



Research Note

Coronavirus (COVID-19) pandemic and the visibility of justice

Marijke Malsch, Gudule Custers, Annerie Smolders and Leonie van Lent^{1 2}

Introduction

The coronavirus (COVID-19) pandemic affects many aspects of everyday life. There is a risk of becoming seriously ill or even dying if someone infects us. Once an individual is infected, he or she has to stay at home for 10 to 14 days to avoid spreading the infection to others. School attendance, use of public transport and attendance at events are restricted or subject to the obligation to wear face masks and keep a distance of 1, 1.5 or 2 metres, depending on the country where one is located.

One domain that has been seriously affected by coronavirus measures is the legal system. In many countries, trials in open court have been replaced with limited access hearings. Facilities for remote hearings have been introduced, based on the use of Zoom, MS Teams or similar systems. Judiciaries have tried to continue dealing with cases as expediently as possible, but they have repeatedly been confronted with serious obstacles.³

This Research Note addresses issues related to the coronavirus measures taken across a number of countries and investigates how these measures have affected the legal system. We specifically focus on aspects of open justice, since this principle has received relatively little attention to date. The aim of the Research Note is to provide an initial update of developments related to coronavirus infection control measures and how these impact on the accessibility of trials to the public and to journalists. The authors plan to publish regular updates of this

¹ Marijke Malsch is professor of Empirical Legal Studies, Open University, senior researcher at the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) and honorary judge; Gudule Custers is communication advisor and works on a voluntary basis for Open University; Annerie Smolders is publicist, fellow at the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) and former judge; Leonie van Lent is assistant professor of Criminal Law and Criminal Procedure, Utrecht University and honorary judge.

² The authors wish to thank Nico Tuijn, senior Justice at the Court of Appeal 's-Hertogenbosch, for his help in finding information for this Research Note.

³ See <https://remotecourts.org/>; https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do

Research Note and express the hope that legal professionals and academics will be prepared to forward information on recent developments to them.⁴

Open justice

The principle of open justice forms an indispensable part of the rule of law. It guarantees that the general public and the media can monitor the hearing of cases by the courts. One implication of the principle is therefore that the administration of justice is accessible to the general public: everyone who wishes it, with a few exceptions, is offered the opportunity to attend case hearings and case adjudication information is made available to the public and the media.

The coronavirus lockdown severely impeded the operation of an open and accessible court system. In those countries where restrictions have now been eased, the courts are still significantly affected by the pandemic. Many restrictions continue to apply. The general public and journalists often cannot attend trials or are offered only limited access. The live-streaming of court hearings for the general public has been a rare phenomenon.

The open justice principle is also strongly dependent on what happens inside the courtroom. Transporting defendants from detention centres to courts has become more difficult because distance must be maintained between individuals, also on transportation buses. As a result, defendants may be not able to physically attend their own cases. Monitors in courtrooms may offer only a restricted view to the audience sitting in the public gallery.

Backlogs have ensued, due to the limited scope to organise hearings. These backlogs may be reduced by the prosecution and the police taking over the handling of cases from courts, for example with sanctions being imposed by a prosecutor or a police officer. Replacing three-judge panels with single-judge sittings is another means of reducing backlogs. However, such measures may endanger the rule of law and the principle of open justice.

Methods

Starting from June 2020, the authors of this Research Note investigated measures resulting from the coronavirus crisis and their consequences for the judicial systems of different countries. A brief digital questionnaire was distributed by email to judiciaries or individual judges in a number of countries. In addition, the second author of the Research Note screened the Internet for information about coronavirus measures and their consequences for open justice. Issues addressed were: the measures being taken; how these measures were affecting aspects of open justice; and any plans or proposals in the respondent's country to increase the number of cases to be decided by the prosecution and/or the police, rather than by a court. Those responding to the digital questionnaire were also asked to give their opinions on the measures.

⁴ Please email via marijke.malsch@ou.nl

Results

In total, eight respondents completed the digital questionnaire. They worked in the following seven countries: Croatia (two respondents), Germany, Czech Republic, Spain, Austria, Italy and Serbia. Information was also collected in the Netherlands, from two Justices working there. One respondent was a public prosecutor and all other respondents were judges.

Neither the respondents, nor their countries of origin, can be considered as representative of the legal systems or judiciaries of Europe or the world. In combination with the other information collected, however, the responses provide for an interesting, albeit provisional, overview of how the coronavirus pandemic is affecting open justice.

The results from both the questionnaire and the information obtained from the Internet are presented below. First, we examine the measures taken in the legal systems under review. We then address the question as to how these measures are affecting aspects of open justice. Finally, we outline the extent to which plans are in place in the various countries to replace judicial decisions with the disposal of cases by other organisations. Related to this question is the issue of the balance of power between the judiciary and State executive and legislative branches, which is also discussed. This Research Note ends with conclusions and a cautious forecast for the future.

Measures taken

Measures taken in the various countries were along very similar lines: adjournment of trials (except for urgent ones, in general); introduction of video conferencing; and court closures or limits on the number of members of the public and journalists able to access hearings and trials. Some measures placed specific demands on judges and other court personnel, such as extended court opening hours or even opening at night ('Nightingale courts'⁵), working from home and hearings organised outside the court building. Information from France indicated that, at the beginning of the pandemic, judges took holidays ranging from zero to ten days.⁶ The governments of countries that make use of a jury (or 'Assizes') sometimes considered replacing them with procedures involving only professional decision makers or (temporarily) reducing the number of jurors (such as in France⁷).

Countries differed with respect to the types and/or the strictness of measures taken. The respondent from the Czech Republic indicated that the coronavirus epidemic was less severe there, so courts could start returning to business as usual by June 2020. The German respondent observed that courts in Germany were *not* generally closed and stressed the importance of access to justice. This respondent noted that video conferencing would not be mandatory for judges if they were unwilling to use it.

The Netherlands seems relatively restrictive, with respect to the accessibility of courts and trials to the public and the media. In the first phase of the pandemic, access was almost entirely denied. Per case, three journalists were allowed to enter the courtroom. How these

⁵ <https://www.independent.co.uk/news/uk/home-news/coronavirus-nightingale-court-buildings-lockdown-cases-delay-a9627476.html>

⁶ <https://medelnet.eu/index.php/association/contact>

⁷ https://www.bfmtv.com/police-justice/les-tribunaux-se-preparent-a-l-apres-confinement-et-a-un-engorgement-inedit_AN-202004240156.html

journalists were selected and on the basis of which criteria remained unclear.⁸ Even after the general coronavirus measures were relaxed nationally, courts still seemed to allow members of the public only very limited admittance to the court building and the courtroom itself.⁹ The United Kingdom also restricts access to journalists but other countries, including Croatia and Germany, seem more flexible.

In general, respondents to the questionnaire were supportive of the measures taken, viewing them as necessary and appropriate to reduce the risk of infection with the virus. Only one respondent was of the opinion that the measures were too strict: they obstructed public and media access to trials and undermined the principle of fair trial.

Impact on open justice

The coronavirus measures inevitably affect several aspects of open justice. As a consequence, the operation of the legal system becomes significantly less visible. Related aspects of fair trial are affected too: defendants may be unable to attend the hearing in their own case, because transportation to court is limited or even impossible. Video links with penal institutions may be used as a substitute. However, as applies in the Netherlands, time limits may be set for their use – often dictated by the director of the penal institute where the defendant is being held.¹⁰ Even if journalists or members of the public are offered access to the public gallery, they may not have a clear view of the monitors, which are primarily focused on the professional participants.

Replacement of judiciary tasks?

The backlogs generated by the coronavirus pandemic may motivate governments to extend the opportunities for bodies or organisations other than the courts to decide cases. This may be achieved through, for instance, increased powers for public prosecutors and police officers to dispose of cases (penal orders, *Strafbefehle* (Germany), *strafbeschikkingen* (the Netherlands)) and mediation or out-of-court settlements. We identified initiatives to create or extend such opportunities in two countries: the Netherlands and Spain.¹¹ In the Netherlands, in cases for single-judge panels that would normally be heard in court, the Public Prosecution Service can now impose *strafbeschikkingen* that replace such procedures.¹² Spain is promoting agreements with the prosecutor office in order to avoid trials. Mediation has also increased in that country, as has restorative justice.¹³ Respondents from the remaining countries stated that such plans were not being considered or implemented in their legal systems, or that they were unaware of such plans.

⁸ <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/05/19/antwoorden-kamervragen-over-fundamentele-rechten-in-het-strafrecht>

⁹ See <https://www.iaj-uim.org/iaj-questionnaire-upon-the-effects-of-covid-19-pandemic/> and <https://www.rechtspraak.nl/coronavirus-%28COVID-19%29/Paginas/tijdelijke-regelingen.aspx>

¹⁰ <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/05/19/antwoorden-kamervragen-over-fundamentele-rechten-in-het-strafrecht>

¹¹ Initiatives may exist in other countries too, but these may not have come to the authors' attention or they may not have been publicised.

¹² <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/05/19/antwoorden-kamervragen-over-fundamentele-rechten-in-het-strafrecht> ; <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Wegwerken-corona-achterstanden-strafrechtketen-voor-eind-2021.aspx>

¹³ https://ficheros.mjusticia.gob.es/aviso/resolucion_servicio_publico_RD478.pdf

Some countries are developing plans to replace three-judge panels with judges sitting alone, in an attempt to reduce backlogs. This is happening in the UK and the Netherlands. In the latter country, retired judges are also being sworn in again and honorary judges are being involved in case hearings more frequently.

Increasing the number of cases dealt with by officials who are not independent and who do not form part of the judiciary may lead to changes in the *trias politica*, the balance between the three powers within the State. In the event of increased numbers of cases being disposed by the prosecution and/or the police, the executive may become more powerful at the expense of the courts. This reduces the visibility and independence of decision-making in legal cases – an outcome that also occurs when other types of out-of-court decision-making are applied.

There was some information and debate on the Internet regarding the issue of balance between the powers. In relation to coronavirus measures planned or taken in Germany, the *Neue Richtervereinigung* stated that they wished to liberate the judiciary from the executive:¹⁴ “*Sie fordert, die Justiz aus der obrigkeitstaatlichen Abhängigkeit von der Exekutive zu befreien. Die Rechtsprechende Gewalt darf nicht mehr den Justizministerien unterstehen, (...)*”. In an e-book by MEDEL (*Magistrats Européens pour la Démocratie et les Libertés*),¹⁵ author Ingo Socha states: “The current crisis highlights the need for a truly independent judiciary. Judges in Germany are wary about the possibility that the executive branch could ‘switch off’ the judiciary.” Socha is also of the opinion that hearings conducted by video conference still need to be accessible to the public.¹⁶

The pandemic may also be reason for countries to restrict the working of certain essential legal principals, or for practices and procedures to be changed in such a way that justice becomes less visible. That is not always accepted without question, however. In Italy, a debate is underway on the fundamental values that may be at stake because of the coronavirus crisis.¹⁷ The issue is how the measures impact on the values underlying procedural rules and the culture of the judiciary. “If we lose a specific physical space for the trial, and we have only a screen, does this change the social function and the overall legitimacy of justice?” Also being debated is whether the principles of orality and immediacy might be undermined: “Principles that are not empty slogans but have the function to ensure the quality of the evidence. Evidence that is formed in the adversary dialogue between the parties.”¹⁸

In relation to concerns about ‘immediacy’,¹⁹ the Italian judiciary is pondering how to safeguard – once the emergency situation is over – the principle that trials must take place in dedicated courtrooms: a space where the judge’s knowledge of facts comes from interpersonal relations. Concern is being expressed that the current changes could lead to marginalisation of the judge and the judge’s role in safeguarding constitutional guarantees.²⁰

¹⁴ <https://www.neuerichter.de/startseite.html>; <https://www.neuerichter.de/details/artikel/article/gibt-es-in-der-krise-noch-eine-3-staatsgewalt-671.html>

¹⁵ <https://www.medelnet.eu/index.php/news/europe/636-e-book-justice-and-challenges-in-times-of-pandemic-in-europe>

¹⁶ *Idem.*

¹⁷ <https://www.medelnet.eu/index.php/news/europe/636-e-book-justice-and-challenges-in-times-of-pandemic-in-europe>

¹⁸ *Idem.*

¹⁹ ‘Immediacy’ is the principle that all evidence is presented in its most original form to the court.

²⁰ <https://www.medelnet.eu/index.php/news/europe/636-e-book-justice-and-challenges-in-times-of-pandemic-in-europe>

Judges in some other countries seem more willing to accept a certain shift in the balance of powers within the State – presumably because this would be temporary, at least by intention. The effectiveness of speedy measures to combat backlogs is perhaps considered more important than principles of open justice, immediacy and fair trial, even by the judges themselves. Although judges are raising objections because of task intensification through having to work longer days and digital techniques that do not always work effectively, fewer concerns seem to be expressed regarding a potential shift in the power balance with the executive. The diminishing visibility of the administration of justice and the reduction of the courts’ tasks also seem to be perceived as less troubling.

Conclusions

The Covid-19 virus is here and it is not certain when it will disappear or subside, or when a vaccine will be found. Measures will therefore remain necessary for the foreseeable period, with associated ramifications for open justice.

Although facilities for remote hearings are far from flawless, they do seem to offer at least some advantages.²¹ The UK law reform group JUSTICE staged three mock trials using a 12-strong jury along with judge, counsel and witnesses, to examine how a Crown Court could operate in a virtual environment. It was possible to attend the trials via a live-streamed virtual public gallery. The results of this experiment suggest some positives.²² It was much easier to see what was going on and follow the case because: (a) participants could see everyone in court at the same time, study their faces and watch their reactions to what was said by others; and (b) the public do not normally see the documents featuring in the case, but these were shown on screen during the virtual mock case. From a transparency point of view, this was a significant benefit.²³

So, with respect to the visibility of justice being done, virtual trials could add something new to existing opportunities for physical attendance at sittings. However, the threshold remains high for potential participants: members of the public need to access and operate computers and systems such as Zoom, with which they may not always be familiar. In addition, there are risks that trial recordings may be shared and trial participants’ privacy invaded. The principles of open justice and fair trial also require that debate actually takes place in the physical courtroom. This immediacy guarantees adversarial debates and transparent truth finding. These drawbacks associated with remote courts imply that we should not relinquish physical attendance of physical trials too readily. When coronavirus permits, we should return to real-life trials as soon as possible.

Some of the countries reviewed in this Research Note indicate heightened awareness of the risks of imbalances in the powers in the State due to coronavirus measures. Such risks are twofold: 1) other, non-independent organisations taking on judiciary tasks or cases being tried by judges sitting alone instead of three-judge panels; and 2) decreased visibility, potentially leading to people ‘forgetting’ that judges exist and are the officials principally responsible for solving legal cases. The second risk may, in turn, lead to reduced opportunities for monitoring the operation of the legal system.

²¹ See <http://www.transparencyproject.org.uk/is-criminal-justice-under-lockdown-remotely-possible/>

²² Idem.

²³ Idem.

In other countries, the authors of this Research Note detected no awareness of these risks. The emphasis in those other countries seems to be primarily on the efficient solution of problems inherent in the present situation.

Updates

The authors of this Research Note intend to track developments related to aspects of open justice, as described above. If you would like to make contact and notify them of specific developments in your country, please do so via this e-mail address: marijke.malsch@ou.nl