A Distance Process: Covid-19 in Spain

Jordi Nieva Fenoll, Full Professor of Procedural Law (Chair), University of Barcelona, email: jordinieva@ub.edu

Date 22 April 2020

We never thought of living in a pandemic. A disease that we could not control, somehow, easily. Something that has forced us to confine ourselves most of the time in our homes. This situation could cause as well some changes in our mentalities, regarding some of the activities that we previously carried out only in person, and now are being done remotely.

Even if this confinement ends, some measures of social distancing are going to last for a while to a greater or lesser extent. But adjudication has to continue. In Spain, when the state of emergency was declared, it was decided to close all courts drastically, leaving only active some urgent services mostly in the criminal jurisdiction, namely the protection of women against violence. The suspension of terms and deadlines was decreed, which was consistent with the situation of force majeure, as already provided in art. 134 of the Spanish Civil Procedure Code.

But life goes on, and after the initial surprise, a country must continue its activity even if distancing measures persist, because otherwise the damages of all kinds will be even more serious than this pandemic. In the judiciary there is going to be a remarkable delay in the courts agenda. Economy also depends highly on judicial processes. For this reason, and bearing in mind that this situation may lengthen or that new spikes in the pandemic may emerge in the future, perhaps it would be time to start thinking about remote judicial process. It is perfectly achievable with the means we have today.

Orality must change its perspective nowadays. In general it came to our processes during different decades of the 20th Century – depending on the country – because writing was highly criticized as it encouraged judges to be absent from the evidence–hearings. Nevertheless, thanks to extensive empirical research into the field of the psychology of testimony, we know today that it is very difficult to extract useful information from a witness. Judges have enormous difficulties in correctly assessing their credibility, and even if they did, it is impossible to enter a person's mind to find out if they are really telling the truth. Therefore, although testimonies impress judges more than we actually think, those impressions can very often be misleading. At the end of the day, the only relevance of the judge being present in a witness statement is that the judge can moderate the examinations of the lawyers and ask questions of his own motion to the witness.

In addition, a statement of the parties – the plaintiff and the defendant – is not actually relevant evidence considering that for sure they have prepared their statement in advance with their lawyers. Their errors usually come because they get nervous, and not because they might lie. In fact, testimonies in general are mostly relevant only in criminal proceedings, because sometimes we have nothing but witnesses, the victim and the defendant. In civil procedure however, witnesses are often of little help, and parties just repeat what their lawyers have said in their claims. If the distancing measures should last,

Septentrio Reports 5, 2020 https://doi.org/10.7557/7.5471

judicial processes will have to be more written, restricting the use of the testimonial evidence.

Almost all of the rest of the acts of a process can be carried out in writing, and if necessary by videoconference. The 'preliminary hearing', for example, as it exists in some procedural laws –art. 414 of Spanish Civil Procedure Code, art. 183 of Italian Codice di Procedura Civile or partly in §275 German Zivilprozessordnung – has no longer the importance it had when it was introduced in the Austrian ZPO of 1895. Nowadays, procedural exceptions are rarely raised, which can also be resolved in writing. The 'preliminary hearing' is often an act that can be ignored. If the evidence is reduced to the documents and experts, and this is very often the case, a process needs no hearings.

The motivation of judgments should also be reduced. In many very frequent simple processes – payment summons, evictions, etc. – motivations are almost always alike, and therefore could be automated. In other processes, judges should be instructed to reduce motivation to the essentials. Extensive explanations are not regularly necessary to decide on a point of law. Brevity makes judgments more understandable. This has long been understood by judges in some countries, and in particular by those of the Court of Justice of the European Union, who are usually quite synthetic.

Finally, the entire procedure should be redone. Not only a general introduction of case management is needed, but many of the bureaucratic formalities of our procedures are nothing more than shadows of the past. The procedure must be re-regulated *ex novo*, avoiding to copy the current regulation, bearing in mind the idea that usually people will no longer be managing it, but AI. Therefore, the exchange of writings between the parties should be automated and judicial intervention during the process should be reduced, restricting it above all to the final phase. At this time, the judge should present a draft judgment to the parties in order to confront it with their opinion, before the judgement is definitely released. A better quality of the judgment is expected this way. Doing so, some appeals shall be avoided.

These contingency measures should not be definitive, because they represent a huge change in our procedural tradition. After this exceptional period, it is necessary to return to normality and duly evaluate if some of the referred changes should be kept.