



---

ACADEMIC ARTICLE

# Swiss Courts Facing the Challenges of COVID-19

Daniel Kettiger\* and Andreas Lienhard†

---

The COVID-19 pandemic took courts in Switzerland by surprise, just as it did most courts and other public institutions in Europe. This contribution summarises the situation as it has affected courts in Switzerland during the COVID-19 pandemic and tries to draw some initial conclusions. In Switzerland, there was a failure to include the justice system in the emergency/pandemic plans and in the organisation of the response to the crisis. In addition, the situation revealed that Switzerland is lagging behind other states on court technology, which led to difficulties in conducting court proceedings during the coronavirus crisis.

---

**Keywords:** COVID-19; emergency law; emergency organization; crisis management; pandemic

---

## 1. Preliminary remarks

The COVID-19 pandemic took courts in Switzerland by surprise, just as it did most courts and other public institutions in Europe. The developments in Switzerland have been observed by the authors from the very beginning and they have already published articles on certain issues.<sup>1</sup> In view of the additional pressures that the courts have faced as a result of the coronavirus crisis, it has not been possible to conduct a scientific study of the effects of the pandemic on the Swiss justice system. Switzerland counts significant less studies on the judiciary in the coronavirus crisis than other countries. This contribution is therefore based on authors' observations and publications, on a webinar for the Swiss judges' journal (*Schweizer Richterzeitung*),<sup>2</sup> on a qualitative survey of around ten court officials<sup>3</sup> and on further information that the authors

---

\* Daniel Kettiger is an attorney at law as well as a senior researcher and research coordinator at the KPM Center for Public Management of the University of Bern (Switzerland); [daniel.kettiger@kettiger.ch](mailto:daniel.kettiger@kettiger.ch).

† Andreas Lienhard is a full professor of public law at the KPM Center for Public Management and at the Institute for Public Law of the University of Bern (Switzerland); [andreas.lienhard@kpm.unibe.ch](mailto:andreas.lienhard@kpm.unibe.ch).

<sup>1</sup> A. Lienhard & D. Kettiger, *Justiz in Krisenzeiten, Rahmen und Massnahmen zur Aufrechterhaltung der Funktionsfähigkeit: Die Herausforderungen der Coronavirus-Krise an die Justiz und das Potenzial, daraus zu lernen*, *Justice – Justiz – Giustizia* 2020/2; D. Kettiger, *Gerichtsverhandlungen, Anhörungen und Einvernahmen mittels Videokonferenz, Kritische Anmerkungen zur COVID-19-Verordnung Justiz und Verfahrensrecht*, *Jusletter* vom 4. Mai 2020; D. Kettiger, *Justiz in der Coronavirus-Krise: Staats- und verwaltungsrechtliche Aspekte*, in *dubio* 3\_20; pp. 104–114.

<sup>2</sup> Webinar@Weblaw "Covid-19 und Judikative", 28 August 2020, [https://www.weblaw.ch/en/competence/academy/webinar/covidundjudikative\\_riz.html](https://www.weblaw.ch/en/competence/academy/webinar/covidundjudikative_riz.html); replay <https://www.youtube.com/watch?v=gaNRzIH3EpE&feature=youtu.be> [accessed 17 April 2021].

<sup>3</sup> From the cantons of Basel-Landschaft, Bern, Graubünden, Uri and Zurich.

have received. The contribution therefore has the structure of a country report rather than the structure of a science-based paper.

## 2. Background and context

### 2.1. The justice system in Switzerland

Anyone who wants to understand the situation that Swiss courts found themselves in during the COVID-19 pandemic must first be familiar with the fundamentals of the justice system in Switzerland.<sup>4</sup> Switzerland is a federalist state with 26 cantons as member states. The cantons are responsible for organising the cantonal courts (Art. 121 para. 2, 122 para. 2 and 191 Federal Constitution [FC]).<sup>5</sup> The cantonal courts have jurisdiction over disputes of first and second instance in private law, criminal law, administrative law and social insurance law. They are subject to the oversight of cantonal authorities. There are also three federal courts of first instance: the Federal Administrative Court for disputes relating to decisions taken by the Federal Administration and arising from public law contracts with the Confederation, the Federal Criminal Court for certain criminal cases and the Federal Patent Court for all patent disputes. These courts are subject to the oversight of the Federal Supreme Court. The Federal Supreme Court reviews judgments of the highest cantonal courts and certain judgments of the federal courts with regard to their conformity with international law, federal law and cantonal constitutional law. However, it does not exercise any actual constitutional jurisdiction in a strict sense over federal enactments. The Federal Supreme Court cannot rule on the constitutionality of federal laws, but is allowed to declare ordinances by the federal government (including emergency ordinances)<sup>6</sup> unconstitutional and therefore void.

### 2.2. Emergency legislation in crisis situations

The Federal Council can enact emergency legislation and order urgent measures in emergencies caused by epidemics or pandemics. Here a distinction must be made between epidemic-related (i.e. public health) preventive measures (“primary measures”) on one hand, and “measures that aim to mitigate the effects of the epidemic-related measures”<sup>7</sup> and urgent measures to manage crisis situations, (“secondary measures”) on the other.<sup>8</sup>

The Federal Council can order measures to control epidemics or pandemics (preventive measures or “primary measures”) in extraordinary situations (and in some cases even in special situations) based on Article 7 of the Epidemics Act (EpidA),<sup>9</sup> for example by issuing ordinances that have the effect of federal acts. However, Article 7 EpidA has no separate legal significance in comparison with Article 185 paragraph 3 FC.<sup>10</sup> In the coronavirus crisis, the

<sup>4</sup> On the Swiss justice system, see A. Lienhard, D. Kettiger, J. Bühler, L. Mérrillat & D. Winkler, *The Federal Supreme Court of Switzerland: Judicial Balancing of Federalism without Judicial Review*, in: J. Kincaid & N. Aroney (Eds.), *Courts and Judicial Systems in Federal Countries*, Toronto 2017, pp. 406 ff.; P. Bieri, *Die Gerichte der Schweiz – eine Übersicht*, *Justice – Justiz – Giustizia* 2014/2; Swiss Federal Supreme Court, *The Path to Swiss Federal Supreme Court – An Overview of Switzerland's Judicial System*, Lausanne 2019, [https://www.bger.ch/files/live/sites/bger/files/pdf/en/BG\\_Brosch%c3%bcrcrA5\\_E\\_Onl.pdf](https://www.bger.ch/files/live/sites/bger/files/pdf/en/BG_Brosch%c3%bcrcrA5_E_Onl.pdf) [accessed 17 April 2021].

<sup>5</sup> Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101.

<sup>6</sup> *Infra* 2.2.

<sup>7</sup> Federal Office of Justice, FOJ (*Bundesamt für Justiz*), Erläuterungen vom 16. April 2020 zur Verordnung über Massnahmen in der Justiz und im Verfahrensrecht im Zusammenhang mit dem Coronavirus (COVID-19-Verordnung Justiz und Verfahrensrecht) vom 16. April 2020 (referred to *infra* as the “FOJ Guide”), p. 2. <https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2020/2020-04-16/erlaeuterungen-covid19-justiz-d.pdf> [accessed 17 April 2021].

<sup>8</sup> See *FOJ Guide*, *supra* note 7, p. 3.; for a detailed analysis of secondary measures D. Wyss, *Sicherheit und Notrecht*, *Justletter* of 25<sup>th</sup> May 2020, No 15 ff.

<sup>9</sup> Epidemics Act of 28 September 2012 (EpidA), SR 818.101.

<sup>10</sup> On the relationship between Art. 7 EpidA and Art. 185 para. 3 FC, see G. Biaggini, «Notrecht» in Zeiten des Coronavirus – Eine Kritik der jüngsten Praxis des Bundesrats zu Art. 185 Abs. 3 BV, *Schweizerisches Zentralblatt*

Federal Council therefore enacted the COVID-19 Ordinance 2,<sup>11</sup> thus seeking to control the behaviour of the Swiss population to a large extent.<sup>12</sup>

Under Article 185 paragraph 3 FC, the Federal Council has the power to directly enact emergency ordinances that have the effect of federal acts in order to counter existing or imminent threats of serious disruption to public order or internal or external security; this includes “secondary measures” in the case of epidemics or pandemics, although there is a debate over whether economic measures are included.<sup>13</sup> The criteria for applying Article 185 paragraph 3 FC are (cumulatively) that public order or internal and/or external security are affected, that there is both a substantive and time-related urgency in protecting the interest that is to be protected by the emergency ordinance measure, and that no suitable (existing) statutory measures are available (subsidiarity); in addition emergency ordinance law must be limited in duration.<sup>14</sup> A functioning justice system is indispensable and systemically relevant for a state governed by the rule of law<sup>15</sup> and therefore a key element in maintaining public order. Switzerland does not recognise any form of extra-constitutional emergency legislation, so the Federal Council’s emergency ordinance law must remain within the framework of the Federal Constitution.<sup>16</sup> Thus constitutional rights must be respected, although the circumstances in which emergency ordinances are enacted provide an adequate basis for restrictions of fundamental rights in accordance with Article 36 paragraph 1 FC.<sup>17</sup> As already mentioned, the Federal Supreme Court can examine the content of such ordinances for conformity with the Constitution and, if that is not the case, prevent their application. Furthermore, the Federal Council may only enact ordinances in place of federal acts in cases where the Federal Constitution confers legislative competence on the Confederation. Accordingly it cannot enact emergency ordinance law that encroaches on the cantons’ legislative and organisational sovereignty. A minority of experts take the view that the Federal Council may in exceptional cases diverge from the federal system of competences when enacting its emergency ordinance law, but only in situations where the cantons can no longer guarantee their own internal security or that their authorities can function.<sup>18</sup> The latter case will very rarely arise and does not apply to the coronavirus crisis, as most cantonal constitutions confer emergency ordinance powers on their cantonal governments,<sup>19</sup> which allow those governments to enact suitable regulations in good time.<sup>20</sup>

---

*für Staats- und Verwaltungsrecht (ZBl) 5/2020*, p. 241 f.; F. Brunner, M. Wilhelm & F. Uhlmann, Das Coronavirus und die Grenzen des Notrechts, Überlegungen zu einer ausserordentlichen Lage, *Aktuelle Juristische Praxis (AJP) 6/2020*, p. 693 f.

<sup>11</sup> Ordinance on Measures to Combat the Coronavirus (COVID-19) (COVID-19 Ordinance 2) of 13 March 2020, SR 818.101.24 (in force until 22.06.2020).

<sup>12</sup> See Kettiger, Staats- und Verwaltungsrechtliche Aspekte, supra note 1, p. 106.

<sup>13</sup> See on this A. Lienhard & A. Zielniewicz, Zum Anwendungsbereich des bundesrätlichen Notrechts, *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBl) 2012*, p. 111 ff; see also the leading judgment of the Federal Supreme Court BGE 137 II 431, E. 4.1.

<sup>14</sup> See U. Saxer *St. Galler Kommentar*, 3. Aufl., Art. 185 FC, No 71; G. Biaggini, *Kommentar BV*, 2. Aufl., Art. 185, No 10 f.

<sup>15</sup> In this sense *FOJ Guide*, supra note 7, p. 2.

<sup>16</sup> See Saxer, supra note 14, Art. 185 FC, No 97 ff.; Biaggini, supra note 14, Art. 185, No 10c f.

<sup>17</sup> See Saxer, supra note 14, Art. 185 FC, No 102, with reference to the leading judgment of the Federal Supreme Court BGE 137 II 431.; Biaggini, supra note 14, Art. 185, No 10c.

<sup>18</sup> See Saxer, supra note 14, Art. 185 FC, No. 98.

<sup>19</sup> See e.g. § 91 para. 4 Cantonal Constitution Aargau, Art. 91 Cantonal Constitution Bern, § 109 Cantonal Constitution Basel-Stadt, § 56 para. 3 Cantonal Constitution Lucerne, Art. 72 Cantonal Constitution Zurich; the Cantonal Constitution for Uri does not recognise a right to enact emergency secondary legislation.

<sup>20</sup> See Kettiger Staats- und Verwaltungsrechtliche Aspekte, supra note 1, p. 107.

### 3. Phases of the coronavirus crisis in Switzerland

The timeline of the COVID-19 pandemic in Switzerland – up to the time of writing this article<sup>21</sup> – can be divided into three phases, as in other countries.

The “*first wave*” lasted from mid-March to May 2020. The Federal Council declared an “extraordinary situation”. In this period, the Federal Council – as mentioned – regulated the efforts to control the epidemic primarily through the COVID-19 Ordinance 2. Restaurants, bars, shops and stores not selling essential everyday goods, universities and schools and all sports and leisure facilities (including mountain railways and ski areas) were closed. The Confederation ordered people to work from home if at all possible and certain public offices were also closed. Officials in public administration and in the judiciary were also ordered to work at home. In addition, binding social distancing rules applied alongside regulations on how many people could be together in any one place. Switzerland did not really experience a “lockdown” in the true sense, it was more of a “shutdown”; people were still permitted to leave their homes as they wished.

From mid-June to mid-October 2020, there was an *interim phase*. The Federal Council downgraded the risk situation in Switzerland to a “special situation”. Powers to regulate measures to counter the pandemic were largely handed back to the cantons, which led to a wide variety of arrangements around the country. The requirement to wear a mask was introduced across much of the public sector. The Federal Council continued to regulate certain measures centrally by means of the COVID-19 Special Situation Ordinance.<sup>22</sup>

From around October 2020, Switzerland began to experience the “*second wave*”, with a very rapid rise in the number of cases of COVID-19 and high excess mortality. The cantons were affected to varying degrees of severity and reacted in some cases with measures that were as drastic as those in the first wave. With an amendment to the COVID-19 Special Situation Ordinance on 28 October 2020,<sup>23</sup> the Federal Council once again introduced additional measures that applied throughout Switzerland, in particular an almost blanket requirement to wear a mask on public transport, within buildings (including work places) and in busy outdoor areas (e.g. pedestrian zones or arcades). Events requiring physical presence in universities and schools were prohibited if possible, with the exception of primary and lower secondary school classes (school years 1–9). The requirement to wear a mask also applied in courts. People were recommended to work from home – this time “home office” was not mandatory.

## 4. Measures relating to the justice system

### 4.1. Federal Council measures

The Federal Council used emergency ordinance law to navigate its way through the coronavirus crisis, issuing numerous secondary measures based on Article 185 paragraph 3 FC.<sup>24</sup> Some of these emergency ordinances directly or indirectly affected the courts and the administration of justice. The following legislation and legal provisions in emergency ordinances are of particular interest:<sup>25</sup>

<sup>21</sup> December 2020.

<sup>22</sup> Ordinance on Measures during the Special Situation to combat the COVID-19 Epidemic (COVID-19 Special Situation Ordinance) of 19 June 2020, SR Ordinance on Measures during the Special Situation to combat the COVID-19 Epidemic (COVID-19 Special Situation Ordinance) of 19 June 2020, SR 818.101.26.

<sup>23</sup> AS 2020 4503.

<sup>24</sup> See for example the official summary «Rechtsetzung im Bereich Massnahmen gegen COVID-19: Übersicht (Stand 13.05.2020)», <https://www.bk.admin.ch/bk/de/home/dokumentation/gesetzgebung/berichtnotverordnungen.html> [accessed 17 April 2021].

<sup>25</sup> See Kettiger Staats- und Verwaltungsrechtliche Aspekte, supra note 1, p. 105 f.

- Ordinance of 20 March 2020 on the Suspension of Deadlines in Civil and Administrative Proceedings to maintain the Justice System during the Coronavirus (COVID-19) Pandemic;<sup>26</sup>
- Article 8 (first instance procedural deadlines) of the Ordinance of 1 April 2020 on Asylum Measures in connection with the Coronavirus Pandemic (COVID-19 Asylum Ordinance);<sup>27</sup>
- Ordinance of 18 March 2020 on a Stay of Debt Enforcement under Article 62 of the Federal Act on Debt Enforcement and Bankruptcy;<sup>28</sup>
- Ordinance of 16 April 2020 on Insolvency Measures in connection with the Corona Crisis (COVID-19 Insolvency Ordinance);<sup>29</sup>
- Ordinance of 16 April 2020 on Measures in the Justice System and Procedural Law in connection with the Coronavirus Pandemic (COVID-19 Justice and Procedural Law Ordinance) of 16 April 2020.<sup>30</sup>

Since April 2020, the justice system has primarily been affected by the COVID-19 Justice and Procedural Law Ordinance. However, the suspension of deadlines in civil and administrative procedure also had a considerable impact on the running of the courts. It is the first time in the history of Switzerland that the justice system has been affected in this way based on emergency ordinance law and the situation raises various constitutional questions.

Since 26 September 2020, the COVID-19 Justice and Procedural Law Ordinance has been based on Article 7 of the COVID-19 Act.<sup>31</sup> In order to guarantee the operation of the justice system and the procedural guarantees under the Federal Constitution, the Federal Council may issue provisions that derogate from the federal procedural law on civil and administrative matters for the first and second instances in the following areas: (a) suspending, extending or restoring statutory or official limitation periods and deadlines; (b) using technical solutions or aids such as video and telephone conferencing in judicial procedures that involve the participation of parties, witnesses or third parties, in particular court proceedings and the questioning of parties and witnesses; (c) the form and service of submissions, communications and decisions and the use of online auction platforms in debt enforcement and bankruptcy proceedings.

The core component of the COVID-19 Justice and Procedural Law Ordinance is Section 2 (in particular Articles 2–4 and 6), which in civil proceedings, in derogation from the applicable law, permits the use of video conferencing applications and in some cases even conference call applications for proceedings, hearings and examinations in courts and by conciliation and arbitration authorities and child and adult protection authorities until 30 September 2020.<sup>32</sup> This regulation was necessary, because otherwise Swiss civil procedure law does not permit audio or video conferencing to be used for court hearings.<sup>33</sup> Criminal procedure on the other hand already permits the use of electronic aids in some cases: for example, public prosecutors and courts may conduct interviews by video conference if a personal appearance

<sup>26</sup> SR 173.110.4 (in force until 19.04.2020).

<sup>27</sup> SR 142.318.

<sup>28</sup> SR 218.241 (in force until 04.04.2020).

<sup>29</sup> SR 281.242 (AS 2020 1233; in force from 20.04.2020 until 19.10.2020).

<sup>30</sup> SR 218.241; original German name «Covid-19-Verordnung Justiz und Verfahrensrecht».

<sup>31</sup> Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic (COVID-19 Act) of 25 September 2020, SR 818.102.

<sup>32</sup> For more detail, see Kettiger *Gerichtsverhandlungen*, supra note 1; F. Bastons Bulletti, *Crise du Covid-19 et évolution des audiences en procédure civile, Justice – Justiz – Giustizia 2020/2*; F. Bohnet & S. Mariot, *COVID-19 et oralité en procédure civile, Justice – Justiz – Giustizia 2020/2*.

<sup>33</sup> Decision 4A\_180/2020 of the Federal Supreme Court of 6 July 2020, E. 3.7.

by the person to be interviewed is not possible or only possible with considerable trouble and expense (Art. 144 CrimPC).<sup>34</sup> Audio or video conferencing is however not permitted in proceedings before the compulsory measures court.

The provisions of the COVID-19 Justice and Procedural Law Ordinance do not apply to the public deliberations of the Federal Supreme Court either. Nevertheless, on 3 November 2020, Social Law Division I of the Federal Supreme Court held a public hearing at which the judges and court clerk, and representatives of the parties and the media were present in the courtroom, while the public was able to follow the proceedings by video in another room. The Presidents' Conference of the Federal Supreme Court had rejected an internal request to conduct the public hearing entirely as a video conference and also to allow the judges – if necessary – to participate online.

Section 3 of the COVID-19 Justice and Procedural Law Ordinance regulates the simplified service of debt enforcement documents and online auctions in debt enforcement proceedings and does not affect the courts.

#### **4.2. Measures taken by the courts**

It goes without saying that the courts have also had to take measures to protect people's health.<sup>35</sup> This means that people who have symptoms of the disease, who have stayed in a region with a serious incidence of the virus in the 14 days before a court hearing, or who have been in contact with a person who has tested positive in the 5 days before a hearing are not permitted to be physically present in proceedings before a court. If an essential party to the proceedings is directly affected and the hearing cannot be postponed, it must be possible to hold the hearing while keeping the party concerned separate from other persons or by using technical means. In order to prevent infection, public access to the courts may also be restricted, which is permitted by the procedural codes (see for example Art. 54 para. 3 CrimPC);<sup>36,37</sup> the public should be informed of the outcome of the proceedings, where appropriate. Proceedings before compulsory measures courts or in care-related hospitalisation cases are in any event not held in public, nor are most administrative law cases (where proceedings are mostly conducted by written submission).<sup>38</sup>

Notwithstanding the emergency regulations enacted by the federal government, the federal courts and the cantonal justice authorities and courts very quickly took action, following the aim of the Federal Council measures, which seek to curtail the spread of the virus primarily by reducing human contact.<sup>39</sup> A crucial part of this was ensuring the protection of people working in the justice system (in particular judges, clerks of court and office staff). In several cantons, court hearings were suspended until the middle or end of April 2020. Exceptions were made for urgent cases, such as those related to compulsory measures, care-related hospitalisation or measures based on the emergency law. In other respects the caseload also has to be managed in a way that that is appropriate in the situation, following an order of priorities set out by the court management board. For example, the Cantonal Supreme Court in Bern devised an actual corona strategy, setting uniform priorities for civil and criminal cases.<sup>40</sup>

<sup>34</sup> Swiss Criminal Procedure Code (Criminal Procedure Code, CrimPC) of 5 October 2007, SR 312.0.

<sup>35</sup> See on this Lienhard et al., supra note 1, No 9.

<sup>36</sup> Swiss Civil Procedure Code (Civil Procedure Code, CPC) of 19 December 2008, SR 272.

<sup>37</sup> Art. 2 para. 3 COVID-19 Justice and Procedural Law Ordinance therefore has only a limited significance in its own right, in that excluding the public does not require any particular grounds or conditions to be met, see Kettiger *Gerichtsverhandlungen*, supra note 1, No 29.

<sup>38</sup> See Lienhard et al., supra note 1, No 9.

<sup>39</sup> See Lienhard et al., supra note 1, No 7.

<sup>40</sup> See Supreme Court of the cantone of Bern (*Obergericht des Kantons Bern*), *Massnahmen im Umgang mit der Covid-19-Pandemie, Zivil- und Strafgerichtsbarkeit des Kantons Bern (ZSG)*, Version 2 vom 18. März 2020.



## 5. Experiences and lessons to learn

### 5.1. *Strategic aspects*

The courts and other judicial authorities in Switzerland were either unprepared or at best poorly prepared for the COVID-19 epidemic. The federal influenza pandemic plan does not even mention guaranteeing that the courts will continue to operate – or public authorities for that matter.<sup>41</sup> This is reflected in the cantonal pandemic follow-up plans. In general, inadequate account or no account at all is taken of the courts in the crisis management plans. There are no rules on courts in the legislation on exceptional situations, no representatives of the courts in crisis teams, no laws on how to organise the courts in emergency situations (e.g. if courts or prosecution services are unable to function at all) and no laws allowing authorities (e.g. the court officials) to issue their own directives in exceptional situations. This amounts to a considerable flaw in the constitutional law on the organisation of the state and in the legislation on exceptional situations, which must be rectified. Not only are further pandemics on the scale of COVID-19 conceivable, but so are major terrorist attacks, and in view of global warming, natural disasters on a larger scale are also possible and pose a clear risk to the mountain regions of Switzerland.

In future senior officials from the justice system should also be included in cantonal crisis teams. The experiences of the Zurich Cantonal Supreme Court also demonstrate how valuable crisis teams within the justice system can be in times of crisis; ideally though, these teams should be set up before any crisis occurs.<sup>42</sup>

### 5.2. *Legal aspects*

It is likely that similar pandemic situations will occur in the future. As a consequence, procedural legislation (e.g. the Civil and Criminal Procedure Codes) should contain provisions on exceptions that apply in crisis situation, as a form of advance legal risk management. These provisions can apply in specific emergencies or can be activated by an authority (e.g. the Federal Council, the Federal Supreme Court or a cantonal government).<sup>43</sup> In addition, the required legal provisions on the use of technology in courts (e.g. allowing court hearings by video) should be enacted.<sup>44</sup> A provision should also be introduced allowing certain hearings before the Swiss Federal Supreme Court to be transmitted by video to the public.

Experiences with the Federal Council's emergency legislation, in particular its unnecessary interference in court-ordered deadlines in March 2020<sup>45</sup> and its failure to create any legal basis for their application in compulsory measures courts, raises the question of whether the Federal Supreme Court should be given emergency law-making powers for the judicial field, or whether emergency law-making powers in the judicial field should be given exclusively to Parliament or a parliamentary committee.

### 5.3. *Organisational aspects*

Court registrars in Switzerland have found that it is feasible to work from home, while “home office”, as it is known here, has not proven so satisfactory for judges. Matters were made difficult mainly by a lack of technology (e.g. VPN access or cloud solutions), by a lack of electronic court records and files, and in some cases by the law on the activities of public servants.<sup>46</sup> The supervision of trainees also proved difficult. The question arises of whether and how trainees

---

<sup>41</sup> See Federal Office of Public Health (FOPH), *Influenza Pandemic Plan for Switzerland 2018*.

<sup>42</sup> Information provided by Dr Lukas Huber, Deputy Secretary General, Supreme Court of the Canton of Zurich.

<sup>43</sup> In on this point, see Lienhard et al, *supra* note 1, No 17, with reference to Biaggini, *supra* note 10, p. 267.

<sup>44</sup> See also *infra*, 5.4.

<sup>45</sup> See Lienhard et al., *supra* note 1, No 10.

<sup>46</sup> According to the responses from the court officials interviewed by the authors.

who are working from home or who are subject to coronavirus measures can be tutored and supervised. A suitable feedback culture should be possible, even when using electronic communications media.

Courts are system-relevant institutions and cannot be allowed to shut down. Accordingly, measures must be taken to ensure – not only in emergencies – that there is never a situation where too many judges are incapacitated. The question arises of whether the judges of a court should be separated into two or more teams as a matter of principle, i.e. that they should not even travel on the same bus on an office outing. The Cantonal Supreme Court in Zurich has had a policy of separating its judges in this way during the coronavirus crisis.<sup>47</sup>

#### **5.4. Technological aspects**

In emergencies – in particular in the case of pandemics – electronic records, electronic legal communications, working from home and hearings by video conference are generally helpful and in many cases indispensable. But even outside crisis situations, the justice system is moving inexorably towards digitalisation. The coronavirus crisis has shown that Switzerland is certainly not leading the field in relation to this – there is a need for action. The current project *Justitia 4.0*<sup>48</sup> aims within the next few years to create an exchange platform for electronic legal communications and electronic court files; this would be an initial step in the right direction.

In Switzerland video conferencing tools have rarely been used for court hearings.<sup>49</sup> This may be due to personal reservations about new technologies, the rather defensively formulated emergency legislation, a lack of technology for courts, or a lack of security in the technology that is available to the courts<sup>50</sup> – we do not know.

Internet platforms for dispute resolution and/or mediation have not been an issue discussed in Switzerland, even though they have been used successfully in other countries during the coronavirus crisis.<sup>51</sup>

### **6. Conclusion: Challenges remain**

The coronavirus crisis is still ongoing at the time of writing this article and is set to continue well into 2021. In view of this and the associated additional pressures on courts in Switzerland, it will probably not be possible for the time being to conduct detailed analyses of the effects of the coronavirus crisis on the Swiss justice system. The most important findings are however already available and should be taken into account as soon as possible. The coronavirus crisis has also given impetus to digitalisation in the courts and at the same time exposed a greater need for digitalisation. This development must be pursued vigorously, for no one knows when the next pandemic or other crises on a comparable scale may come.

---

<sup>47</sup> Information provided by Dr Lukas Huber, Deputy Secretary General, Supreme Court of the Canton of Zurich.

<sup>48</sup> See <https://www.justitia40.ch/de/> [accessed 17 April 2021].

<sup>49</sup> According to responses from court officials interviewed by the authors.

<sup>50</sup> See Kettiger Staats- und Verwaltungsrechtliche Aspekte, supra note 1, p. 112 f.; Kettiger Gerichtsverhandlungen, supra note 1, No 45 ff.

<sup>51</sup> E.g. the US State Michigan, see Online Dispute Resolution Tool Now Live in All 83 Michigan Counties, *Michigan Courts News Release*, 1 July 2020, [https://courts.michigan.gov/News-Events/press\\_releases/Documents/News%20release%20on%20MI-Resolve%20in%20All%2083%20Counties.pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/News%20release%20on%20MI-Resolve%20in%20All%2083%20Counties.pdf) [accessed 17 April 2021]; or see S. Butler, S. Mauet, C.L. Griffin & S. Mackenzie, *The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report*, University of Arizona 8 September 2020, [https://law.arizona.edu/sites/default/files/i4\\_Utah\\_ODR\\_Report.pdf](https://law.arizona.edu/sites/default/files/i4_Utah_ODR_Report.pdf) [accessed 17 April 2021].



### Competing Interests

The authors confirm that there is no conflict of interest that affects this academic article; the authors have no personal or institutional interests in or personal or professional relationships with individuals or organizations that have influenced or could have influenced the content of the article.

**How to cite this article:** Daniel Kettiger and Andreas Lienhard, 'Swiss Courts Facing the Challenges of COVID-19' (2021) 12(2) International Journal for Court Administration 5. DOI: <https://doi.org/10.36745/ijca.380>

**Published:** 06 May 2021

**Copyright:** © 2021 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.



*International Journal for Court Administration* is a peer-reviewed open access journal published by International Association for Court Administration.

**OPEN ACCESS** The Open Access icon, which is a stylized padlock with an open keyhole.