

# Report on how the Court can function in the current situation due to the COVID-19 pandemic



THE CHAMBER OF ADVOCATES MALTA

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## Preliminary Report on the objectives of the Chamber of Advocates

### Current Situation

With a view to protecting the health and safety of all court users and to help contain the spread of the 2019 novel coronavirus (COVID-19), on the 13<sup>th</sup> March Legal Notice 65.20 was issued in terms of which the Superintendent of Public Health ordered the closure of the Law Courts, including the Court Registry, with effect from the 16<sup>th</sup> March 2020.

The word "Court" in the said legal notice was defined as being *"any courts and includes the superior courts and the inferior courts including appellate courts irrespective of their competence or jurisdiction, and also includes any tribunal established by law, and any boards, commissions, committees or other entities before which any proceedings are heard or procedures undertaken which are subject to legal or administrative time limits for filing any claims, defences or other acts"*.

Following the publication of legal notice 65.20, on the 23<sup>rd</sup> March 2020, another legal notice was published 97.20 in terms of which the word "Court" was substituted with the word "designated Courts" and came to be defined as *"any of the courts of justice, that is the superior courts and the inferior courts including appellate courts irrespective of their competence or jurisdiction, and includes also any tribunal established by law which operates from the building of the Courts of Justice, and any boards, commissions, committees or other entities which operate from the building of the Courts of Justice before which any proceedings are heard or procedures undertaken which are subject to legal, judicial or administrative time limits for filing any claims, defences or other acts: Provided that the tribunals, boards, commissions, committees or other entities which operate from the building of the Courts of Justice shall include the:*

- (a) *Industrial Tribunal;*
- (b) *Employment Commission;*
- (c) *Committee of Inquiry (Deprivation of Citizenship);*
- (d) *Partition of Inheritances Tribunal;*
- (e) *Information and Data Protection Appeals Tribunal."*

Notwithstanding the order for the closure of the designated Courts, legal notice 61.20 still granted the power to any court (1) to order the opening of its registry, (2) to hear any case and (3) to do anything consequential and incidental thereto, provided that the matter is deemed one of urgency or that it is in the public interest to have the case heard.

Furthermore, where the Court decided that the situation merits a hearing, it was granted the power to order the implementation of any specific arrangements for the guarding against and or controlling dangerous epidemics or infectious disease as it may determine.

Although the situation in Malta seems to be relatively under control it would appear that the current situation will not be resolved within a short period of time, and consequently it is imperative to explore options as to how our courts can start to function, even if in a limited manner for the moment.

Some judges have already taken certain initiatives which even though commendable in terms of proactively exploring ways of how court may start to function, it may prove to be illegal in that it runs contrary to the law at present, and therefore certain legislative intervention would be necessary to provide a relaxation to the general court closure.

## **Proposals**

This paper is intended not only to make suggestions and proposals on how court sittings can start to take place but also on how the Court Registry can start to refunction.

### **1. Court Sittings**

The problem caused by the closure of the Courts of Justice is not one exclusive to Malta. Like us, in a large number of other jurisdictions the Courts have either closed altogether or alternatively, have limited their work drastically.

Although it is important to try to find a way how our courts may still function in view of the current situation this must only be done if it poses no risk to the health and safety of those court users, including that of the court staff.

The easiest solution for the continuance of court sittings and the one that carries no risk whatsoever would be the creation of virtual court rooms. With the use of video-conferencing technology certain court sittings can easily take place remotely.

Our law already caters for the possibility of witnesses being heard remotely. Article 622B(1) of the COCP grants the Court the power to allow the video-recording of any evidence required from a witness. The law seems to allow the use of video-conferencing only in the cases of collection of evidence and consequently, legislative intervention would be required in order to amend article 622(B) to allow the use of video-conferencing more widely.

In the current situation the use of video-conferencing technology for court sittings to take place can become more complicated where there is the need to hear witnesses. This also entails adopting working practices which would emphasize more written pleadings and therefore resorting to written processes rather than oral ones in court sittings.

### **Courts of Appeal**

Initially it would be recommendable to set up virtual court rooms only for sittings before the appellate courts. Once, as a rule, no witnesses are heard before the Courts of Appeal, the introduction of remote sittings would be much easier to implement.

At the appellate stage of a court case, the parties usually would have already exhausted their arguments in writing however, it is very possible that lawyers might wish to add to the arguments already made in their written pleadings. Experience shows that in effect very few are the instances when in oral pleadings parties add much more value to the arguments they would have already made in their written submissions.

### **Appeals in the Civil Jurisdiction**

In so far as the sittings before the Courts of Appeal in its civil jurisdiction the following proposals are being suggested:

- If the lawyers have nothing to add to their original pleadings a note can be filed (even by a dedicated email), informing the judge/s that they have nothing further to add and that the case can be put off for judgement;
- If the lawyers would like to add to their original pleadings, these can be done in writing and filed by email.
- If alternatively, the lawyers wish to make oral pleadings, a video-conference can be arranged between the judge/s and the respective lawyers for the hearing of the said pleadings.

The Chamber has already been approached by the Hon. Justice Giannino Caruana Demajo with proposals for such a system to take place – if for no other reason because, during this time judges in appeal would be able to work on preparing judgements.

When it comes to delivering its judgement, once the law stipulates that this must be read out in open court, the law would need to be amended to allow the court to dispense with this obligation or alternatively, a live feed could be created and the judgements can be read out and transmitted live on the law courts' web-site.

### **Appeals in the Criminal Jurisdiction**

In the case of Appeals before the Criminal Court, the situation is different in that the accused needs to be present in court when a sitting is held. The Chamber has been approached by Madame Justice Scerri Herrera who presides over the Court of Appeal, together with other judges and who has made a number of proposals for the said courts to be able to function in the current situation.

A in the case of Civil Appeals the lawyers can chose to rely on the original pleadings or alternatively, file a note of submissions in which case there would not be the need to have a sitting, other than for the pronounciation of the judgement.

Should however, the lawyers opt to make oral submissions then a remote sitting would need to be arranged for this purpose. In view of the fact that the accused would need to be present, both during the sitting to hear oral submissions as well as during the sitting for the pronounciation of the judgement, he may connect remotely.

Should the accused already be in preventive custody, the prison authorities are willing to make available a room with a computer having the required video-conferencing technology for him to be able to connect and listen to what is being said by the lawyers and the judge, or just the judge where the judgement is being read out.

Where, on the other hand the accused is not in preventive custody, then he would need to be notified (this is done by the police) with the date and time of the sitting and he can either go to court and be placed in a room on his own with the necessary video-conferencing technology.

Even in the case of criminal appeals the sittings can be streamed live in order to satisfy the condition of sittings needing to be held in public.

The Chamber has reached out to a number of lawyers who work in the field of criminal law to get their views on the above proposals. The said lawyers all pointed out that unlike in civil appeals, it is very uncommon for a reply to be filed in criminal appeals. In criminal appeals lawyers tend to make oral submissions and written submissions are very rarely made other than the appeal itself.

Although in theory oral submissions can be made through a video-conferencing system, the lawyers all voiced the same concern, namely that the client/accused needs to be with his lawyer even in those cases were the judgement is going to be delivered. The lawyers explained that if a person is given a prison sentence he needs to have his lawyer with him to explain to him the judgement and the consequences of that judgement. They all insisted that the fact that the accused would be able to present virtually is not sufficient. The lawyer would need to speak with his client in confidence, and the proposed system does not guarantee this.

The Chamber feels that in cases where there exists the possibility that the defendant may be prejudice one should err on the side of caution.

### **Courts of First Instance (Civil Law)**

In the case of sittings before the courts of first instance the situation can become slightly more complex due to the fact that the court would need to hear evidence and it is not always possible to use affidavits for this purpose. Where affidavits can be made use of, this is to be encouraged.

When examining the possibilities available for the functioning of the courts of first instance, the solutions vary depending on the stage at which the case is at.

#### **A) Cases put off for Judgement**

In so far as pending cases are concerned if these have already been put off for judgement, a date for the delivery of the judgement may be fixed and the sitting streamed live. The judgement is to be

emailed to the lawyers together with a copy of the taxed bill of costs on the same day of judgement and it is also to be uploaded to the web-site of the Courts.

The time-period within which to file an appeal is to be extended to 30 days and the appeal can be filed remotely by email or by uploading it to the system making use of the lawyer's E-ID and accessing the private area of the courts website reserved for lawyers. No payment would need to be effected at the time of filing, however payment would need to be affected within an established period of time, once the court registry re-opens and becomes fully functional.

Until the current situation is resolved the signature of the legal procurator is to be dispensed with, but the LP's name is to be included in the act.

A scanned copy of the appeal is to be uploaded to the web-site and a courtesy copy is to be sent to opposing counsel for him to have access to the application, even though his client might not as yet have been notified. It is imperative that notification to lawyers whether by email or otherwise, is to be done solely as a courtesy and cannot be considered as a lawful notification in terms of law.

If, on the other hand no appeal is filed and the judgement becomes definitive the winning party must be granted the possibility of enforcing it with immediate effect. In such a situation, one should be allowed to file executive garnishee orders and judicial hypothecs, however, the filing of warrants of seizure will be difficult in the current situation since you require the assistance of the court bailiffs, the consignatory, the police and sometimes also a locksmith should there be the need of forced entry.

The Court Registry would need to allow for the physical filing of *cedoli* by the banks or other persons who hold funds appertaining to the debtor and who have been notified with the garnishee order. The court employees who work in the *Subbasta* department would need to be available to communicate with the lawyers and/or legal procurators in order for them to calculate the costs involved, since these are generally deducted from the amount being deposited.

## **B) Pending Cases**

In so far as pending cases are concerned, unless there is the need to hear witnesses orally, a lot of the work can still be done without the need for sittings to take place. If the case is at the stage of the collection of evidence, the production of evidence by affidavit should be encouraged however if there is no other option other than to listen to one's evidence orally, then the judge and the lawyers are to collaborate with the view of seeing whether it would be possible for the witness to testify remotely. If this proves to be impossible then the case would have to be postponed until sittings can be held normally.

Where the case is awaiting the report a legal referee, or court expert, they should be encouraged to complete their brief and copies sent out to the lawyers for them to prepare themselves accordingly, after the relative fee due is settled.

Where the case is awaiting the notification of one of the parties there needs to be a system in place whereby people can still be notified with judicial acts, notwithstanding the current situation. With so many people being expected to stay at home it should be easier for people to be notified.

So far, the postal service is still functioning and consequently, acts can still be notified in this manner. The problem arises in the event that one is not notified the first-time round, when in terms of law the

second attempt is to be made by the court bailiff. At present, the bailiffs are not working so this is not an option.

The possibility of serving judicial acts by courier should be introduced.

### **C) New Cases**

Even though, in principle, the filing of new cases should be allowed and can easily be filed electronically, it is important to ensure that the rights of the defendant are not prejudiced. We need to recognize that in the current situation, it might be difficult for a person against whom a lawsuit has been filed to contact and meet up with his lawyer to prepare his defence. Even though in theory a meeting between the client and the lawyer can take place remotely, we need to take into the consideration that not everyone has the necessary hardware, or has the capability to make use of modern technology.

On the other hand one could allow the filing of new cases, but the time period within which to file the reply would be suspended until the Court registry reopens fully.

### **D) Hearing of various Applications**

It should be possible for one to file applications electronically. More often than not the need for the hearing of evidence is not required in which case the procedure as is being proposed for the Courts of Appeal can be implemented, the lawyers are to be given the opportunity to make further submissions by filing a note of submissions or alternatively, a sitting is to be fixed for the lawyers to make oral submissions remotely.

Court decrees are to be sent to the lawyers by email, accompanied by the relative taxed bill of costs, where applicable.

### **Courts of First Instance (Criminal Law)**

In the case of sittings being heard by the Courts of Criminal Jurisdiction in the first instance, these should remain adjourned until the Courts reopen and in the meantime, Magistrates can focus on the completion of a number of court inquiries that are still pending before them and have been so pending for a while.

In the case of *Kumpilazzjonijiet*, where the accused is in preventive custody it is imperative that these continue to be heard. The sittings are to continue however access to the court room is to be limited to the presiding magistrate, the deputy registrar, the prosecutor and the defence lawyers. The court room is to be thoroughly disinfected prior to the sitting and all the parties are to respect the relative distance from one another, as advised by the health authorities.

Witnesses who need to be heard will be obliged to testify by video-conferencing, either in a separate room within the Court House or alternatively he/she is to be given the option to choose to testify remotely on his/her own device.

### **Courts of First Instance (Family Law)**

In cases of personal separation were the parties have agreed to separate consensually, they should be allowed to file a joint application together with a copy of the contract, for it to be approved by the

judge. Once the proposed draft has been approved, the lawyers are to be informed by email and the notary public is to be able to collect a copy of the contract from the Family Court Registry in order for it to be published.

In the case of applications for divorce, again where the parties are in agreement, a joint application can be filed, and the sitting can be held remotely for the delivering of the judgement.

## **2. Court Registry**

A system allowing for the electronic filing of acts is long overdue and should be introduced irrespective of the current situation. Realistically the setting up of a fully-fledged electronic filing system in the short term is not an option.

In the interim there are two methods filing which can be adopted, electronically albeit limitedly and physical:

### **Electronic Filing**

Certain acts can be filed by electronic mail, or alternatively, by uploading the act to the web-site of the courts in the section reserved for lawyers.

In the case of filing by electronic mail, the court authorities would need to create specialized email address to be used exclusively for the filing of acts.

In so far as acts being filed in pending cases, the deputy registrar of the judge handling the case is to be copied in the email. The email address to be set up by the court authorities is to have a system that acknowledges receipt of the email.

The filing is to be made without payment, however, once the situation returns to normal and the Court Registry re-opens, the parties would need to regularize their position and settle any dues payable at the time.

In the case of uploading of documents to the web-site, one would need to discuss this possibility with MITA or the administrators of the site. Today, in a number of cases certain documents related to the particular case are uploaded and can be accessed by the lawyers in the private section reserved only for lawyers.

The possibility of uploading the document directly to the virtual court file should be explored. The system would need to provide for a notification of the upload to both the Court Registry, as well as the Deputy Registrar of the particular judge.

### **Physical Filing**

Apart from the electronic method of filing being proposed above the possibility of opening the Court Registry restrictively should also be considered. The Registry could be open, even though only certain authorized people would be able to gain access, such as for example legal procurators.

The idea of making the registry open to legal procurators only should be explored, and only one legal procurator at a given time would be able to access the Registry, with the sole scope of filing acts. Each legal procurator after applying with the court authorities would be granted a particular day and time when he/she may go to the court to file judicial acts. The LPs would be encouraged to, as much as

possible, group the acts to be filed and ideally not go the Registry more than once or twice a week at the maximum.

No more than one LP at a given time would be allowed access and would be by appointment only.

The court authorities would need to take all those measures necessary to safeguard the health of the court employees working in the registry, as well as that of the LPs visiting.

**Conclusion**

The Covid-19 pandemic has shown us that our judicial system is very much behind the times when it comes to the use of modern technology. This experience has highlighted the dire need of the introduction of modern systems of electronic filing which should be introduced without further delay, irrespective of the duration of the lock-down, but also encourages to explore the possibility of making use of virtual courts rooms in certain instances, even after the pandemic would have long gone.

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