

*Precautionary Measures Taken for the Functioning of Justice Facilities
in the Time of Pandemics
(Covid-19 as a Case)*

فعالية الإجراءات الإحتياطية المتخذة لسير مرفق العدالة في زمن الأوبئة
(كوفيد 19 نموذجاً)

نوال يامي قحموص

Naoual YAMI GAHMOUSSE

أستاذة محاضرة أ، كلية الحقوق جامعة الجزائر 1

Lecturer Class A, Faculty of law, University of Algiers1
gamyam49@yahoo.fr

سعاد راحلي

Souad RAHLI

أستاذة محاضرة أ، كلية الحقوق جامعة الجزائر 1

Lecturer Class A, Faculty of law, University of Algiers1

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ملخص:

اتخذت الجزائر كغيرها من دول العالم لمواجهة جائحة كورونا وخشية انتشار الفيروس على قطاع أوسع إجراءات الوقائية على عدة مرافق من بينها مرفق العدالة. أصدرت السلطات المختصة عدة مراسيم تنفيذية متعلقة بتدابير الوقاية من هذه الجائحة والمتمثلة أساساً في الحجر الصحي، كما أصدر أيضاً وزير العدل بيان من أجل سير مرفق العدالة بتوقيف عمل الجهات القضائية إلى غاية السيطرة على هذه الجائحة دون الإعلان عن حالة القوة القاهرة بطريقة مباشرة وصريحة، لكن أمر بتفعيلها من طرف المتقاضين من أجل ممارسة حق الطعن. الهدف من هذه الدراسة توضيح طريقة العمل على مستوى قطاع العدالة وخاصة الجهاز القضائي، والأثر المترتب على سريان المواعيد الإجرائية بعد أمر وزير العدل بتفعيل نص المادة 322 من قانون الإجراءات المدنية. ومن أهم النتائج المتوصل إليها عدم إعلان الجزائر عن حالة القوة القاهرة بصفة رسمية وما أصدره وزير العدل في إطار التدابير الوقائية ولحسن سير قطاع العدالة له إيجابياته وسلبياته.

كلمات مفتاحية:

كوفيد 19، مرفق، العدالة، جائحة كورونا، الإجراءات، الإستثنائية، الجهاز، القضائي.

Abstract:

Algeria too has taken strict measures to confront the Coronavirus and stop its spread. These measures have affected several sectors, including the justice sector. Therefore, several executive decrees related to the prevention measures, mainly the quarantine, were issued. The Minister of Justice also issued a statement to establish measures for the functioning of the justice facility requiring the suspension of the work of the judicial authorities until this pandemic is controlled without explicitly declaring the state of force majeure. He ordered to activate them by litigants to exercise the right to appeal. The aim of this study is to clarify the functioning method of the justice sector, especially the judiciary, and the effect of the procedural dates after the Minister of Justice activated Article 322 of the Civil and Administrative Procedures Law. The most important results reached was that Algeria did not officially announce the state of force majeure, and the advantages and disadvantages of the framework of preventive measures issued by the Minister of Justice for the good functioning of the justice sector.

Keywords:

Covid-19; Justice Facility, Pandemic; Exceptional Measure; Judiciary system.

1. INTRODUCTION

In late December 2019, a virus infecting the human respiratory system called the Coronavirus appeared in the Chinese city of Wuhan. It spread rapidly in several regions of the world. Covid-19 is a new disease that has the characteristics of a pandemic, according to the WHO classification issued on 30 January 2020. The Algerian government, like other governments, has classified it as a serious and infectious disease.

Pandemics are calamities that can affect several sectors including the justice sector. The Algerian Government, therefore, has taken measures to face the virus for fear of its widespread and considering the best interest of its citizens. Several executive decrees have, thus, been issued. One of the most important of these decrees is the Executive Decree 20/69¹ related to the measures preventing the widespread of the epidemic and combating it for 14 days, starting from 22 March 2020. Several decrees were subsequently issued to extend these provisions².

The Minister of Justice issued several statements, the first of which was issued on 16 March 2020³. While the previous decrees did not address the justice sector, this one did. The aforementioned statement took effect from 17 March to 13 April 2020; and it ordered precautionary measures for the good functioning of the

justice facilities. Other statements that determined further procedures followed this one⁴.

Some legislations, like the American and the Chinese ones, have acknowledged Covid-19 Pandemic as a force majeure and issued the force majeure certificates to avoid its contractual commitments. However, Algeria, to this date has not acknowledged the state of force majeure. Many questions, therefore, come to mind: how did the pandemic affect the functioning of the justice sector in Algeria after the Minister's statement regarding the measures to be taken for the functioning of the sector? What is the impact of the Coronavirus on litigants and legal workers?

To answer these questions, we relied on the descriptive and analytical methods to study all legal actions taken to prevent the spread of the pandemic.

The plan we used for this study is the following:

The first axis is related to the temporary suspension of judicial work by a ministerial statement: firstly, at the level of courts and penal institutions and secondly, at the level of judicial and administrative courts.

The second axis is related to the effect of the state's non-authorization of force majeure and the activation of Article 322 of the Law of Civil Procedures: firstly, the procedural dates shall remain in force until the activation of Article 322, and secondly, suspending the trials of the detainees, activating the Visio conversation technology, and violating the principle of personal freedom.

2. Temporary Suspension of Judicial Work by a Ministerial Statement

The State has undertaken the task of establishing justice among the people with the judiciary becoming one of the basic functions of the State⁵. The justice system is, therefore, one of the most important governmental sectors. It is the core of the state's legal system. It administers, supervises, and provides justice. The judiciary sector is a body like others which have been affected by the Corona pandemic. Therefore, the Minister of Justice has issued a ministerial statement on March 16, 2020, which came into force on March 17 to April 13, 2020. It set precautionary measures for the functioning of the justice facilities. A second statement was issued on 21 March 2020 to extend the preventive measures. The confinement period was extended several times, thus; the Ministry of Justice issued several statements concurrently with quarantine periods. We will address the content of these statements and their impact on the judicial system in the following sections.

2.1. The Court and Penal Institutions

2.1.1. The Court

The judiciary has the authority given by the legislature to resolve disputes of any nature. The Algerian legislature has organized it through the Organic Law 05/11

on the judicial bodies of Algeria⁶, which include the ordinary judicial system, the administrative judicial system and the court of disputes.

One of the most important principles on which the Algerian judicial system is based is the principle of two-degree litigation, which gives litigants the possibility to re-submit their dispute to the rule of a judicial authority of a level above that of the primary court⁷.

The ordinary judicial system includes the courts, the judicial councils and the Supreme Court⁸, and the administrative judiciary includes the administrative courts and the Council of the State. The courts and councils of the ordinary judiciary are divided into sections and chambers such as the Civil Section, the Criminal Section, the Emergency Section ...etc.

According to the Minister of Justice's statement of March 16, 2020, except for the Emergency Division, the civil hearings were suspended at the court level; noting that urgent cases cannot be registered by lawyers or litigants unless they are viewed, accepted and scheduled by the president of the court to limit the number of cases. The President is informed of the case to ensure the availability of the emergency condition and inviolability of the rights⁹.

For the penal aspect, the Criminal Court and the offences court sessions have been suspended, except for those previously scheduled. Cases are carried out only in the exclusive presence of the parties, without the public.

As for the criminal cases that were resolved by negative final sentences for persons in the condition of release, they were deferred until the end of the quarantine.

The Minister of Justice also asked the procurators of the republic to avoid contact with the litigants as much as possible by rationing of the immediate appearance orders. Only people placed under surveillance are concerned.

He also ordered stopping the release of prisoners from penal institutions by investigating judges, except for extreme necessity with people in temporary detention. A new measure was also taken, which is the possibility of using remote trial procedures when possible and suspending public reception only for the extreme necessity judged by the President of the Tribunal.

2.1.2. The Penal Institutions

According to the statement of the Minister of Justice, all family visits were suspended, while ensuring that the families of the detainees are informed to avoid infection inside the penal institutions. The lawyers' visits to the prisoners, on the other hand, happened through a separation barrier in the chat room. Furthermore, the operations of partial freedom, leave permissions and external workshops have also been suspended until the end of the quarantine.

The Minister also ordered the placement of the new detainees in separation from the rest of the prisoners for 14 days and to subject them to medical monitoring and examination. Preventing the introduction of any food from outside the penal institution and put means of purification and hygiene at the disposal of the staff and the prisoners were also insisted upon.

Employees were also prevented from contacting the prisoners without means of protection or leaving the organization for no serious reason.

The Minister has also ordered the municipal and health departments to clean all places and facilities of penal institutions periodically and to acquire all medical protection from the central hospital pharmacy. To ensure the sustainability of these measures, a crisis cell has been formed at the level of each judicial Council, chaired by the Attorney General. It meets periodically to assess the situation and coordinate with the concerned health departments¹⁰.

2.2. The Judicial and Administrative Courts

According to the statement issued by the Minister of Justice related to taking the necessary measures to prevent the spread of the Coronavirus, work at the judicial and administrative courts level has also been suspended as follows:

2.2.1. The Judicial Councils

The courts are the second-class judiciary; they consider appeals against court rulings. Each one is constituted of ten chambers including the Civil Chamber, the Criminal Chamber, the indictment Chamber... etc.

According to the statement, the sessions are suspended in the entire penal chambers, except for sessions that were programmed before the start of the quarantine. The civil cases continue to be held in the presence of lawyers without the litigants. However, in reality, judges postpone all the sessions to a later date through the telecommunication and technological means at the level of the Judicial Council Bar Hall. The unified nets providing information to lawyers and litigants are suspended because the clerks are not present.

The suspension also applies to the emergency room of the Judicial Council, unlike the emergency section at the court, which still operates. The public reception at the judicial level has also been suspended except for extreme necessity defined by the President of the Judicial Council.

2.2.2 The Administrative Courts and the Councils of State

Administrative courts are considered to be a second-degree of litigation. They are independent of ordinary courts, and they adjudicate administrative disputes only. The Civil and Administrative Procedure Act established the legal existence of these courts¹¹. They are considered to be the public authority in administrative disputes to

adjudicate on appeal in all cases involving the State, a district, a municipality, or any public institution with an administrative form.

In reference to the statement by the Minister of Justice, the administrative court sessions remain exclusive to the presence of lawyers without litigants. However, in practice, the judges have taken the same position as the judges of the judicial councils, postponing and scheduling all hearings at a later date. The date of postponement of these sessions is communicated according to the Ministry of Justice statement issued on 21 April 2020 at the level of the official website of the Ministry of Justice.

The Council of State, on its part, issued a statement based on the instruction of the Prime Minister¹² considering the safety of the council's employees and acquitting the judiciary assistants and litigants from moving to the headquarters of the State Council. It called for the suspension of all work of judicial nature at the level of the secretariat, except for the registration of cases, the filing of pleadings and their association with certain deadlines, as well as the filing of expert reports.

Sessions are also continued with the exclusive presence of lawyers without the parties, and access to online cases happens through email, phone number and fax number¹³.

3. The Effect of Non-Activation of Force Majeure Status and Article 322 of the Law of Civil and Administrative Procedures

Like America, Iraq and China, Algeria did not announce the status of force majeure, neither through the Minister of Justice by a ministerial statement nor through the Prime Minister in relevant decrees regarding the quarantine.

The non-recognition of this exceptional circumstance can affect all sectors, especially the justice system concerning the procedural side. Furthermore, the section of the ministerial statement about sustaining trials will negatively affect people's freedom and the good functioning of the justice facilities. This is what we will address in the following two sections¹⁴.

3.1. The Procedural Deadlines Remain in Effect until the Activation of Article 322 of the LCAP

To defend their rights, legal positions and to fulfil their procedural duties; individuals resort to the judiciary. They are granted the right to filing lawsuits that might be interrupted in some cases by special circumstances or foreign causes. These circumstances and causes represent the state of force majeure, which makes it impossible for the opponents to take a procedural action.

The jurists have defined force majeure as every act in which the will of the convict cannot interfere. The act cannot be expected nor prevented. It also makes any

obligation impossible to fulfil, and it exempts the convict¹⁵. It is also defined as anything a person cannot anticipate, such as natural phenomena, floods, droughts, fires, and other phenomena, which make fulfilling obligations impossible; and by impossible, it is meant that the parties are not able to stop or overcome this cause. The following are the conditions of force majeure that can be concluded from these definitions:

- That the accident must not result from the action of the party in charge of the procedure, and he has nothing to do with it.
- That the accident is something that can never be expected from either the plaintiff or the defendant¹⁶.
- That the sudden accident makes the fulfilment of the joint obligation an absolute (complete) and not a relative impossibility, i.e., it is impossible to implement for any person who is in the convict's position.
- It must be exceptional and rare; the usual accident is not considered as it does not fall within the framework of force majeure.

Accordingly, a valid reason for applying the case of force majeure¹⁷ is a pandemic like the Coronavirus pandemic, which is a foreign cause that prevents the implementation of contractual obligations and affects them. It also affects the progress of procedural dates, which are those appointments set by the law to initiate pleading procedures or to attend them¹⁸. Appointments are necessary for achieving a balance between two considerations. The first is to prevent pleading procedures from resolving the dispute in an untimely manner, and the second is to grant sufficient time for the litigants to take the necessary measures and prepare their defence means in a way that guarantees their rights in defending themselves¹⁹.

The legislator has not put in place a general rule indicating the effect of the foreign reason on the appointed date, as it has done in determining the effect of the official holiday²⁰, for example, and thus scheduled dates are stopped by the force of law when there is a force majeure. The judge has the authority to intervene to stop the appointed date²¹. Normally, the judge is not allowed to amend the deadlines set by the law because they were found as a guarantee achieving stability for the opponents. Therefore, it is unreasonable to deprive them of this guarantee, but this rule has two exceptions: if urgent conditions require that, or if the law stipulates it explicitly²².

By referring to the Article 322 of the Law of Civil and Administrative Procedures, all procedures in the law to exercise the right to appeal when not respected will engender the fall of this right, except for the case of force majeure or the occurrence of events related to it that impact the normal functioning of the justice facilities.

As for the current situation in Algeria, since the force majeure status has not been announced, and the current circumstances were considered exceptional circumstances due to the outbreak of the Corona epidemic, then the second paragraph of the Civil and Administrative Procedures Law, Article 322 must be activated. It gives litigants the right to submit an order on the foot of a petition for sustaining procedural deadlines. Indeed, according to a memorandum sent to the heads of judicial councils and administrative courts²³ the Minister of Justice requested that they strive to implement Article 322 of the Civil and Administrative Procedures Law. The article grants the absolute discretionary power to the head of the judicial authority before which the dispute is brought to decide on the request to cancel the lapse of the right to appeal following an order on the tail of a petition. This course of action is adopted as preventive measures addressing the Corona pandemic, where the normal course of the judicial procedures has been disrupted, especially the Secretariat of the tribunal. This may have prevented the litigations from exercising their right to appeal within the legally prescribed deadlines. A copy of this memorandum has been sent to the National Federation of Lawyers Organizations for assistance in what the law decides.

3.2. Suspending the Trial of Detainees and Activating the Videoconferencing Technology

Under the current circumstances and following the decisions of the President of the Republic, the Minister of Justice has ordered the suspension of misdemeanour hearings in courts and judicial councils, except for those related to detainees whose cases were already scheduled. These are conducted with the exclusive presence of the parties, but not the public. Therefore, the following questions might be asked: What is the fate of the detainees who are under pre-trial detention and whose cases have not been scheduled? Is suspending their cases considered a violation of their rights and the principle of justice in exceptional and urgent circumstances?

Like other countries, Algeria has adopted measures to limit the spread of the Coronavirus, and some of these measures are restricting to freedoms. However, it is worth noting that doing so is legally and socially permitted in exceptional cases. Article 15 of the European Convention on Human Rights, for example, allows measures that contradict the agreed-upon rights to be taken in emergency cases. The Coronavirus was considered one of the exceptional cases. On the other hand, precautionary detention is one of the most important and most dangerous investigation procedures that can affect the freedom of the accused, whether during these procedures or the trial. It deprives a person of his liberty if charged with

committing a crime for a while, by placing him in a prison and pending the completion of the investigation that is carried out with him.

Precautionary imprisonment in this way is a punishment that deprives a person of his freedom. The principle is that penalties should not be applied before a verdict proving he is guilty and specifying the penalty in a fair trial, where the accused is guaranteed the right to defend himself. However, as an exception to this principle, the legislator permitted the investigating judge to detain the accused at the beginning of the investigation or during its course. Precautionary detention in this case is just one of the investigation procedures that contradict the constitutional presumption of the innocence of the accused. Therefore, it is a very dangerous procedure, especially if it is overused, which transforms it into a penalty applied without a trial²⁴.

Therefore, keeping the accused in pre-trial detention in penal institutions violates the principle of personal freedom and the right to physical safety. It may affect his health with the increase in cases of the new Coronavirus while pre-trial detention is nothing but a precautionary measure. It is taken by the investigating authority against the accused during the consideration of the case until a final judgment is issued against him²⁵. To prevent the harmful effects and to protect prisoners from the spread of the virus, it was advisable to use alternatives to temporary imprisonment represented in placing the accused under judiciary supervision. This could reduce the burdens of prisons, which are generally overcrowded, mixed and do not respect social distancing and where the risk of infection is high and threatening to this category of individuals.

For this reason, the United Nations invited several countries to release prisoners to prevent the spread of the virus. As Robert Colville, a spokesperson for the United Nations High Commissioner for Human Rights, recommended the Egyptian authorities to follow the example of other countries that organized new regulations in prisons due to the threat of the emerging Coronavirus, and recommended the release of people who suffer from special vulnerabilities, either because of their age or because of serious medical conditions²⁶.

Amnesty International also called on the Lebanese authorities to review the cases of those held in pre-trial detention as part of the measures adopted to contain the Coronavirus and prevent its spread²⁷.

Finally, as long as pre-trial detention is in practice, it is a punishment restricting the freedom of the accused whose innocence may appear at the end of the investigations or before the court. Furthermore, because the accused is innocent until proven guilty, it is assumed that this procedure, which destroys the lives of many

families due to the absence of their main source of income, should not be continued. The Public Prosecution should consider this category, especially with the Corona epidemic, for which no cure has been found until this moment and is spreading in closed and crowded places.

However, due to the importance of not stopping judicial work because of these exceptional circumstances, the Algerian legislator issued decree 20/04 to amend the Criminal Procedures Law, and allow the use of audio and visual means of communication to follow through the procedures, permit the proper functioning of the justice sector and secure the public health of the parties, witnesses, experts, or translators during investigations and trials. The resort to remote litigation according to the text of Article 441 bis 7 of Order 20/04 amending the Criminal Procedure Law has become allowed on the initiative request of the ruling authority or the investigation party without the consent of the accused, contrary to what was required by Law 3/15 relating to the modernization of justice where the matter was optional for the accused.

4. Conclusion

The necessary measures adopted by most countries of the world to avoid the spread of the new Coronavirus have affected several sectors, including the justice sector. This pandemic is an exceptional circumstance that has negative effects on the legal aspect.

Algeria has not announced the state of force majeure officially. What the Minister of Justice has issued, as preventive measures and for the good functioning of the justice sector, has its advantages and disadvantages. This study concludes with many important findings and recommendations presented as follows:

4.1. Results

- The judicial work has been suspended, except for the urgent section of the courts, with the continuation of civil sessions at the level of judicial councils in the presence of lawyers only, and judges have postponed whole cases without holding any session. Also, concerning the emergency department, the registration of cases is not allowed except after the approval of the head of the regional court.

- To stop the process of releasing detainees from penal institutions, except in cases of extreme necessity to avoid the spread of the virus.

- The Minister of Justice asked judges to activate Article 322 of the Civil and Administrative Procedures Law to drop the procedural deadlines.

- Amending the Criminal Procedures Law to initiate remote litigation as an alternative facilitating procedure during the exceptional circumstances the world is experiencing.

- Adhere to the remote litigation procedure in criminal cases only, whether at the level of investigation or trial on the request of the ruling or investigating authority, the parties to the case, or their defence.

- Conducting remote litigation is no longer considered optional for the accused, but it has become obligatory for the good functioning of the judiciary during the exceptional health circumstances of the Covid-19 pandemic.

4.2. Recommendations

It would have been better for the Algerian authorities to announce the status of force majeure in order to use it in several fields, the most important of which is the procedural aspect in the justice sector, by suspending deadlines automatically by the force of law without resorting to activating Article 322, Paragraph Two of the Civil and Administrative Procedures Law. This article states that the litigant is required to resort to the head of the specialized judicial authority through an order on the foot of a petition to forfeit the right of appeal. After that, he must resort again to the judge of the matter to settle the dispute, which burdens the litigant.

- A special law or decree must be issued and the Corona pandemic must explicitly be recognized as a force majeure.

- Extending the remote litigation or trial procedure to include other kinds of cases and not limiting it to criminal cases only, especially if the quarantine procedure is resumed to prevent the spread the Coronavirus.

- The authorities should also consider reducing inmates through the conditional release of those most exposed to the risks of the virus, such as the elderly and those with chronic diseases.

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⁹ Refer to Article 299 of the Civil and Administrative Procedures Law.

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