested 290,000 people.[12] As a result of rigorous testing and isolation measures, new cases are declining in South Korea. The U.S. is still struggling to test citizens, while there is a spike in infected cases. At the current time, the states most affected are New York, New Jersey, Connecticut, California, and Louisiana.

What went wrong in the U.S.? Health officials relied exclusively on CDC test kits, some of which proved faulty. Instead of shortcutting regulatory red tape, the Food and Drug Administration (FDA) failed to approve other tests until more than five weeks later. Finally, on March 16, the FDA issued a revised policy loosening restriction on the manufacture of test kits. Unfortunately, even as more coronavirus testing becomes available, fresh problems loom: there is a dwindling supply of the products and chemicals needed to achieve test results.

These are not the only failings in the U.S. health system. There is a severe shortage of hospital beds, ventilators, and respirators, and even basic personal protective equipment (PPE) like masks and sterile gloves. There have been urgent appeals for donations of these products on social media. Others have improvised and some health workers at U.S. hospitals are wearing garbage bags over their clothes or retrofitting scuba masks to connect to oxygen.

> While all people are filled with dread and uncertainty about the effects of the pandemic, few are at greater risk than our nursing home residents.

Health care workers and other first responders exemplify hard work and dedication. What they lack in necessary equipment they try to make up for with resourcefulness. When many sounded alarms about their inability to provide necessary health care to large populations or handle the influx of patients expected to require treatment, President Trump invoked the Federal Stafford Act on March 6, 2020. This allowed the Federal Emergency Management Agency (FEMA) to utilize disaster relief funds to work with the Department of Health and Human Services (DHS), and their federal partners, to assist local governments. The National Guard was deployed to deliver medical supplies, distribute food, and build hospitals.[13]

The Secretary of DHS declared a Public Health Emergency (PHE) on January 31, which allowed the federal government to take on powers related to "making grants;

entering into contracts; and conducting and supporting investigations into the cause, treatment, or prevention of the disease or disorder." President Trump invoked the Defense Production Act (DPA) on March 18, which gave the government the authority to control the entire supply chain. This means the government can mandate that private companies manufacture critically needed items and the government can take over the distribution and allocation of those supplies.

Federal control may alleviate the problem of states competing with one another to obtain medical supplies based upon need. Business leaders have been against the DPA; they instead had volunteered to do whatever was needed to avoid the DPA being enacted. Apple, General Motors, and Tesla are among the firms early to diversify from their established specialized areas to help produce essential medical supplies. President Trump specifically required General Motors to produce ventilators.[14]

There are no clinically tested therapies or drugs known to effectively treat Covid-19, although Malaria treatment drugs are often mentioned. While it could be several months to years before any drugs are approved, the use of off-label drugs has been advocated. As Covid-19 infections explode in the U.S. and too little equipment exists to treat patients, hospitals could be forced to decide who will live and die.[15] The federal government has been slow in offering guidelines necessary for those in the middle of difficult decision-making processes when there are scarce resources to meet needs.

It is yet unknown how dire the crisis in the U.S. will get. In preparing for worst-case scenarios, health care providers across the country are creating guidelines for rationing limited resources during this crisis. Old age should not be an automatic disqualifier because it would be discriminatory. However, one grim calculation hospitals can make is how long a patient may need a ventilator and how many other lives the equipment might otherwise save. If a patient would likely require permanent intensive care to survive, that individual may be excluded. That would help prevent the even more gut-wrenching decision of whether to take a patient off a machine to make it available to others.

Guidelines typically designate separate triage teams to decide these issues, rather than leaving it to the treating doctors who are providing bedside care. Having separate teams make these decisions is intended to ease the emotional burden on the treating doctors, as well as to apply the guidelines fairly for all patients, regardless of race, age, or ability to pay.

Italian Treatment, Sanitary Organization, and Medical Devices

During this pandemic, the health care workforce is concentrated on responding to Covid-19, aware that countless lives depend on the capacity of medical structures to face the emergency both from a scientific and technological angle. But even more, they depend on their ability to maximize the capacity of hospitals and grow their intensive care units. Efforts are being made to scale up national health care systems.

From an Italian perspective, the goals of each nation's health care systems should be to:

- Prevent infections among health care providers.
- Safeguard hospitalized patients suffering from non-Covid-19 pathologies and vulnerable potential targets of the virus.
- Provide effective care to Covid-19 affected patients by using the best available resources.[16]

Health care systems are not only required to act in the best interests of patients, but also to save the whole system. The system's priority is based upon a utilitarian analysis, whereby the health care provider refrains from overusing resources on one patient if that means more patients will be deprived of the help they need. From an organizational point of view, this means a shift in focus from patient care to safeguarding the ability of medical structures to continuously provide required services both to Covid-19 patients and to other patients with medical emergencies.

These presenting problems are familiar in wartime medicine, where health practitioners faced the moral issue of whom to assist. They will unfortunately need support long-term to cope with mental health challenges arising as the traditional patient-centered approach of clinical care moves to the public-centered approach under emergency conditions.

Health care workers in Italy and Spain are working day and night. Italian volunteers increased the number of persons providing care. Many health care workers have become patients. Most volunteers lack essential technical and professional backgrounds. The contraction of the virus by health care workers being replaced by volunteers demonstrates the effect of institutional failures to provide PPE. The virus is killing medical structures in places that lack an appropriate plan, strategic guidance, and supplies, or that are impossibly affected by too many patients.

Federal and state governments must take this pandemic seriously and cooperate to pull in the same direction. As the virus destroys health care systems, as well as individuals, decisions must be informed by data collected from scientific experts and long-term social interests, including the preservation of constitutional rights, and emergency plans must be enacted that best utilize our first responders and resources.

While the U.S. President and others failed to comprehend the nature of this pandemic and tangled together the webs of real and fake news, there were real world consequences.

Questions as Italy Enters the Next Stage of the Pandemic

Another real concern is the treatment of all of the other patients who suffer from debilitating conditions that require hospitalization. How are patients who experience strokes and heart attacks to be cared for in a medical system overwhelmed by Covid-19 patients?

The Italian National Health Institute,[17] publishes hospital death statistics including patients who died of complications from other illnesses. It will be difficult to reconstruct evidence of the cause of death when the primary concern of health professionals is not to maintain health

records. High morbidity rates require rapid cremation, while relatives of victims are deprived of the minimal comfort of a last viewing.

In the "pre-CovidD-19" age, health care providers across Europe were already struggling to cover their operating costs, and this challenge became even more difficult due to the spread of the present contagion. Costs were already expected to soar and current methods for raising funds deemed inadequate because tax revenues and insurance premiums historically depended on a youthful workforce. This workforce has now begun to age. Even before the pandemic, public expenditures on healthcare in Europe were expected to rise from the current 9% average to 14% in 2030 due to the interconnected trends of an aging population (24% > 65 years in 2030) and the expected rise of chronic diseases.

Foreseeable spiraling costs in health care systems risk ruining a system of health care largely supported by governments, in which the risk of paying for medical expenditures was pooled. These costs will also be impacted by economies depressed due to pandemic-related effects. Pre-pandemic priorities and the existing medical financial structures are ill-suited to meet new requirements. They are anchored to old-fashioned fragmented schemes of medical organization that focus on acute, rather than management, of chronic conditions.

Advanced and effective medical technologies have significantly contributed to rising costs. Between 1975 and 2006, the cost of bringing new medicines to market grew ten times to $1.3 billion, and the recent costs for expanding intensive care structures has also burgeoned. Keeping the current universal health care model will be difficult to sustain in Europe. The provision of medical services must change as governments improve the collection and transparency of health data to better prioritize investment decisions. The role of a general physician serving as treatment coordinator for patients with multiple health issues will gain importance. Preventive measures and lifestyle changes must be effectuated and promoted, and patients must take a more active role and responsibility for their own health, treatment, and care.

Telemedicine Treatment

Telemedicine, sometimes called Tele-health, is a constantly evolving health science that incorporates new advancements in technology and can adapt to ever-changing health care needs. Three elements are germane to telemedicine: (1) providing broad-based clinical support with access to many types of medical providers, (2) overcoming geographical barriers by connecting health care providers and patients in remote physical locations, and (3) using various types of Information Communication Technology (ICT) to improve health outcomes.

Because telemedicine allows a patient to obtain medical advice and treatment at home while the health care provider is at a different site, it is a perfect modality to implement during the current pandemic. This practice may enable hospitals to minimize costs and eliminate the risk of in-person cross infections.

Before the pandemic, the biggest impediments to telemedicine in the U.S. were designing reimbursement methods and changing state licensing laws. Both issues have been resolved on a temporary and emergency basis under the President's 1135 Waiver and the Coronavirus Preparedness and Response Supplemental Appropriations Act. Medicare and many health insurance providers are currently reimbursing physicians for telemedicine visits.

In response to these changes in policy, physicians have ramped up their telemedicine capabilities, thereby increasing patient accessibility to health care. The University of California at San Diego reports that it transformed more than 50% of all otherwise ambulatory visits to telemedicine in one week. Given its demonstrated effectiveness, this change in the delivery of health care is likely to survive long after the pandemic resolves because it will promote the continuance of our medical structures. Thus, Covid-19 has caused the unexpected benefit of overcoming political, financial, psychological, and cultural barriers that previously prevented full utilization of cost-effective technology in medicine.

Where Do We Go from Here?

Quarantine measures in pandemics should be adopted at an earlier stage in the future, before health care workers and medical strategic structures are compromised. Doctors, nurses, and other health providers, as well as technical experts and first responders, are invaluable and must be safeguarded as they represent the first and last line of defense. The later protective measures are adopted, the more severe the consequences. The deaths of tens of thousands of individuals, both directly and as "collateral damage," can be avoided.

Both Europe and the U.S., like the rest of the world, minimized or denied the seriousness of Covid-19 at first, and when they decided to react, many acted without appropriate medical expertise or relevant data. The U.S. President focused undue attention on the origin of Covid-19, and closed U.S. borders with China, and then Europe, while failing,

himself, to understand the importance of social distancing. This was exemplified by his hand shaking behaviors among U.S. leaders of industry on national television.

While the U.S. President and others failed to comprehend the nature of this pandemic and tangled together the webs of real and fake news, there were real world consequences. Despite governmental shortcomings, entrepreneurs have adopted and transformed existing industries to become active participants in emergency management. Businesses and countries are learning from each other.

To combat our current pandemic, we remind ourselves that conquering it is more like winning a war than winning a battle. In a war, a global strategy made up of supportive entities and communities to satisfy common needs must prove successful. The challenge, in part, will be for patriots to convince each world leader to realize our interdependence and to act accordingly.

As part of addressing the current emergency, attention must be paid to the legal and ethical ramifications of decisions that also impact citizen rights. We are now aware of the need to be prepared for future health crises, perhaps the type emerging from the loss of our permafrost, with decisive, scientifically based emergency plans representing the consensus of leading international experts instead of by rushed provisions dictated by ill-prepared legislative bodies.

While history tells us, "this too shall pass," Covid-19 has changed life as we know it. COVID-19 will accelerate fundamental changes in health care, the economy, the workplace, and the government. We can all learn from the Italian writer, Alessandro Manzoni, who said, regarding the Black Death, "… to observe, listen, compare, think before speaking."[18]

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Useful Websites

OMS General Indications and Guidelines
https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public

ECDC European Articles Published on COVID-19
https://eurosurveillance.org/content/2019-ncov

Definition of Positive Cases and Surveillance in Europe
https://www.ecdc.europa.eu/en/case-definition-and-european-surveillance-human-infection-novel-coronavirus-2019-ncov

ECDC Risk Assessment
https://www.ecdc.europa.eu/en/current-risk-assessment-novel-coronavirus-situation

Johns Hopkins Coronavirus Resource Center
https://coronavirus.jhu.edu/map.html

1. https://www.bloombergquint.com/onweb/spain-tops-italy-as-world-s-healthiest-nation-while-u-s-slips#gs.5TOxQWIS

2. https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)

3. The name of the new disease, COVID-19, was adopted on February 11, 2020: "Co" and "vi" to indicate the coronavirus, "d" for disease and "19" for the year of discovery, 2019. Concurrently, the virus changed its scientific name to Sars-CoV-2 because the pathogen is related to the coronavirus responsible for SARS, which was much more lethal, though less contagious.

4. Ordinance of Ministry of Health March 30, 2020.

5. Dpcm 22.3.2020, effective from March 25 and identifying essential activities exempted from closure.

6. *Elimination Of NSC Global Health Security Office Part Of National Security Adviser Bolton's Plans To Streamline Council* May 11, 2018 https://www.kff.org/news-summary/elimination-of-nsc-global-health-security-office-part-of-national-security-adviser-boltons-plans-to-streamline-council/.

7. *Coronavirus live updates: As WHO warns 'pandemic is accelerating,' Donald Trump wants US to soon 'open for business'* Jorge L. Ortiz USA TODAY March 23, 2020, https://www.usatoday.com/story/news/health/2020/03/23/coronavirus-live-updates-congress-stimulus-us-deaths-donald-trump/2895096001/

8. Covid-19 Is Becoming the Disease That Divides Us: By Race, Class and Age Jeff Green March 21, 2020, Bloomberg News, https://www.bloomberg.com/news/articles/2020-03-21/covid-19-divides-u-s-society-by-race-class-and-age?utm_campaign=news&utm_medium=bd&utm_source=applenews

9. *What are the coronavirus restrictions in my community? A guide for Southern California* By Rong-Gong Lin II March 19, 2020 Los Angeles Times, https://www.latimes.com/california/story/2020-03-18/how-southern-californias-coronavirus-restaurant-restrictions-and-bans-on-gatherings-work

10. 6. *About the Emergency Rule Making Process, California Office of Administrative Law*

https://oal.ca.gov/emergency_regulations/emergency_regulation_process/

11. 8. For a discussion of how COVID-19 is creating new protection from liability laws in the U.S., please see *Managing HIPAA and Other Legal Risk in the Age of the Coronavirus*, which is published in this same issue of *Juriste*.

12. *Special Report: How Korea trounced U.S. in race to test people for coronavirus*, Chad Terhune et al, Reuters March 18, 2020, https://www.reuters.com/article/us-health-coronavirus-testing-specialrep/special-report-how-korea-trounced-u-s-in-race-to-test-people-for-coronavirus-idUSKBN2153BW

13. *Trump orders National Guard, building of medical facilities in NY, Calif., Wash.* March 22, 2020 The Hill, https://thehill.com/homenews/administration/488931-trump-orders-national-guard-building-of-medical-facilities-in-ny

14. *Trump Invokes DPA After Attacking GM CEO Barra Over Ventilator Production* March 27, 2020 Forbes https://www.forbes.com/sites/billroberson/2020/03/27/trump-attacks-gm-ceo-on-twitter-over-ventilator-production/#73f7183c5d45

15. Ethical Framework for Health Care Institutions Responding to Novel Coronavirus SARS_CoV-2 (Covid 19), Nancy Berlinger et Al (The Hasting Center March 16, 2020).

16. *The Hardest Questions Doctors May Face: Who Will Be Saved? Who Won't?* March 21, 2020, New York Times https://www.nytimes.com/2020/03/21/us/coronavirus-medical-rationing.html

17. https://www.epicentro.iss.it/coronavirus/sars-cov-2-traduzioni-popolazione-straniera, https://www.epicentro.iss.it/coronavirus/, www.iss.it

18. If you have time to read, maybe during this "stay at home period," read *The Betrothed* by A. Manzoni (https://archive.org/details/betrothed00manzuoft) and you will easily realize that centuries pass, but human beings remain the same. Also, in those days, the approach from institutions to the pandemic was skeptical, and actions adopted to reduce the spreading of contagious terribly late, simply because for human beings, it is difficult to accept what is totally unwelcome.

Etiquette for Conference and Video Calling

Laura CONDUIT

In these challenging times we are all becoming more reliant on technology to keep in touch. These straightforward rules should help us all to have more productive and more enjoyable conference and video calls with UIA colleagues, our teams and clients.

1. The host should set out and circulate in advance an **agenda** to keep the meeting on track and on time.
2. The host should also clearly set out the rules for the call in advance and remind participants at the start of the call. That way all participants know when and how they will be invited to speak and whether their time or topic is limited.
3. **Test your system** including speakers, microphone and internet connection before commencing the call.
4. **Be on time**. This is particularly important if you are hosting the call but, equally, important for participants. If you would not be late for a face to face meeting, why would you be late to a conference call?
5. On video calls think about your **professional image**. Wear work appropriate clothing. If you are dressing from the waist up (!) whilst working from home, then do not make the mistake of standing up mid call and showing everybody your pyjama bottoms! Ensure that you have a professional backdrop and check the lighting.
6. Please, please, please **mute yourself** unless you are speaking! This one is vital to avoid everybody sounding like a Dalek and the inevitable echo when somebody forgets.
7. Try and arrange a **quiet area** in which to make calls. Of course this may not always be possible with dogs barking and children at home. In the current climate people will understand, but this becomes ever more important after the initial, endearing giggles of a small child turn into the wails of siblings sounding like they are murdering one another!
8. Consider a **traditional voice call** rather than a video call if the video is not actually serving a purpose. Sometimes video can be a distraction rather than a help.
9. **Do not talk over each other and do not get distracted** during the meeting. If an important email arrived during a face to face meeting it would wait until the end of the meeting. The same rules should apply during a video call.
10. Most importantly, we should all enjoy the human contact. Who knows when we may be able to jump in a car, on a train or a plane to see one another again and we are fortunate to have such excellent ways of keeping in touch during these difficult times.

I am available any time on Zoom, HouseParty, Skype for Business, Starleaf or any other method you choose – even if it is just for a cup of tea and a catch up!

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Le Covid-19 : Un fléau pour les habitants de la Terre mais une opportunité pour la Médiation ?

Christine SARTINI-VANDENKERCKHOVE

La pandémie du Covid-19 va changer notre rapport au temps, à nos habitudes, à nos relations avec autrui, à notre travail. Et si elle nous aidait à changer aussi notre rapport à… la médiation notamment en matière immobilière ??

Ce fléau pour les êtres humains du 21e siècle pourrait alors se transformer en une occasion de faciliter et développer cette méthode de résolution des conflits.

Vu la baisse d'activités du pays voire leur interruption totale dans certains secteurs, nombreux sont ceux, particuliers comme sociétés, qui sont déjà à l'heure de la mise en ligne de cet article, ou qui le seront tôt ou tard, confrontés à un problème de paiement de loyer que ce soit dans le cadre d'un bail de résidence principale ou d'un bail commercial.

Y a-t-il une alternative à lancer une citation devant le tribunal de paix contre son locataire en paiement de loyer, ou contre son propriétaire pour en être exonéré temporairement, partiellement ou moyennant des termes et délais ?

S'engager dans une procédure judiciaire devant des tribunaux qui seront débordés au jour de la reprise de leurs audiences, où les notions de force majeure, d'exécution de bonne foi des obligations, voire celle d'abus de droit feront l'objet de longs et coûteux débats, c'est initier un autre combat entre Terriens alors que nous sommes tous en guerre contre un ennemi commun mortel.

Les propriétaires et les locataires devront continuer à vivre – voire à survivre – et la médiation offre une autre voie de résolution du conflit dans le cadre d'un processus volontaire faisant appel notamment au bon sens des participants afin d'identifier **ensemble** une solution acceptable pour chacun. Cela implique bien entendu que chacun mette 'cartes sur table' et n'utilise pas ce processus de manière abusive pour gagner du temps ni ne cache la réalité de sa situation.

Il n'est pas sans intérêt de rappeler qu'un accord conclu avec l'aide d'un médiateur ou d'une médiatrice agréé(e) peut être entériné par un jugement susceptible d'exécution.

Pour trouver un médiateur/médiatrice agréé(e) cliquez sur https://www.cfm-fbc.be.

Dans les circonstances actuelles, il n'existe qu'une seule façon de terminer un message : prenez soin de vous et des vôtres et restons constructifs.

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État d'urgence sanitaire en France : les juridictions administratives s'organisent[1]

Hélène PAULIAT

La crise sanitaire contraint les juridictions administratives à s'organiser pour assurer la continuité du service public. L'ordonnance du 25 mars 2020 prévoit des dérogations aux règles législatives et règlementaires relatives à l'organisation et au fonctionnement des juridictions. Ces dispositions applicables pendant l'état d'urgence sanitaire ne doivent pour autant pas remettre en cause les droits des requérants.

Sur le fondement de l'article 11, I, 2 C de la loi n°2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de Covid-19, le Gouvernement est habilité à prendre, dans un délai de trois mois à compter de la publication de ladite loi, toute mesure *« adaptant, aux seules fins de limiter la propagation de l'épidémie de covid-19 parmi les personnes participant à la conduite et au déroulement des instances, les règles relatives à la compétence territoriale et aux formations de jugement des juridictions de l'ordre administratif et de l'ordre judiciaire ainsi que les règles relatives aux délais de procédure et de jugement, à la publicité des audiences et à leur tenue, au recours à la visioconférence devant ces juridictions et aux modalités de saisine de la juridiction et d'organisation du contradictoire devant les juridictions ».* C'est donc sur cette base juridique que, sur le rapport du Premier ministre et de la garde des Sceaux, a été prise une ordonnance n°2020-305 du 25 mars 2020 portant adaptation des règles applicables devant les juridictions de l'ordre administratif.

Le texte a un champ d'application général, puisque l'ensemble des juridictions de l'ordre administratif est concerné (TA, CAA et CE), sauf lorsque les dispositions de l'ordonnance prévoient un domaine différent *(art. 1er)* ; il s'applique également dans les îles Wallis et Futuna *(art. 18)*.

L'ordonnance se divise en deux titres, l'un traitant des dispositions relatives à l'organisation et au fonctionnement des juridictions (Titre 1), l'autre regroupant des dispositions particulières relatives aux délais de procédure et de jugement. L'objectif est donc clair : pendant la crise sanitaire, il est indispensable de maintenir la continuité du fonctionnement de la justice administrative, en instaurant des mécanismes permettant aux juridictions de rendre des décisions (1) ; mais des dispositifs sont prévus pour déterminer des délais de procédure et de jugement, qui préservent les droits des justiciables (2).

1. Le maintien du fonctionnement des juridictions pendant l'état d'urgence sanitaire

C'est l'objet du titre 1er de l'ordonnance, qui prend soin de préciser que n'est pas mis en place un système spécifique à l'état d'urgence sanitaire. Il s'agit seulement, en effet, de déroger, pendant la période qui a débuté le 12 mars 2020, aux dispositions législatives et règlementaires applicables aux juridictions administratives *(art. 2)*. L'ordonnance n'a pas fait le choix de créer un nouveau chapitre au sein du Code de justice administrative prévoyant le fonctionnement de la juridiction administrative en période de circonstances exceptionnelles. Le texte privilégie une sorte de parenthèse dans le fonctionnement normal de la justice administrative, en édictant des possibilités de dérogation au droit existant. Cette situation pourra durer jusqu'à la fin de la période d'urgence sanitaire, donc à une date qui n'est, à l'heure actuelle, pas encore connue.

Le dispositif dérogatoire se vérifie, tant dans l'organisation de la juridiction que dans son fonctionnement.

A. Des règles dérogatoires dans l'organisation des juridictions

S'agissant de l'organisation, l'ordonnance autorise les formations de jugement des tribunaux administratifs et des cours administratives d'appel à délibérer en étant complétées, en cas de vacance ou d'empêchement, par un ou plusieurs magistrats en activité au sein de l'une de ces juridictions, désignés par le président de la juridiction demandeuse sur proposition du président de la juridiction d'origine. Il s'agit donc de faire appel à des magistrats provenant d'autres juridictions. Il est ainsi dérogé à une compétence territoriale globale de la juridiction, mais ce mécanisme apparaît nécessaire dans la mesure où l'absence de magistrats administratifs au sein de leur juridiction d'appartenance est une probabilité évidente au regard de la crise sanitaire et des risques élevés de contamination au covid-19. Pour parer à toute éventualité, le même article 3 prévoit la possibilité de désigner des magistrats honoraires pour compléter les formations de jugement, mais dans le respect des règles fixées à l'article L. 222-2-1 du Code de justice administrative (inscription sur une liste arrêtée par le vice-président du Conseil d'État en particulier).

> Des modalités sont précisées pour éviter de réunir dans une salle d'audience un nombre de personnes conséquent, qui risquerait d'encourager à la propagation du virus.

Une autre évolution, toujours liée à l'objectif de maintenir le fonctionnement de la juridiction administrative, tient à l'élargissement du champ des magistrats administratifs pouvant statuer par ordonnance dans les conditions prévues à l'article R. 222-1 du CJA, c'est-à-dire pour donner acte des désistements, pour rejeter les requêtes ne relevant manifestement pas de la juridiction administrative, pour constater qu'il n'y a pas lieu de statuer sur une requête, pour rejeter les requêtes manifestement irrecevables, pour statuer sur les requêtes qui ne présentent plus à juger de questions autres que la condamnation ou la charge des dépens, pour statuer sur les requêtes relevant d'une série qui présente

à juger de questions déjà tranchées, pour rejeter des requêtes ne comportant que des moyens infondés ou irrecevables. Alors que, dans le droit commun, seuls les présidents de tribunal administratif et de cour administrative d'appel, le vice-président du TA de Paris et les présidents de formation de jugement des tribunaux et des cours peuvent statuer sur ces matières par ordonnance (le code précise qu'il faut avoir au minimum le grade de premier conseiller pour statuer par ordonnance), l'article 4 de l'ordonnance déroge à cette liste pour y ajouter les magistrats ayant le grade de conseiller et une ancienneté minimale de deux ans, dès lors qu'ils seront désignés par le président de leur juridiction.

L'on essaie ainsi d'anticiper sur des absences nombreuses de magistrats qui ne pourraient plus prendre de telles décisions. Les garanties offertes aux justiciables semblent ici maintenues puisque les contentieux sur lesquels ces magistrats vont être amenés à statuer par ordonnance ne sont pas en principe les plus discutables.

Il n'en va pas totalement de même des dispositions qui régissent le fonctionnement juridictionnel.

B. Un fonctionnement de la juridiction devant respecter les droits des justiciables

S'agissant du fonctionnement même de la juridiction administrative, l'ordonnance apporte des dérogations au droit existant en tentant de limiter le plus possible les contacts entre membres de la juridiction, requérants et public. Les échanges doivent donc être réduits au maximum. C'est ainsi que la communication des pièces, actes et avis aux parties peut être effectuée par tout moyen *(art. 5)*. L'objectif est de pouvoir adresser des pièces par voie électronique, sans recourir à la voie postale, qui oblige à sortir des mécanismes de confinement.

C'est surtout la tenue des audiences qui est revue par l'ordonnance. Des modalités sont précisées pour éviter de réunir dans une salle d'audience un nombre de personnes conséquent, qui risquerait d'encourager à la propagation du virus.

Ainsi est-il prévu *(art. 6)* que le président de la formation de jugement peut décider que l'audience aura lieu hors la présence du public, donc à huis clos, ou limiter le nombre de personnes admises à l'audience, donc en restreignant la publicité des audiences, principe général du droit. Cela relève des précautions classiques lors de cette crise sanitaire. L'ordonnance donne aussi la possibilité de tenir des audiences en utilisant des moyens de télécommunication audiovisuelle ; dans ce cas, les juridictions devront être capables de s'assurer de l'identité des parties, de garantir la qualité de la transmission (ce qui n'est aisé en aucune circonstance compte tenu de l'ampleur des recours de toutes les juridictions à de tels moyens), et surtout la confidentialité des échanges entre les parties et leurs avocats. Il faudra donc être certain que la qualité des instruments numériques soit à la hauteur des enjeux des principes du procès. En cas d'impossibilité technique ou s'il est impossible de garantir la qualité et la confidentialité des échanges, le juge peut décider d'entendre les parties et leurs avocats par tout moyen de communication électronique, y compris téléphonique, présentant les mêmes garanties.[2]

Des dérogations à la présence physique du conseil ou de l'interprète d'une partie sont prévues. Dans ces différentes hypothèses, le juge organise et conduit la procédure, s'assure du bon déroulement des échanges entre les parties, veille au respect des droits de la défense et au caractère contradictoire des débats ; il assure ainsi la police de l'audience au sens large du terme *(CJA, art. R. 731-2)*, une attention particulière devant être portée au caractère contradictoire lorsque des moyens de communication à distance sont utilisés. Le greffe dresse le procès-verbal de l'ensemble des opérations effectuées.

Plus discutable sans doute est la possibilité donnée au président de la formation de jugement de dispenser le rapporteur public, sur la proposition de ce dernier, d'exposer à l'audience des conclusions sur une requête le principe étant l'exposition publique des conclusions *(CJA, art. L. 7)*, toutes les matières étant concernées puisque l'article 8 n'en restreint pas le champ. Là encore, l'idée est de préserver le nombre de personnes dans une salle d'audience et de ne pas exposer inutilement les conclusions ; il est alors indispensable de s'assurer, comme le prévoit le CJA, que le sens des conclusions du rapporteur a bien été porté à la connaissance des parties *(CJA, art. R. 711-3)*, ce qui peut constituer au moins une garantie. Il est aussi important de déterminer le moyen par lequel les conclusions seront accessibles aux parties, dès lors qu'elles n'ont pas été exposées à l'oral. La question se posera peut-être d'un contentieux tenant à la connaissance de ces conclusions…

L'ordonnance prévoit aussi la possibilité de statuer sans audience sur des requêtes présentées en référé *(art. 9)*. Tel est déjà le cas pour les matières figurant à l'article L. 522-3 CJA (demandes ne présentant pas un caractère d'urgence ou ne relevant manifestement pas de la

juridiction administrative, ou irrecevables ou mal fondées), le juge pouvant rejeter par ordonnance motivée, sans audience. Le texte étend là encore le champ d'application du dispositif. Le juge des référés doit en informer les parties et doit fixer la date à partir de laquelle l'instruction sera close. Les décisions ainsi prises sans audience, donc sur ce fondement dérogatoire, peuvent faire l'objet d'un appel si le juge a été saisi sur le fondement de l'article L. 521-2 CJA, d'un référé-liberté. L'ordonnance donne également la possibilité au président de la cour ou au président de chambre de statuer sans audience publique sur les demandes de sursis à exécution *(art. 10)*. Par dérogation à l'article R. 741-1 CJA, selon lequel la décision (sauf ordonnance) est prononcée en audience publique, l'article 11 de l'ordonnance permet de rendre publique une décision par mise à disposition au greffe de la juridiction, évitant ainsi une audience publique.

Alors que, selon l'article R. 741-7 CJA, la minute de la décision est signée par le président de la formation de jugement, le rapporteur et le greffier d'audience, l'ordonnance autorise le président de la formation de jugement à signer seul la minute de la décision, la circulation de documents devant rester limitée, d'une part, et la signature des trois personnes mentionnées risquant d'être parfois compliquée en cas d'absences dues à la contamination par le virus. Alors que le principe *(CJA, art. R. 751-3)* est que les décisions sont notifiées à toutes les parties en cause, à leur domicile, par lettre recommandée avec avis de réception, ou à celle des personnes désignées par le mandataire, il est prévu que, lorsqu'une partie est représentée par un avocat, la notification est valablement accomplie par l'expédition de la décision à son mandataire *(art. 13)*. De même, alors que l'article R. 776-27 CJA impose que le jugement soit prononcé à l'audience si l'étranger est retenu, au jour de celle-ci, par l'autorité administrative, il est désormais établi (et ce n'est pas une simple possibilité) que les jugements relatifs aux mesures d'éloignement prises à l'encontre d'étrangers placés en centre de rétention ne sont pas prononcés à l'audience, ce qui est compréhensible au regard des contraintes sanitaires, mais qui risquent peut-être d'empêcher une parfaite compréhension de la décision par l'étranger.

2. L'aménagement des règles relatives aux délais de procédure et de jugement

Le texte distingue les délais opposables aux requérants et les délais imposés au juge.

A. Une prorogation des délais de procédure

L'ordonnance *(art. 15)* rend applicables aux procédures devant les juridictions administratives les dispositions de l'article 2 de l'ordonnance n°2020-306 du 25 mars 2020 relative à la prolongation des délais échus pendant la période d'urgence sanitaire ; ce texte précise que tout acte, recours… qui aurait dû être accompli pendant la période comprise entre le 12 mars 2020 et la fin de l'état d'urgence sanitaire *« sera réputé avoir été fait à temps s'il a été effectué dans un délai qui ne peut excéder, à compter de la fin de la période d'état d'urgence sanitaire, le délai légalement imparti pour agir, dans la limite de deux mois »*. Cette disposition apparaît de bon sens, la période de confinement rendant difficile, voire impossible, la réalisation des actes ou recours en question ; certains calculs donneront cependant peut-être lieu à discussion et interprétation. Il existe à ce principe général des dérogations : en matière de droit des étrangers, en particulier s'agissant des obligations de quitter le territoire français, le point de départ du délai de recours est reporté au lendemain de la cessation de l'état d'urgence sanitaire ; il en est de même pour les demandes d'aide juridictionnelle ; l'on aurait aimé une plus grande clarté dans la détermination du terme, par exemple le lendemain du jour déterminé pour la cessation de l'état d'urgence sanitaire. Certaines procédures ne font pas l'objet d'adaptations (contestation du refus d'entrée sur le territoire français au titre de l'asile, obligation de quitter le territoire français si l'étranger est en rétention ou en détention). Enfin, pour le contentieux électoral, des adaptations étaient nécessaires, compte tenu du fait que le premier tour des élections municipales a bien eu lieu, mais la décision de confinement et la déclaration de l'état d'urgence sanitaire ont suivi immédiatement ; les réclamations et recours contre les opérations électorales du premier tour peuvent être formés au plus tard à 18 heures le cinquième jour qui suit la date de prise de fonction des conseillers municipaux et communautaires élus au premier tour, date fixée au plus tard au mois de juin 2020.

B. Une adaptation des délais de jugement

Les mesures de clôture d'instruction, dont le terme vient à échéance au cours de la période de l'état d'urgence sanitaire, sont prorogées de plein droit jusqu'à l'expiration d'un délai d'un mois suivant la fin de cette période ou à une autre date si le juge décide de reporter le terme *(art. 16)*. Quant aux délais de jugement, ils font aussi l'objet de certaines adaptations *(art. 17)*. Ainsi, le point de départ des délais impartis au juge pour statuer est reporté au premier jour du deuxième mois suivant la date de cessation de l'état d'urgence sanitaire, sauf en matière de droit des étrangers (pas d'adaptation pour les recours contre les refus d'entrée sur le territoire français, demandes d'annulation des décisions affectant un étranger en rétention) et pour les recours contre les résultats des élections municipales, le délai pour statuer expirant le dernier jour du quatrième mois suivant le deuxième tour de ces élections, étant précisé que la date de ce deuxième tour n'est pas encore fixée (la date du 21 juin a été évoquée).

Le dispositif dérogatoire mis en place assure la continuité du fonctionnement de la justice administrative et garantit également, dans la mesure du possible, la sécurité et la santé des membres des juridictions administratives. L'ordonnance tente en effet de préserver les principes et règles du procès équitable, en particulier le contradictoire, tout en ne paralysant pas l'activité juridictionnelle.

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2. L'on peut noter qu'une telle décision est insusceptible de recours, ce qui peut être discuté au regard de la nécessaire préservation de la publicité des audiences et des débats et des garanties dues au requérant.

Pénurie de masques : une responsabilité pour faute de l'État ?[1]

Anne JACQUEMET-GAUCHÉ

La gestion de la crise sanitaire causée par le coronavirus fait déjà l'objet de vives critiques, parmi lesquelles le manque de masques FFP2 disponibles pour les personnes désirant se prémunir de la contamination et/ou ne pas contribuer à la propagation de la pandémie. Les déclarations rassurantes d'Agnès Buzyn, alors ministre de la Santé, le 26 janvier 2020 au terme desquelles « nous avons des dizaines de millions de masques en stock en cas d'épidémie, ce sont des choses qui sont d'ores et déjà programmées » se heurtent aux récentes déclarations du Gouvernement et notamment à celles de son successeur, Olivier Véran, selon lequel « en fonction de la durée de l'épidémie, nous ne savons pas si nous en aurons suffisamment à terme » (17 mars 2020). Le personnel médical, les soignants, les pharmaciens, les salariés qui continuent à travailler au contact du public en particulier dans la grande distribution et les malades, ainsi que leurs proches, relayent sur les réseaux sociaux et dans les médias cet état de pénurie ou d'accès restrictif aux masques de protection.

Face à la colère qui gronde, face à l'information parcellaire, voire à la désinformation, qui alimentent les réseaux sociaux du fait d'une méconnaissance répandue dans l'opinion publique du mécanisme de la responsabilité administrative, il paraît utile de faire le point sur le cadre de la responsabilité de l'État qui pourrait être recherchée (sur le sujet et ses autres aspects V. not. sur le blog du Club des juristes, *O. Beaud, Didier Rebut, C. Broyelle, La responsabilité des ministres et de l'État dans la gestion de la crise du Coronavirus : http://www.leclubdesjuristes.com/responsabilite-ministres-etat-gestion-crise-coronavirus/*). Évidemment, l'exercice est difficile. Lorsqu'il sera amené à se prononcer sur le sujet, dans plusieurs mois (et plus probablement dans un délai moyen de deux ans), le juge administratif procédera à une lecture rétrospective de la crise sanitaire, possédera toutes les informations nécessaires au jugement des affaires, aura à sa disposition des expertises et données précises. L'analyse proposée ici ne constitue, en revanche, qu'une projection à l'aide de la jurisprudence passée du juge administratif et en particulier du Conseil d'État. À défaut de disposer de tous les éléments utiles pour apporter une réponse définitive, deux questions seront évoquées et de simples pistes de réponse proposées.

1. Une carence fautive de l'État ?

L'État n'est pas confronté à sa première crise sanitaire. Les précédents du sang contaminé, de l'amiante, du Mediator et les futures crises, comme celle du Chlordécone, viennent à l'esprit de tous les juristes et de nombreux citoyens. Les trois premières affaires, parce qu'elles ont déjà donné lieu à décision de la part du juge administratif, permettent de tirer trois enseignements qui peuvent être transposables au coronavirus.

N'en déplaise aux partisans de la théorie du complot, l'État n'est pas responsable du coronavirus, mais uniquement de la manière dont il gère la crise sanitaire qui en découle.

La faute. Le juge administratif exigeait parfois, il y a encore quelques décennies, qu'une faute lourde soit commise pour engager la responsabilité de l'État, c'est-à-dire qu'une faute d'une particulière gravité ait été commise. Les grandes affaires sanitaires évoquées précédemment montrent que, désormais, seule une faute simple est exigée, c'est-à-dire, selon la célèbre formule de Laferrière, celle d'un « administrateur plus ou moins sujet à erreur ». Pour autant, le juge administratif continue à tenir compte des contraintes qui pèsent sur l'administration et n'exige pas que cette dernière soit omnisciente ni qu'elle prenne des précautions démesurées.

D'une part, le juge tient nécessairement compte de l'urgence dans laquelle l'État se trouve contraint d'agir, de l'ampleur de la crise sanitaire – inédite –, des incertitudes qui entourent les diverses prévisions concernant l'évolution de l'épidémie… bref, d'un ensemble de circonstances exceptionnelles qui contribuent à ce que la faute ne soit reconnue qu'avec parcimonie. Cependant, le coût des mesures n'est pas un argument qui exonère l'État au vu de la somme modeste (au regard d'autres dépenses induites par la crise) que représentent l'achat et le stockage de masques. De même, si la force majeure exonère l'État de toute responsabilité, il semble difficile d'admettre que la survenance d'une crise sanitaire, aussi exceptionnelle soit-elle, constitue au XXIe siècle et selon les trois critères de la force majeure, un évènement extérieur, imprévisible et irrésistible pour l'État français, d'autant que ce dernier dispose de plusieurs outils pour anticiper ou gérer les crises, au titre desquels l'Établissement de Préparation et de Réponse aux Urgences Sanitaires (EPRUS) créé en 2007 – puis dissous en 2016 et intégré dans l'agence Santé publique France.

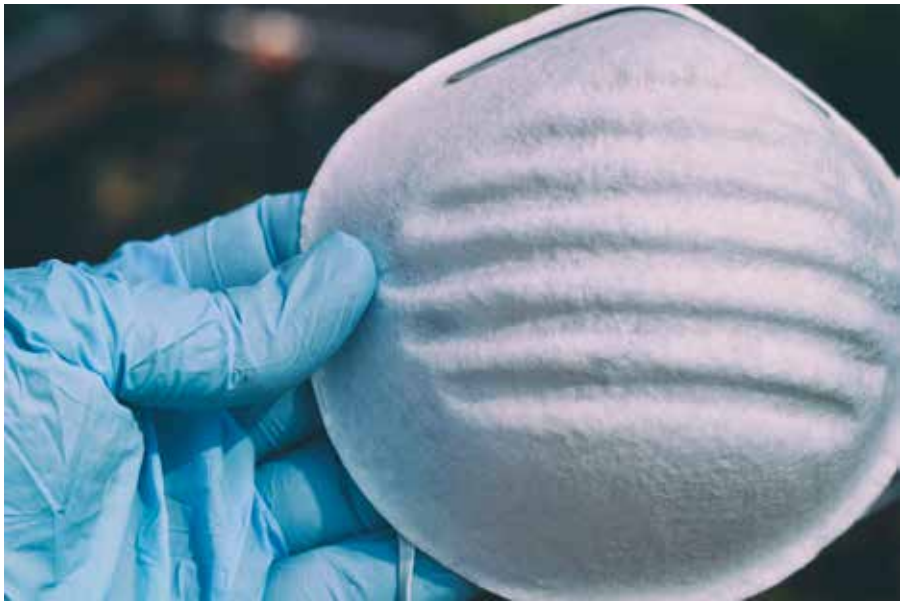
D'autre part, un difficile équilibre est à trouver dans la mesure où l'excès de précaution est aussi susceptible d'être reproché à l'État comme le prouvent les critiques (uniquement politiques et non juridiques) essuyées par Roselyne Bachelot à l'issue de la crise du H1N1 en 2010 : en tant que ministre de la Santé, elle avait commandé des masques et vaccins en quantité, qui n'ont que très peu ou pas servi. Cette recherche d'un subtil équilibre – certains diront cette particulière bienveillance – de la part du juge vis-à-vis de l'administration est perceptible en particulier dans la façon dont celui-ci procède pour retenir la carence, mais aussi la date à partir de laquelle cette dernière est caractérisée.

La carence. Dans la jurisprudence administrative, toute carence est fautive ou, pour le dire autrement, dès lors que le juge

reprend à son compte le terme de carence, cela signifie qu'il reconnaît la faute de l'État. Le reproche principal fait à l'État dans les affaires passées porte sur son inaction : inaction à retirer les lots de sang contaminé ; inaction à prendre des mesures et à les faire appliquer pour lutter contre l'exposition des travailleurs à l'amiante ; inaction à retirer l'autorisation de mise sur le marché du Mediator dans le cadre de la police de pharmacovigilance. L'État se voit reprocher son inaction totale ou partielle, c'est-à-dire qu'il peut aussi lui être fait grief de ne pas avoir pris toutes les mesures qui s'imposaient, même s'il a partiellement agi.

N'en déplaise aux partisans de la théorie du complot, l'État n'est pas responsable du coronavirus, mais uniquement de la manière dont il gère la crise sanitaire qui en découle. S'agissant plus précisément des masques, trois sortes de carence sont, théoriquement, envisageables et peuvent être aussi bien de nature juridique (par ex. ne pas avoir édicté les bonnes mesures) que matérielle (par ex. ne pas avoir commandé et livré des masques). La première porte sur une planification générale des *scenarii* de crise et sur une mauvaise évaluation des besoins sanitaires en cas de crise. Ainsi, serait reproché à l'État un manque de précaution et/ou de prévention pour ne pas avoir constitué de stocks suffisants, en temps normal, afin de prévenir un risque de rupture de mise à disposition des masques. La deuxième carence pourrait porter sur la gestion du début de crise, les pouvoirs publics ayant trop attendu pour passer une commande de masques et augmenter les stocks dans l'urgence, alors même que la situation n'était pas entièrement inédite au vu du précédent chinois, confronté au virus plusieurs semaines avant la France. La troisième serait une carence au pic de la crise, par exemple si des masques disponibles en un lieu n'étaient pas livrés en temps utile sur l'ensemble du territoire, si des mesures juridiques n'étaient pas prises ou mal appliquées pour la détermination de besoins prioritaires.

La temporalité de la faute. Nul doute que si la carence fautive de l'État devait être retenue s'agissant des masques de protection, la période au cours de laquelle la faute sera considérée comme caractérisée témoignera de la prise en compte des circonstances factuelles dans lesquelles l'action de l'État s'est inscrite. Pour bien comprendre la façon dont le Conseil d'État procède, les précédentes carences en matière sanitaire sont une référence précieuse. Pour le sang contaminé, les premiers cas ont été connus en 1981, le fait que le sang était vecteur de contamination a été établi par la communauté scientifique en novembre 1983, tandis que l'efficacité du procédé de chauffage du sang était connue par la communauté scientifique en octobre 1984. Le Conseil d'État n'a toutefois retenu la faute de l'État qu'à partir du 22 novembre 1984, date à laquelle les faits ont été consignés dans un rapport par l'un des épidémiologistes à la direction générale de la santé (*CE, ass., 9 avr. 1993, n° 138653 : JCP G 1993, II, 22110, note C. Debouy*).



Quant au Mediator, bien que les premières alertes soient remontées en 1995, le Conseil d'État n'a retenu la faute de l'administration qu'à partir de la mi-1999 « compte tenu des nouveaux éléments d'information dont disposaient alors les autorités sanitaires », quant aux dangers du médicament (*CE, 9 nov. 2016, n° 393904 : JCP G 2017, 58, note J.-Ch. Rotoullié*). Le juge peut s'appuyer aussi bien sur des rapports que sur des déclarations de la part de personnalités politiques. Dans un contexte médiatique renouvelé, on pourrait aussi imaginer que des articles de presse ou des *tweets* soient invoqués pour établir la date à partir de laquelle la faute est établie.

Avec tous les risques que la prédiction comporte, il semble délicat que le juge administratif accepte de reconnaître une carence avant même le début de l'épidémie de coronavirus. Ce faisant, il s'immiscerait excessivement dans des décisions politiques, dans la manière dont les politiques publiques sont déterminées par les gouvernants. Quels stocks stratégiques effectuer pour faire face à une menace sanitaire, écologique ou à une catastrophe naturelle ? Cette question est éminemment politique (comme le prouve notamment la primauté des considérations budgétaires après 2011 concernant la gestion des stocks de masques). Il n'appartient pas au juge administratif d'y répondre. En revanche, il n'est pas exclu que le manque de réaction ou que la réaction tardive des pouvoirs publics et surtout de la ministre de la Santé soit considérée comme une carence fautive alors que, dès décembre 2019/janvier 2020, plusieurs alertes indiquaient qu'une épidémie était imminente en France, à la suite de la Chine. Ainsi, les « regrets » exprimés dans les colonnes du *Monde* le 17 mars 2020 par l'ancienne ministre de la Santé qui affirmait avoir eu connaissance de la situation en Chine dès le 20 décembre 2019 pourraient faciliter la reconnaissance de la carence. De même, s'il était prouvé prochainement que des masques sont disponibles actuellement sur le territoire, mais mal distribués, là aussi la carence pourrait être retenue.

Quand la carence cessera-t-elle ? Dans les contentieux précités, la fin de la défaillance publique était assez facile à borner : le retrait des lots de sangs non chauffés ou

du Mediator du marché, l'interdiction de l'amiante. Avec les masques, l'hypothèse n'est pas celle d'une interdiction ou d'un retrait, mais d'une mise à disposition, ce qui rend également complexe la détermination de la fin de la carence. Ni la réquisition de stocks de masques (par le décret n° 2020-247 du 13 mars 2020 relatif aux réquisitions nécessaires dans le cadre de la lutte contre le virus covid-19 : *JO 14 mars 2020 ; JCP A 2020, act. 162, obs. P. Villeneuve*) ni la commande massive de masques annoncée le 21 mars 2020 par Olivier Véran ne saurait suffire pour que la carence fautive cesse : le juge contrôle aussi l'effectivité de la mesure, c'est-à-dire le fait que des masques soient disponibles en quantité suffisante. Une incertitude demeure : la mise à disposition devra-t-elle concerner uniquement les personnes les plus exposées ou toute la population ?

2. Quelle indemnisation des victimes ?

Même si elle venait à être reconnue, la faute ne suffirait pas à engager la responsabilité de l'État. En droit positif, la victime doit en plus apporter la preuve d'un préjudice et du lien de causalité entre celui-ci et la carence. En l'état actuel des connaissances scientifiques, les déclarations des épidémiologistes sont unanimes pour affirmer que le port du masque FFP2 constitue une mesure de protection efficace pour lutter contre la transmission du coronavirus, ce qui pourrait faciliter l'établissement du lien de causalité.

Soignants, livreurs, employés de supermarché, mais aussi toutes les personnes exposées, au contact des malades ou elles-mêmes malades, sont susceptibles de former un recours. Des préjudices de toute sorte pourront être invoqués. L'on songe ici tant aux préjudices patrimoniaux qu'extra-patrimoniaux, en particulier au préjudice d'affection lié au décès d'un proche, à des incapacités permanentes, voire simplement à l'angoisse d'être exposé à la maladie – mais il faut dans ce dernier cas des éléments circonstanciés. Le juge administratif est plutôt généreux ces dernières années, sa jurisprudence tendant à l'extension de la reconnaissance des chefs de préjudice.

Néanmoins, il n'est pas à exclure que le juge voie dans l'absence de port du masque uniquement une perte de chance, la perte

d'une chance de se soustraire à la maladie (raisonnement fréquent dans ses décisions, dès lors que le préjudice est multicausal). Cela conduirait à diminuer le montant de l'indemnisation. Un autre facteur de réduction de l'indemnisation serait celui de la faute ou du fait de la victime : la victime a-t-elle accepté ce risque, par exemple en travaillant volontairement ou a-t-elle pris des risques inconsidérés, en ne respectant pas certains gestes barrières ? La faute du tiers pourrait aussi être opposée aux victimes devant le juge administratif, par exemple celle de l'employeur des salariés du secteur privé. Si ces hypothèses ne diminuent en rien la faute de l'État, le montant de l'indemnisation, lui, peut l'être fortement. Il n'est pas exclu non plus que, dans certaines hypothèses, le juge en vienne même à retenir l'absence de préjudice ou de lien de causalité et donc que la responsabilité ne puisse pas être engagée.

Enfin, il faut rappeler que le seul pouvoir du juge dans le cadre de la responsabilité administrative est de condamner l'État au versement d'une compensation pécuniaire. *In fine,* les contribuables seront donc indirectement mis à contribution, la condamnation pécuniaire pesant sur le budget de l'État. L'engagement de la responsabilité aurait néanmoins une vertu symbolique pour les requérants – la reconnaissance de leur statut de victime – et stigmatisante pour l'État – à travers l'identification d'une faute. On aimerait que la condamnation ait aussi des vertus pédagogiques, aux termes desquelles l'État serait incité à tirer pour l'avenir les leçons de la présente crise sanitaire, mais on doute qu'une telle action suffise à arracher le masque de l'incurie étatique.

NDLR : Sur les autres domaines du droit impactés par le Covid-19, V. déjà *L. Mayaux, Coronavirus et assurance : JCP G 2020, act. 295, Libres propos. – A. Discours, S. Qu et J. Buhart, L'impact du covid-19 sur l'exécution des contrats. Étude comparative droit chinois / droit français : JCP G 2020, act. 329, Libres propos.* – V. Dans ce numéro, *A. Levade, État d'urgence sanitaire : à nouveau péril, nouveau régime d'exception : JCP G 2020, act.369. - P. Mistretta, Coronavirus COVID-19 : un droit pénal chimérique : JCP G 2020, act. 370, Libres propos. - D. Roman, Coronavirus : des libertés en quarantaine ? : JCP G 2020, act. 372, Libres propos.*

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Assurer le service, quoiqu'il arrive : mais que peut faire le bâtonnier au temps du coronavirus ?

Michel FORGES

A ceux qui me demandaient, il y a près de quatre ans aujourd'hui, si je pouvais être un bon bâtonnier, je répondais qu'il fallait avoir exercé cette mission pour le savoir. Que dire alors d'être bâtonnier dans la tourmente d'une crise comme celle à laquelle le coronavirus nous confronte ?

Je vous livre, dans les lignes qui suivent, quelques préoccupations qui ont caractérisé ma mission de bâtonnier depuis le 15 mars 2020.

Le barreau, un oublié du confinement… parmi d'autres

Le mercredi 18 mars 2020, la Belgique est entrée en confinement, après que diverses recommandations préalables aient déjà été émises : les Belges ont été priés de rester chez eux pour éviter la diffusion du coronavirus, et il a été demandé à la population de limiter les déplacements à l'« essentiel ».

Que fallait-il entendre par l'« essentiel » ? D'emblée, il a été question de « santé, nourriture, banque, pharmacie, poste, essence, aide aux gens dans le besoin » ; ce n'est que dans un second temps qu'on s'est aperçu qu'un sort devait être réservé au fonctionnement de la Justice et au travail des avocats.

A tort ou à raison, le gouvernement, soucieux de respecter la séparation des pouvoirs a adopté peu de mesures contraignantes à l'égard de la Justice, et les autorités judiciaires ont pu agir de manière autonome, de même que les barreaux ; aucune autorité supérieure n'est apparue d'emblée pour dicter des normes générales.

Or, les avocats attendaient des directives, des réactions et des consignes.

Les affaires fixées allaient-elles pouvoir être plaidées ? Les délais de procédure devaient-ils toujours être respectés ? Quid des recours et du dépôt des actes de procédure ? Les affaires pénales, impliquant notamment le transfert de détenus seraient-elles prises ? Les greffes fonctionnaient-ils toujours ?

Les avocats pouvaient-ils toujours visiter leurs clients en prison ? Que penser des gardiens zélés qui interdisent aux avocats de porter un masque sanitaire ? Le refus d'une procédure écrite peut-il constituer un manquement à nos règles déontologiques? Est-il admissible de demander un jugement par défaut dans le contexte actuel ?

Dès le début des mesures exceptionnelles qui ont été prises, que l'on pourrait résumer par l'horrible formule « méfiez-vous les uns des autres », chaque secteur d'activité a souffert de l'absence de prise en compte de ses particularités : le barreau n'a pas fait exception.

> Tout n'est certes pas encore au point, mais nous découvrons tous les possibilités de programmes informatiques que nos machines contiennent déjà, et les habitudes se brisent.

Préserver l'organisation interne

Pour assurer le strict respect des règles de confinement et concilier celui-ci avec le bon fonctionnement des services de l'Ordre, il a rapidement été décidé de fermer le secrétariat de l'Ordre et de dispenser les membres du personnel ainsi que du cabinet de s'y déplacer.

Les moyens techniques nécessaires ont été mis en place pour que les uns et les autres puissent poursuivre leurs activités par télétravail.

De cette manière, les services de l'Ordre sont restés opérationnels et joignables, tant par voie électronique que par téléphone, grâce à la déviation de chaque téléphone.

A l'heure actuelle, le courrier électronique entrant est dépouillé comme à l'accoutumée et transmis à son destinataire qui y réserve les suites utiles.

Les membres du cabinet en charge de la déontologie demeurent joignables, leurs lignes téléphoniques directes et adresses électroniques étant déviées.

La nécessaire communication

On le sait : dans de telles situations, les responsables, ou ceux qui sont perçus comme tels, doivent communiquer, rassurer, renseigner les marches à suivre et rendre compte de ce qu'ils font. Pour les avocats de son barreau, le bâtonnier doit indiquer la marche à suivre.

Par bonheur, nous disposons d'outils de communication : une lettre d'information hebdomadaire, qui peut être adaptée en temps réel, en fonction de l'actualité, et qui est diffusée par voie électronique à tous les membres du barreau, la possibilité de diffuser des flashs d'information, de la même manière, et un site web, qui peut concentrer toutes sortes d'informations, susceptibles d'être mises à jour au fur et à mesure.

Dès l'entrée en vigueur des premières mesures, les ordres communautaires (OBFG – Ordre des Barreaux Francophone et Germanophone – et OVB – Orde van Vlaamse Balies) ont joué un rôle actif pour que des solutions claires soient adoptées, en concertation avec les autorités judiciaires ; cela nous a permis de suggérer très vite des solutions pour remédier aux suppressions d'audiences et à la paralysie de plusieurs services indispensables.

Tous les contacts entretenus avec les chefs de corps, responsables de la magistrature, ont été activés, pour que l'organisation de chaque juridiction soit connue et puisse être répercutée ; c'est que chaque juridiction connaît des situations particulières, et

doit faire face à des urgences spécifiques. Certaines affaires ne peuvent pas attendre.

Grâce à ces contacts, le site web du barreau a pu tenir systématiquement à jour les ordonnances et les mesures qui règlent le fonctionnement des juridictions, des cris d'alerte quant à la situation des détenus ou des réfugiés ont pu être diffusés, de même qu'un message général de report de tout ce qui n'est pas urgent et d'une priorité à donner à la protection de la santé.

Un appel a été lancé pour que les avocats évitent de surcharger les tribunaux, pour que les avocats s'abstiennent de demander des défauts dans des situations incertaines, et pour qu'ils accueillent avec bienveillance les demandes de remise ou de report.

Un principe a été adopté : l'arrêt de toute activité impliquant un contact rapproché avec d'autres personnes, le report de toutes les audiences autres qu'absolument indispensables et, pour celles-ci, une limitation des rencontres physiques et une représentation aussi générale que possible des clients par leurs avocats, même dans les cas où leur comparution personnelle est requise par la loi.

Malheureusement, pour des raisons diverses parfois difficiles à identifier, tous les avocats ne prennent pas connaissance des informations diffusées par les canaux certes modernes mais officiels, pour leur préférer des déclarations partielles voire inexactes, souvent assimilables à des rumeurs, diffusées via les réseaux sociaux, sur des groupes fermés ou non, qui donnent lieu à de très nombreux échanges (du type Facebook ou WhatsApp, notamment).

Le phénomène n'est pas triste en soi (après tout, si cela permet de s'entraider, ou de se soutenir), mais que doit faire le bâtonnier quand il constate que bon nombre de questions posées via ces réseaux reçoivent des réponses inexactes, alors que la réponse correcte figure sur le site de l'Ordre, ou que des reproches d'inaction sont émis, alors que des explications ont été fournies en bonne place et que des initiatives ont été prises?

Une communication immédiate est en concurrence avec une communication plus durable ou plus profonde… et certains destinataires semblent préférer une communication partielle ou inexacte mais immédiate à une communication fiable mais différée !

La diffusion des opinions, des conseils et des inquiétudes

Et que dire des réponses, ou des réflexions, conseils ou inquiétudes qu'il faut bien absorber d'une manière ou d'une autre, dès lors que le tout inonde votre ordinateur ?

Soudain, un temps considérable doit être consacré à la prise de connaissance des suggestions des uns et des autres, et des plaintes de toutes sortes que la situation exceptionnelle génère.

Tout n'est pas à jeter, loin de là.

Mais la seule idée que des procédures écrites pourraient être une bonne solution pour ne pas geler les procès civils a, par exemple, donné lieu à des commentaires multiples, plus savants les uns que les autres, qui tiennent à la mission même qui doit être assignée à la Justice.

Un projet d'arrêté royal de pouvoirs spéciaux évoquant notamment une prolongation de délais et des aménagements de procédure a donné lieu à une avalanche de réflexions craintives, autour de la peur de faire pire que mieux en adoptant le moindre changement.

Avec les meilleures intentions du monde, des acteurs de tout bord croient nécessaire de vivre « à cerveau ouvert » et jugent indispensable d'attirer l'attention des responsables sur les effets pervers des mesures envisagées.

A raison, les mêmes s'érigent en défenseurs de nos valeurs démocratiques et répandent urbi et orbi leurs idées aussi bonnes que

soudaines pour que les mesures sanitaires ne servent de prétexte à la destruction de nos libertés fondamentales.

Mais ce n'est pas le moment de revoir l'aérodynamisme du bateau quand il menace de couler ; après avoir répondu aux demandes d'avis qui nous ont été transmises, et nous avons fait connaître notre conviction que quelles que soient les règles adoptées, nous ferions face, en collaboration avec les magistrats et d'une manière générale avec tous les acteurs de la justice (c'est-à-dire même avec ceux qui ont peur de tout, et d'abord de tout changement) pour que cela fonctionne au mieux, le cas échéant sur base d'accords particuliers avec les juridictions.

Les technologies à l'honneur

L'Ordre avait déjà entrepris, par le développement d'un « incubateur », de diffuser des formations pour rendre les technologies numériques accessibles à tous les avocats.

Très vite, des relais ont ainsi pu se construire et permettre, en pleine crise du coronavirus, de continuer à croire au bon fonctionnement de nos cabinets, au maintien de nos réunions et contacts indispensables et au développement d'une Justice plus moderne et plus efficace que jamais : place aux réunions virtuelles, aux plaidoiries par vidéoconférence, à la consultation en ligne des dossiers du greffe, à la remise électronique des dossiers de pièces et des conclusions…

Tout n'est certes pas encore au point, mais nous découvrons tous les possibilités de programmes informatiques que nos machines contiennent déjà, et les habitudes se brisent.

Dans la foulée, la fermeture de la bibliothèque a été compensée par un geste des éditeurs juridiques, qui ont permis d'accéder gracieusement à leurs banques de données pendant le temps du confinement.

Les répercussions économiques

Les répercussions économiques de la crise frapperont les avocats, dont la trésorerie va souffrir, au point de les empêcher de payer à temps tantôt leurs cotisations sociales ou professionnelles, tantôt les sommes dues à leur personnel, et à leurs stagiaires ou collaborateurs.

En dépit du recours aux technologies, le rythme des audiences et des réunions, le développement des affaires sont cassés ; nous devons nous attendre à un assèchement de nos revenus et à des difficultés de trésorerie, ne fût-ce qu'en raison des problèmes financiers de nos clients.

Tous les cabinets sont ou seront affectés.

En complément des mesures prises par l'Etat et les régions, les autorités de l'Ordre tentent de mettre en place pour les avocats l'accès à un crédit de caisse à des conditions favorables qui permettrait de soulager temporairement une trésorerie exsangue. De même, le conseil de l'Ordre examine la possibilité d'assouplir pour les avocats qui pratiquent l'aide juridique, les conditions d'accès au système d'avance sur indemnités.

Les stagiaires et les collaborateurs sont particulièrement fragilisés : des stagiaires sont confrontés tantôt à la menace d'une brusque rupture de leur contrat de stage, tantôt à des décisions unilatérales quant à la poursuite de la collaboration.

Cette situation a été examinée par le conseil de l'Ordre, qui entend préserver la solidarité des membres du barreau, principe fondateur de notre profession : la crise actuelle ne peut en aucun cas constituer un motif justifiant à lui seul la rupture d'un contrat de stage ou de collaboration. En revanche, la perte de travail et la perte de revenus qui en est la conséquence peuvent constituer un cas de force majeure.

Face à cette situation, le conseil de l'Ordre a adopté des lignes directrices, qui interdisent, par exemple, que la suspension des contrats de stage ou de collaboration pour des raisons de force majeure interviennent avant le 30 avril 2020.

Il a de même été prévu que les avocats confrontés à des difficultés financières en raison de la crise du coronavirus puissent obtenir un report ou l'étalement du paiement de leurs cotisations, à l'intervention du trésorier ou du service social du barreau.

D'autres initiatives seront prises dans le même sens.

Dans la tourmente, rassembler sans diviser

L'avenir nous réserve sans aucun doute bien des difficultés pratiques, et la tentation sera grande, pour chacun, d'en faire porter la responsabilité par d'autres ; qui sera responsable des reports ? Ces avocats spécialistes des procédures dilatoires ? Ces juges désorganisés ?

Répandre des considérations caricaturales sur les uns et les autres ne sert à rien, spécialement dans un contexte aussi exceptionnel. Les difficultés pratiques des juridictions et de leurs greffes, les contraintes liées à la collégialité de certains sièges, les difficultés conjuguées des avocats et de leurs clients, ne peuvent pas être minimisées.

Mais ces difficultés ne peuvent nous empêcher de garder le cap vers l'objectif annoncé, de garantir la continuité de la Justice, et d'accepter de perfectionner chaque jour les mécanismes adoptés avec les moyens du bord, en accord avec les magistrats en général et les chefs de corps en particulier.

C'est par un dialogue constant, en faisant la nécessaire balance des intérêts en présence, entre ceux qui veulent une décision rapide et ceux qui demandent que les règles de l'Etat de droit ne soient jamais sacrifiées que nous éviterons les solutions injustes et que nous sauvegarderons les intérêts supérieurs des justiciables.

Tel est le rôle du bâtonnier dans la tourmente : préserver les valeurs du barreau, œuvrer pour rassembler, éviter le chacun pour soi, rester sur le pont quoi qu'il arrive… chaque jour recréer la confiance et ressusciter l'espoir.

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The COVID-19 Pandemic Immigration Response: USA and Canada

George AKST & Jacqueline BART*

Introduction

As the COVID-19 outbreak has escalated throughout the world, the US and Canadian governments have approached travel restrictions into their countries in ways that are both similar and, in some ways remarkably different.

Canadian Immigration Response

As the COVID-19 outbreak has escalated both in and outside of Canada, the Government of Canada's response to the pandemic has been constantly evolving in recent weeks to manage the spread of the outbreak while maintaining essential economic activity, trade, public health and food security. From implementing facilitative measures for immigration applicants in hot-spot areas to enforcing border closures and mandatory isolation orders, the Canadian government's response to COVID-19 has had significant implications on the administration of Canada's immigration program.

(a) Beneficial Measures for Immigration Applicants

In early February 2020, Canada's administrative immigration agency, Immigration, Refugees and Citizenship Canada (IRCC), began implementing special pro-immigration measures in order to provide flexibility for immigration and citizenship applicants living in hot-spot areas, such as China, Iran and South Korea, who have been impacted by unprecedented events relating to COVID-19. These beneficial measures include extensions of time to obtain necessary documentation and the ability to request urgent processing. To date, IRCC has since expanded certain special measures to all applicants, irrespective of country of origin, in an effort to alleviate the impact of service disruptions on immigration and citizenship applicants.

(b) Restrictions on Travel

The Government of Canada has also implemented a number of travel restrictions which have also greatly impacted immigration to Canada. These travel restrictions have created a complex web of rules that apply differentially to air and land-based travel, as well as for travelers from the United States compared to other countries.

1. Restrictions on travel from countries other than the United States

One week after the World Health Organization declared the COVID-19 outbreak a global pandemic, the Minister of Transport issued the first '*Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19*' (the "*Interim Order*"), pursuant to the authority granted under the *Aeronautics Act*.[1] The *Interim Order* prohibits most foreign nationals (i.e. non-Canadian citizens or permanent residents) from boarding an aircraft for an international flight to Canada, by imposing a series of prohibitions and positive obligations upon commercial airlines, with financial penalties for contravention.

Under the first *Interim Order,* certain groups of people were exempted from these travel restrictions including spouses, common-law partners and children of Canadians or permanent residents, those invited by the Minister of Health to assist with the COVID-19 response, and persons who presence is in the national interest.

However, in recognizing the vital role that foreign workers play in the Canadian economy and the importance of keeping families united, the Canadian government subsequently released a series of amendments to the original Interim Order, to facilitate travel to Canada for certain groups of people. Currently in its fourth iteration,[2] the *Interim Order* now restricts all air-based travel to Canada, from any country *other than the United States*, with additional exemptions for emergency service workers, persons making medical deliveries, foreign workers, some international students, and parents of Canadians or permanent residents.

On March 20, 2020, pursuant to the *Quarantine Act*[3], the Canadian government issued an Order-in Council[4] (or "*Emergency Order*"), thereby prohibiting all foreign nationals from entering Canada, if arriving from countries other than the United States, with some enumerated exceptions. While the *Interim Order* operates to restrict travel by limiting who can board a flight to Canada, the prohibitions under the *Emergency Order* restricts who is able to enter the country at a Canadian port of entry.

At the date of writing, the list of exemptions under both the *Interim Order* and the *Emergency Order* have been consolidated and includes: immediate family members[5]

of Canadians and permanent residents; persons authorized in writing by a consular officer or immigration official to travel to Canada to be reunited with immediate family members; select international students and study permit holders; temporary workers and approved work permit applicants; permanent resident visa holders; accredited officials and diplomats; protected persons; people whose presence is deemed to be in the national interest; emergency service providers; those who are entering Canada to deliver or maintain medical equipment; those making medical deliveries; and people in transit to another country.[6]

(c) Restrictions on Travel from the United States

Foreign nationals entering from the United States are prevented entry to Canada for leisure and tourist travel. The government continues to allow flow of goods and persons across the Canada-U.S. border for essential services critical to Canada's economy.[7] Under the Order-in Council (P.C. 2020-0185)[8] (or "*Emergency Order 2020-0185"*), all travelers from the United States are prohibited from entering Canada if they exhibit any symptoms of COVID-19, including fever, cough or breathing difficulties.

Whether travelling by land or by air, all travelers from the United States who are asymptomatic may still be prohibited from entering Canada if they are seeking to enter for an "optional or discretionary purpose, including tourism, recreation and entertainment" or if they have been outside the U.S. or Canada in the 14 days prior to their entry to Canada.[9]

(d) Mandatory Isolation

Finally, pursuant to the Order in Council (P.C. 2020-0175)[10], all individuals (including Canadian citizens) who enter Canada by land or air are required to self-isolate for 14 days. The penalty for non-compliance with the mandatory isolation order includes fines of up to CAD $1,000,000 and three years' imprisonment.

Again, certain groups of people deemed critical to Canada's COVID-19 response, including medical care or supply providers, emergency service providers, and 'essential service' workers by the Chief Public Health Officer are exempted from the mandatory isolation requirement. While there is no explicit definition of who is an 'essential service worker', the Public Health Agency of Canada has indicated that 'essential workers' are those who are "considered critical to preserving life, health and basic societal functioning. This includes, but is not limited to, first responders, health care workers, critical infrastructure workers, hydro and natural gas, and workers who are essential to supply society by critical goods such as food and medicines."[11]

USA's Immigration Response

The COVID-19 Pandemic and Immigration to the US

Since President Trump took office in January 2017, he has used the power of his office to issue many Executive Orders and Proclamations on the subject of immigration to the US. Some of these have been quite controversial, such as his first Executive Order on the subject, the so-called "Muslim Ban", issued on January 27, 2017, which, in fact, was a travel restriction aimed at certain Muslim-majority countries.

The latest exercise of his executive authority can be seen in a series of recently-issued Proclamations aimed at controlling the entry of travelers from certain countries with high rates of Coronavirus (COVID-19) infection. The first of these, Proclamation 9984, was issued on January 31, 2020. It suspended entry of certain immigrants and nonimmigrants who were physically present within China, excluding Hong Kong and Macau, in the 14 days immediately prior to their entry or attempted entry into the United States. The ban became effective on February 2, 2020.

Despite much confusion at the time of its issuance, this ban did not apply to US citizens, permanent residents (green card holders), or a host of other specified travelers returning to the US.

This was followed on February 29, 2020, by Proclamation 9992, which suspended and limited entry of all individuals who were physically present within the Islamic Republic of Iran during the 14-day period immediately preceding their entry or attempted entry into the United States. This proclamation went into effect on March 2, 2020. Again, this was subject to certain exceptions.[12]

The next Coronavirus-related travel restriction, Proclamation 9993, was issued on March 11, effective on March 13, 2020. This proclamation again, ***with some exemptions***, suspended and limited entry of certain immigrants and nonimmigrants, who were physically present within the European Schengen Area[13] during the 14-day period immediately preceding their entry or attempted entry into the United States.[14] Although the President stated in an address to the nation that this restriction would only last 30 days, this proclamation does not automatically sunset in 30 days. It will remain in effect until affirmatively terminated by the President.

Further tightening of the virus-related travel ban occurred on March 20, 2020, when the US issued Joint Initiatives with both Canada and Mexico, effective on March 21, 2020, restricting travelers from crossing the land borders between these countries for non-essential purposes. Non-essential travel is defined as tourism or recreational in nature and is banned for at least 30 days, while commercial travel is still permitted.

As of this writing, all of these Proclamations remain in full force and effect.

The authority under which the President can authorize these travel restrictions is found in the Immigration and Nationality Act (INA) §§ 212(f) and 215(a).

The first part of INA § 212(f) codifies the broad authority of the President of the United States "to suspend, by presidential proclamation, the entry of any aliens or of any class of aliens if the President determines that such entry would be detrimental to the interests of the United States."

INA § 215(a)(1) further affirms that **"**Unless otherwise ordered by the President, it shall be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." Many of the President's proclamations issued since he took office have been criticized by the public and even overturned by the courts. However, faced with the

unprecedented global impact of the COVID-19 pandemic, the recent travel restrictions implemented by the Administration have been far less controversial.

Conclusion

In the months since the COVID-19 outbreak began, the Government of Canada has utilized and adapted a number of legislative and executive mechanisms in order to protect public health, while also aiming to moderate the impact of COVID-19 on Canada's economy and immigration systems. While some of these measures are currently effective until the end of June 2020, given the rapidly evolving nature of the COVID-19 pandemic, it remains to be seen what amendments or further measures will be introduced in the months to come.

Likewise, in the USA, immigration rules where introduced to limit entry of certain nationals to protect the health and safety of Americans. The situation in the US continues to likewise remain fluid and ongoing restrictions will lift only when both economic and public health concerns are satisfactorily addressed. Most notably, the definition of what is essential, for travel purposes, is much more permissive in the USA than it is in Canada. However, Canada is authorizing 'essential workers' (a concept that is meant to be restrictive, yet remains largely under-defined) in addition to work permit and study permit holders to re-enter Canada, provided that they meet the government's health guidelines.

Another key distinction between jurisdictions, is that Canada's first response to the Covid-19 pandemic was to institute beneficial measures for current immigration applicants such as extending visas or limitation periods in order to enable them to continue their applications. The USA has introduced no such measures.

Although it is evident that both countries have placed health and safety their nationals above all other immigration issues, this international crisis has highlighted our key immigration differences, namely, that the USA gives first place to foreign worker mobility in the economy generally. By contrast, Canada, gives first place to essential workers in the health, safety, medical supplies, food, agriculture and, restrictively, to other supply chain and free trade activities. Canada also protects, welcomes and facilitates the entry of all current temporary status holders and immigration applicants to/in Canada.

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1. (R.S.C., 1985, c.A-2), section 6.41(1).

2. Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19, No. 4 (dated April 6, 2020).

3. (S.C. 2005, c. 20), section 58.

4. *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from countries other than the United States)*, (P.C. Number 2020-0162).

5. Pursuant to Section 1 of the Order-in-Council entitled *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from any country other than the United States), P.C. Number 2020-0184*, an "immediate family member" in respect of a person is defined as: (a) the spouse or common-law partner of the person; (b) a dependent child of the person or the person's spouse or common-law partner; (c) a dependent child of a dependent child; (d) the parent or step-parent of a person or the person's spouse or common-law partner and, (3) the guardian or tutor of the person.

6. For a complete list of exemptions, please refer to Section 3 of the Order-in Council, P.C. Number 2020-0184, entitled *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from countries other than the United States), P.C. Number 2020-0184.*

7. Public Safety Canada, "Guidance on Essential Services and Functions in Canada During the COVID-19 Pandemic" (dated April 4, 2020), available at: https://www.publicsafety.gc.ca/cnt/ntnl-scrt/crtcl-nfrstrctr/esf-sfe-en.aspx

8. Order-in-Council, P.C. Number 2020-0185, entitled *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States).*

9. Order-in-Council, P.C. Number 2020-0185, section 3-4.

10. Order-in-Council, P.C. Number 2020-0175 issued pursuant to section 58 of the *Quarantine Act*, entitled *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation).*

11. Public Health Agency of Canada, "Preventing COVID-19 in the Workplace: Employers, Employees and Essential Service Workers", (March 31, 2020), available at: www.canada.ca/en/public-health/services/publications/diseases-conditions/preventing-covid-19-workplace-employers-employees-essential-service-workers.html.

12. This proclamation does not apply to U.S. citizens or lawful permanent residents of the United States. Foreign diplomats traveling to the United States on A or G visas are excepted from this proclamation. Other exceptions include certain family members of U.S. citizens or lawful permanent residents, including spouses, children (under the age of 21), parents (provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21), and siblings (provided that both the sibling and the U.S. citizen or lawful permanent resident are unmarried and under the age of 21). There is also an exception for airline and ship crews traveling to the United States on C, D or C1/D visas.

13. Although referred to as the European travel ban, this restriction only applies to travelers from certain Schengen area countries. For purposes of this proclamation, the Schengen Area comprises 26 European states: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

14. Moreover, in addition to the exceptions set forth in the earlier travel bans, the suspension and limitation on entry pursuant to this Proclamation was expanded and *also* does not apply to:

- any alien who is the child, foster child, or ward of a U.S. citizen or LPR, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;
- any alien traveling at the invitation of the U.S. Government for a purpose related to containment or mitigation of the virus;
- any alien traveling pursuant to a C-1, D, or C-1/D nonimmigrant visa as a crewmember or any alien otherwise traveling to the U.S. as air or sea crew;
- any alien (A) seeking entry into or transiting the U.S. pursuant to one of the following visas: A-1, A2, C-2, C-3 (as a foreign government official or immediate family member of an official), E-1 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 (or seeking to enter as a nonimmigrant in one of those NATO categories); or (B) whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;
- any alien whose entry would not pose a significant risk of introducing, transmitting, or spreading the virus, as determined by the Secretary of Health and Human Services, through the CDC Director or his designee;
- any alien whose entry would further important U.S. law enforcement objectives, as determined by the Secretary of State, Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee;
- any alien whose entry would be in the national interest, as determined by the Secretary of State, Secretary of Homeland Security, or their designees; or
- members of the U.S. Armed Forces and spouses and children of members of the U.S. Armed Forces.

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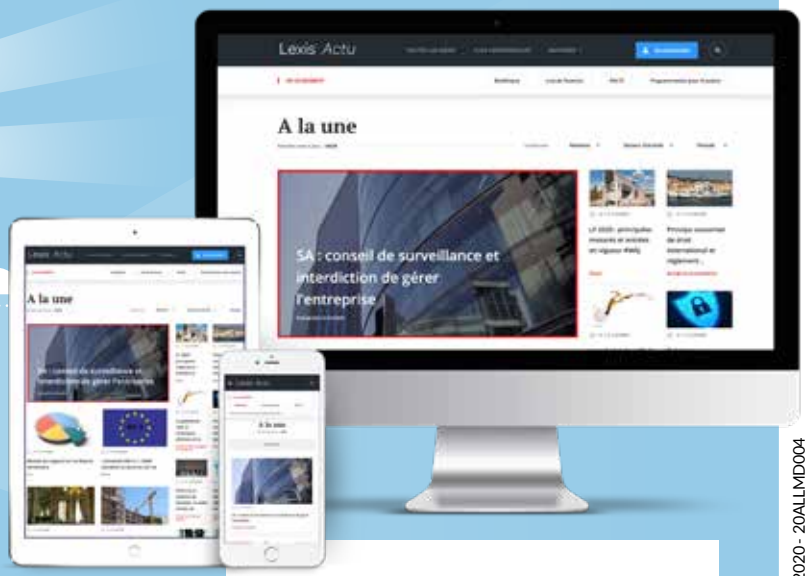

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