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PROMOTING AN EFFICIENT ACCESS TO JUSTICE THROUGH RESILIENT PROCEDURAL RULES

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ABSTRACT
The institutions promoting an efficient access to justice play a crucial role in the legal system: they ensure the protection of rights of individuals and interests of business actors through a fair settlement of alleged injustice or violation of rights and promote the maintenance of trust in social and economic relations. Due to the pandemic, the question of crisis-resilient solutions in the field of justice system has entered into centre of attention, both at the level of legal solutions and political discourse. The current paper aims to give an overview on the question, how the general framework of access to justice, elaborated in theory and in the case-law, applied during the pandemic, and how international and European standards, recommendations and practices promoted an efficient access to justice. This systematic overview can give a new impulse to the scientific assessment of the institution thus contributing to its resilience and efficiency.

KEYWORDS
Resilience, access to justice, functioning of the judiciary, legal aid, international standards

INTRODUCTION

„Access to justice is a fundamental pillar of western legal culture. 'To no one will we sell, to no one will we deny or delay right or justice' proclaimed the Magna Carta in 1215, (…) expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention on Human Rights, (…) the Charter of Fundamental Rights of the European Union (…) and the case-law of the Court. (…) Therefore, the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised" [1]. This quotation from an opinion by Advocate General Ruiz-Jarabo Colomer shows that the institutions promoting an efficient access to justice play a crucial role in the legal system. They ensure the protection of rights of individuals through a fair settlement of alleged injustice or violation of rights irrespective of the financial situation or legal knowledge of the parties. They are also a basic safeguard for the business sector, where litigation related to contract breaches, employment issues, bankruptcy filings and tax payments – especially as regards small and medium-sized enterprises – and legal needs relating to the rapidly-evolving emergency regulations on business conduct trigger a growing need for an efficient access to justice. [2] This way, they contribute to the maintenance of trust in social and economic relations.

After the COVID-19 was declared a pandemic by WHO on 11 March 2020, [3] and parallel to the introduction of measures to tackle the negative effects of the disease at national level, it became clear that the pandemic has also created challenges for courts and judicial authorities all over the world, including the European countries. In cases of emergency, the proper functioning

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of the judiciary is crucial as it offers the necessary safeguards against infringement of rights and ensures the review relating to the lawfulness of emergency measures. [4] As the European Commission for the Efficiency of Justice (hereinafter: CEPEJ) summarized: "*Member States have made considerable efforts to adjust to new circumstances within a short time and to make the best use of existing resources to ensure the functioning of their courts*"[5].

However, the question arises, whether ensuring the functioning of courts in extraordinary situations is sufficient to ensure efficient access to justice. The analysis of the practices followed by the European states with regards to access to justice during the COVID-19 pandemic, an overview of the international and European standards and recommendations as well as a comparison of these with the theoretical concept of access to justice is inevitable in order to contribute to the well-functioning of the judicial system with equal and unhindered access, even in extraordinary situations: "*we must make sure when the next crisis comes, whatever its nature, we are even better prepared for it*"[6].

BACKGROUND AND METHODOLOGY

The current paper aims to summarize the international and European standards as regards access to justice in crisis situations. The relevant literature analyses the concept of access to justice either from the perspective of constitutional law with special regard to the human rights aspect, [7] or from the point of view of civil procedural law with a focus on the institution of legal aid, [8] while other sources examine the connection with social aspects, protection of vulnerable groups and the compensation of neediness. [9] As regards the questions of applying or adapting the institutions of civil procedural law – especially those promoting access to justice – in emergency situations, [10] the relevant literature contains rather limited guidance; the sources focus primarily on the introduction and evaluation of national solutions [11] or on the use of digital technologies in courts during the pandemic. [12]

Therefore, it seems to be useful to analyse the question in a broader context. Firstly, the theoretical background shall be clarified by defining the concept of access to justice based on international human rights standards and case-law. Afterwards, the paper examines how the proper functioning of the judiciary and access to justice appear in the documents adopted lately in relation to crisis situations at the level of the United Nations, Council of Europe, OECD, OSCE and the European Union, while mentioning the basic tendencies derivable from the national laws. As the paper offers a synthesis of the theoretical background, the related jurisprudence, national solutions introduced by certain states and the general requirements identified by the international community, it can contribute to a more comprehensive understanding of access to justice in emergency situations. The findings can also give a new impulse to the elaboration of efficient solutions in this regard.

THE CONCEPT OF ACCESS TO JUSTICE

In order to evaluate the measures promoting access to justice in emergency situations, first the theoretical background shall be clarified; the conceptual elements of "access to justice" need to be defined. [13] Article 47 of the Charter of Fundamental Rights [14] of the European Union lays down the principles of effective judicial protection containing in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented. [15] The right to access to justice articulates at the level of fundamental rights the individual's claim to enforce his rights effectively and independently from his financial and material circumstances, legal knowledge or other possibilities. Nevertheless, access to justice is not limited to the right to institute proceedings

before courts in civil matters. [16] Other particular aspects are the right to obtain a determination of the dispute by a court [17] as well as the requirement of the decision being able to remedy wrongs or asserting claims. [18]

The right to an effective (in contrast to theoretical or illusory) access to justice presumes a state obligation, 'the duty to ensure justice.' In order to fulfil this obligation the state has to introduce procedural measures to facilitate citizens to assert their right: "*in such circumstances, the State cannot simply remain passive [....] The obligation to secure an effective right of access to the courts falls into this category of duty*"[19]. The institutions promoting access to justice according to the case-law of European Court of Human Rights (hereinafter: ECtHR) might be legal assistance [20], exemption from court fees, [21] certain simplifications of the applicable procedure, e.g. with regard to the position of parties lacking litigation capacity [22] or for the adjudication of small claims [23] (referred to shortly and summary as legal aid). When defining the precise methods to achieve this aim, it shall be recalled that the State enjoys a certain margin of appreciation in this regard. [24] Thus, the principle of access to justice cannot be interpreted as prescribing specific procedural measures [25]: the efficient and practical possibility of litigation shall be guaranteed in the complex system of procedural law.

In the following, it is intended to analyse against this background, how the general framework of access to justice, elaborated in theory and in the case-law, applied during the pandemic, and how international and European standards, recommendations and practices promoted an efficient access to justice.

ACCESS TO COURTS IN NARROW SENSE

The first and most evident element of this summary is to examine the actual, physical access to courts. "*Some courthouses and buildings closed fully, others partially, dealing with only "urgent" cases. The extent to which judges and court staff have been able to operate in person and virtually during this time has depended on the particular State's response to the pandemic, the regulations imposed by the authorities and the type of court and cases they deal with*" [26]. In certain countries the administration of courts called for home office, courts used telephone meetings to prepare cases, entry into court premises has been limited, special rules made it possible to hear the parties and their lawyers by any electronic means of communication, including telephone, the courts conducted hearings, main hearings and public hearings only to the extent necessary, some procedural acts have been performed in special locations suitable to accommodate greater numbers. [27] These measures were often accompanied with suspending or extending procedural and enforcement action deadlines. [28]

These seem to be self-evident and reasonable steps in order to protect the health and safety of justice professionals and court users, while ensuring the right to institute proceedings before courts in the narrowest sense with due regards to the specificities of the epidemiological situation. At the same time, they are simple to introduce and apply at times when quick decisions are needed in a rapidly changing environment.

TACKLING THE RISK OF LENGTHY PROCEEDINGS

However, due to the broader concept of access to justice, limitations can arise also if the direct possibility of access to court proceedings is safeguarded. Firstly, in general terms, these above mentioned measures inevitably result in backlogs at courts and thus in lengthy proceedings. Even the 2022 Justice Scoreboard shows that in several Member States of the EU, the temporary closures of courts and the suspension of deadlines accompanying them, led to a decrease in efficiency, particularly at first instance courts. [29] Secondly, even if the

extended or suspended deadlines apply to the parties equally, [30] it shall be recalled that long deadlines might also put the weaker or vulnerable party in substantial disadvantage. While the first problem is manageable by a wide-spread use of information and communications technology as well as innovative online solutions enabling digital connectivity, [31] the second can only be tackled by applying special procedural rules.

In connection with the COVID-19 pandemic, it has been acknowledged, that alternative means such as online services or strengthening access to information through court websites and other means of communication (phone, email, etc.) played a crucial role in ensuring access to justice. [32] However, it shall not be forgotten that "*justice users can have very different features. Business lawyers have different needs than self-represented litigants. ICT applications should have the flexibility to tackle most of the different features and demands of their different users. Technology design should ensure the possible advantages of the use of ICT are not unevenly distributed. ICT must not worsen the access to justice for low income and self-represented litigants*"[33]. In this spirit, international fora, e.g. the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán reminded that countries must take prompt and sustained action to close the digital divide that affects access to justice and generates exclusion. [34] That is why e.g. OSCE/ODIHR recommends that in the field of digitalization of justice, the needs of vulnerable persons in accessing and managing the technology must be considered. [35]

Furthermore, it has been recognized that certain vulnerable groups need special attention and specific groups of cases shall be prioritized under the circumstances of lockdown measures, e.g. cases relating to children, alimony or maintenance obligations, proceedings connected to the protection of fundamental rights; protection orders against domestic violence etc. [36] While acknowledging that under emergency situations judicial systems should give priority to cases which concern vulnerable groups of persons or groups of sensitive cases, these findings and solutions continue to focus on the questions of actual access to the court, ensuring the continuous operation of the courts and timeliness of procedures. Thus, they are still based on a technical, functional understanding of access to justice.

ENSURING EQUAL ACCESS TO COURTS

However, access to justice, primarily the right to obtain a determination of the dispute by a court as well as the requirement of the decision being able to remedy wrongs or asserting claims, go way beyond these questions. According to the ECtHR case-law, rights related to fair trial (primarily the adversarial principle and the principle of equality of arms) shall ensure "*a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents*"[37]. This approach takes also into account that due to financial neediness or the lack of legal knowledge there might be significant differences in the possibilities of the parties and is also the basic justification for a more substantive interpretation of access to justice.

During emergency situations, the forms of vulnerability arising from the crisis got into the centre of attention. [38] Certain states paid particular attention to the functioning of legal aid services, encompassing also general legal advice, [39] however, these measures were less in the legislators' or policy-makers' focus as compared to the above mentioned IT-solutions. This might be related to the fact that the international theory and case-law on access to justice widely acknowledges the state's margin of appreciation with regards to the possibilities of the budget. [40] However, the more general the concept of vulnerability [41] is, the more diversified support is offered, the more extensively is an equally efficient access to justice for

all safeguarded. As the UN Special Rapporteur also recalled: "*Restrictions on access to justice must be decisively addressed to prevent the marginalization of the most disadvantaged social groups and the "elitization" of justice systems*"[42]].

The possible solutions might include a.) measures of soft-law nature, like supporting access to legal information and rights awareness; facilitating access to restorative justice services, such as online mediation and alternative dispute resolution as well as access to administrative legal services and legal documentation; and cooperation with bar associations and other governing bodies of lawyers and partnership with civil society; [43] b.) clarification of the fact that crisis situations, primarily an economic crisis should not lead to substantial cuts to legal aid funding; c.) tools supporting a more flexible use of already existing measures in rapidly changing environments, e.g. to adopt binding guidelines or standards for courts to identify those cases which are suitable for remote hearings and those which are not; [44] and d.) a general review of existing procedural concepts fostering a more simplified protection for the most vulnerable, e.g. to remove legal obstacles to legal standing, notably by allowing courts to accept the submission of third-party interventions and equality bodies to represent individuals in legal proceedings in certain cases [45]. Analysing the applicability of such solutions and their implementation would be crucial in order to ensure the protection of rights of individuals and interests of business actors through a fair settlement of alleged injustice or violation of rights irrespective of changes in the social or economic environment.

CONCLUSIONS

Access to justice, understood as "*the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards*" [46], is a basic safeguard for the protection of human rights and therefore plays an important role in crisis situations. The COVID-19 pandemic proved that that irrespective of the level of limitations introduced, the national legislators have paid special attention to maintaining the possibility of turning to courts and obtaining a decision, in line with the seriousness of the epidemiological situation. However, besides safeguarding the actual, physical and basic procedural framework of access to justice, enhanced support should be ensured for the vulnerable so that the crisis does not result in a decrease in the level of protection offered for them. Therefore, such solutions should be elaborated that can flexibly react to the new forms of vulnerability appearing as a consequence of a particular crisis.

In line with international recommendations, it should be clarified at international and European level in a more explicit manner that a.) not only electronic communication and online solutions should be promoted in court procedures, but also the availability of legal advice; b.) therefore, crisis situations should not lead to substantial cuts to legal aid funding and c.) that procedural laws should include flexible measures to support the citizens in seeking legal remedy, advice and support with due consideration of their individual situations and needs. These steps can contribute to maintaining the trust in the judicial system even under extraordinary circumstances, which is also a key to the maintenance of trust in social and economic relations and institutions in general.

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