



**INTERNATIONAL ASSOCIATION OF JUDGES
UNION INTERNATIONALE DES MAGISTRATS
UNIÓN INTERNACIONAL DE MAGISTRADOS
INTERNATIONALE VEREINIGUNG DER RICHTER
UNIONE INTERNAZIONALE DEI MAGISTRATI**

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JUSTICE IN TIMES OF FEAR

Please accept my warm greetings to the Danish Association of Judges, which I extend in my capacity as President of the International Association of Judges (“IAJ”). I am honoured to have been asked to speak at your annual meetings but cannot avoid talking about the impact of the pandemic on the Rule of Law, the independence of the judiciary and upon justice more generally.

The emergence and spread of the coronavirus has taken us all by surprise. It should not have done so, and we should have been prepared for this kind of event, but we were not. The virus is novel, it spreads rapidly and has deadly effect. It cannot easily be seen and therefore it is difficult to protect against or to combat.

The entire world is facing real and understandable fear. A consequence of the fear is that unusual measures are taken for our safety. Those measures often include the suspension of rights, freedoms and rules of law that are fundamental to a free, democratic and liberal society. We had all thought that those measures would be temporary and that we could all soon go back to enjoying life as it had been immediately before the pandemic began. That, however, is not proving to be the case. The measures designed for our safety, but which require suspension of rights and interference with judicial work, are extended in many places or have been reintroduced as new emergencies are thought to arise.

The legal system, and the judiciary within it, has responded very well. Cases have continued to be decided, trials have continued to be conducted and the administration of justice has not stopped in the face of the pandemic. How justice has operated, however and how judges have had to work, has changed and those changes have not all been good.

The spread of the virus has not stopped but nor has the need for justice stopped because there is a pandemic. The virus does not suspend the need for justice to be administered: cases still need to be decided because rights need to be upheld, disputes need to be resolved and the law needs to

be enforced. Judges have risen to the occasion by practical accommodation, practical compromises and at times personal sacrifices. Judges have had to learn how to conduct hearings remotely by video, at times in isolation and without the physical support of colleagues and staff. Judges have, of course, constantly responded and adopted technological changes over time and have always ensured that the adoption of those change have not come at too great a cost or without safe guards. The way judges worked in 2019 was fundamentally different to the way in which they worked in 1969, 1919 or 1869. Technological changes in the broader community have always caused justice to be administered with the assistance of those changes, such as by the now largely obsolete fax machine, and by telephones and emails.

The changes caused by COVID-19 have been different. The changes caused by the pandemic have been abrupt and they have been more widespread than the gradual and slow adoption of changes that had been the case with technological advances in normal times. Judges were compelled by the pandemic quickly and significantly to change how justice was administered and how their work was to be conducted. It was a case of necessity dictating how things had to be done rather than justice slowly incorporating changes as they were adapted within an orderly system administering the Rule of Law by judges deciding cases independently.

It is important that all this be recorded and evaluated with great care and precision. There are some changes to the administration of justice which should, at best, only be temporary, even if temporary might mean longer than we had thought. There are some changes, however, which should not be allowed to last at all and which may have crept into the administration of justice like the virus without been seen and, like the virus, which are difficult to remove. The negative impact upon the administration of justice is something which judges are uniquely placed to see, to report upon and to wind back where necessary.

Working remotely has been a widespread consequence of the measures taken to protect us from the spread of coronavirus. Many of us have learned to work from home and to do things that until recently we thought could only be done from places of work with colleagues and support staff. Some have come to enjoy that new style of work and for some it may be very attractive. In many jurisdictions it has been possible for judges to work remotely for sometime without the need for the jolt caused by the pandemic. However, we should not be too eager to embrace this new style of work without thinking about what we lose as we think that we are gaining something. The loss of causal and haphazard contact with out colleagues is not something we should allow to happen without measuring its cost. Being in close proximity provides occasions for discussion, bonding and quality control. We learn from being together at times by casual conversations. We develop standards and common understandings by being together and by interacting with each other in unplanned circumstances. These interactions provide great benefit

and value to the administration of justice which cannot be measured by the accountant's profit and loss or the bureaucrat's measures for allocating resources.

Legal systems differ from country to country and within different courts and jurisdictions within each country. It is, therefore, difficult to generalise about which alterations in procedure and practice may have positive impacts and which may have negative impacts. In the common law world, for example, it is fundamental for an accused person to be able to see physically the accuser. Virtual criminal hearings make that difficult if not impossible. Delaying hearings until a physical hearing is possible may be the cause of different injustices either to the accused or the accuser. It may seem administratively efficient for criminal trials to be conducted virtually with the key stakeholders in different locations but to do so (at least in the common law world) brings a cost which needs to be understood if it is to be incurred as a recurrent expense.

Remote hearings also carry other risks which are also difficult to quantify. A benefit of a judge hearing oral evidence in person is that the judge can evaluate whether the evidence is being given by that person without the assistance of others providing "off stage" suggestions. One consequence of oral evidence being given remotely is an increase in the risk that the evidence of a witness will be suggested by others that the judge cannot see on the screen. That risk is, of course, always present when evidence is given in written form. In that case there is time to reflect and to be influenced by others before finally deciding what to put in writing. But oral evidence is different: it is direct and immediate. The person giving it and the person receiving it do so at the same time. Doing that through video links alters significantly the nature of the evidence and impacts upon its reliability.

There are also likely to be enormous pressures upon the funding available for the administration of justice as a result of the measures which have been taken to protect us. It is likely that administrations will look for ways in which the monetary costs of justice may be saved over time by curbing, reducing or removing expenditure on things which have to date been regarded as essential to the administration of justice. Justice is costly, and necessarily so. Reducing the expenditure upon justice will always bring some reduction in the objectives which justice seeks to achieve. It is likely that there will be pressures upon costs for support staff, judicial salaries and the many other cost items and cost centers connected with the necessary administration of justice, the Rule of Law and the independence of a judiciary. The economic impact of the pandemic has been great and there will inevitably be discussion about how to meet those costs by reducing expenditure in the future, and justice and the judiciary are unlikely to be vaccinated against the spread of that contagion.

There are always pressures upon the rule of law and the independence of those who must decide cases and apply the law. Those often pressures come from friendly voices who remind us that

justice must live within its means and that at times the process of justice causes injustice when cases are decided the wrong way or the guilty are not punished. But fear brings another pressure that we must be careful not to be overwhelmed by. Fear can make us suspend or put aside safeguards that seem expendable in the face of a great danger. Fear can make us believe that judges can work with fewer resources. Many of these pressures will come upon us quickly, without announcement and without notice. We must be vigilant to these pressures and to the changes that they impose upon us or persuade us to make.

We have the misfortune of finding ourselves as the guardians of values which we have inherited from others and which we need to preserve for the future. We did not anticipate that the events would turn as they have done but we now have the challenge to ensure that what we leave for the future is as good as we received from the past.

G. T. Pagone