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'Access to justice during and after the Coronavirus pandemic': *an exchange of views – human rights restrictions, procedures adopted, lessons learned*[1]'

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Introduction

President, valued colleagues, it is an honour and a pleasure to have been invited to speak to you here today on the subject of access to justice during and after the Coronavirus pandemic.

The pandemic has had serious repercussions for the law and legal protection, for access to justice and for judicial procedures. It is essential, while we are still in the grip of the pandemic, that we use past experiences to learn how we are best able to guarantee access to justice. I will first review what has actually been happening during this period and then briefly discuss the situation in the Netherlands.

I will conclude my presentation with some thoughts on the conflict between two fundamental rights: the right to a public hearing and the right to privacy in proceedings before the courts.

World literature / ACA survey

An extensive body of literature has been published worldwide on justice in relation to the COVID-19 crisis, including the impact it has had on the courts. To name just a few publications:

- The Functioning of Courts in the COVID-19 pandemic: A Primer[1],
- Civil courts Coping with COVID-19[2], and
- Remote Hearings and Access to Justice during COVID-19 and Beyond[3].

For this presentation I make grateful use of a recent survey by ACA Europe[4]. ACA is the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union.

The survey covers all EU member States. Although that sample is far smaller than the number of signatories of the Convention, hopefully the picture painted by the analysis is nevertheless representative.

[1] Organization for Security and Co-operation in Europe, 2 November 2020.
[2] Editorial Board: Bart Krans and Anna Nylund. Boom Juridische uitgevers, 16 April 2021.
[3] Created by the California Commission on Access to Justice, published by the National Center of State Courts (NCSC, www.ncns.org).
[4] "The Supreme Administrative Courts in times of COVID-19 crisis – a lesson learned", Transversal Analysis 2020, ACA Europe, www.aca-europe.eu.

The pandemic has had a huge impact on the working life of the courts, and hence on the work of judges, judges' assistants and other court staff. That is reflected in the wide range of measures that were adopted, which included:

- reductions in the number of court staff;
- implementation of furlough systems;
- introduction of alternative ways of working (digitally and remote);
- working from home and on flexible hours;
- performance of tasks from home (deliberation, drafting, e-signing).

Let me briefly mention some other interesting topics.

Special legislation targeting the activities of the courts. More than 50% of the countries surveyed adopted special legislation targeting the activities of the courts and designed to prevent the spread of the COVID-19 virus.

Physical access. Physical access to justice was hindered or even blocked. In most countries court buildings were closed, particularly in 2020.

Authorities with competence to order closure of the courts. Interestingly from a constitutional point of view, the authorities with competence to order the closure of the courts during the pandemic varied from one country to another: Parliament (Austria, Poland), the Government (Poland), the president of the court (Austria, Czech Republic), the Chief Justice (Ireland) and the Special Pandemic Medical Officer (Sweden). In some member States, that competence lay with multiple authorities.

Compulsory health measures for gaining entry to court buildings. With the exception of Sweden, every respondent country adopted compulsory health measures with respect to access to court buildings. These measures included: social distancing (1.5 or 2 metres), face masks, plexiglass face shields and glass barriers, disposable gloves, measurement of temperature, hand sanitizer, signposting of courtroom entrances, walking routes and exits, and wider spacing between seats in the courtrooms and therefore limited seating.

Use of video conferencing and live streaming. The speed with which courts switched from a paper-based process to a digital process, including video conferencing and remote hearings with live streaming, has been revolutionary. The institutions in most countries now use two-way video-conferencing systems. 25% of the countries surveyed arrange live streams of hearings in order to limit the number of people present in the court itself and to promote the public character of the hearings.

National procedural law: modifications to facilitate judicial functions. Of the countries surveyed, 64% have modified their national procedural law in order to facilitate the courts in the performance of their judicial functions during the pandemic. The relevant amendments to regular procedures are related to:

* special parts of the procedure (for instance, urgent measures) (25%);
* mandatory timeframes for deciding cases (11%);
* procedural deadlines (43%);
* the deadline for appeal (14%);
* time-limits for execution of court decisions (11%);

* other parts of the procedure (43%), mostly:
- the organisation of oral hearings
- the possibility to decide a case without an oral hearing
- the possibility to hold hearings remotely
- the exclusion or restriction of attendance by the public.

It is noteworthy that **no** country has modified the form of judgments (for example, short judgements, oral judgments), or the number of judges required to decide cases, in order to cope with the situation during the pandemic.

The public hearing

The European Court of Human Rights (ECHR) has repeatedly emphasised the importance of a public hearing. The survey shows that there are many nuances in national procedural law to the fundamental right to be heard in a public hearing. A number of factors are relevant in that context:

* the area of law concerned
* the legal person involved (for instance, minors, prisoners)
* the type of court (first instance – appellate – cassation – constitutional)
* is a hearing mandatory or optional?
* the right to be physically present
* can a hearing be held remotely?
* can the hearing be waived and by whom?

Digital public hearings. As regards digital or remote hearings, the first relevant point is the type of two-way communication that is used: telephone, some form of video conferencing, or also live streaming. Then the setting: there are significant differences between countries and courts in terms of who can participate in the digital hearing and from what location. I will give you three scenarios.

First scenario: all of the participants attend from home, including the judge(s). This can provide an unusual glimpse into kitchens, bedrooms and studies. With holiday snaps, IKEA lamps and other household items in the background. On a personal note, I find that these domestic scenes distract attention and undermine the status of the court and the legal procedure. I therefore suggest the use of a court template as background.
Second scenario: the judge(s) in the courtroom, everyone else via video.
Third scenario: the judge(s) and some parties in the courtroom, other parties via video (a hybrid hearing).

The situation in the Netherlands

After this brief European *tour d'horizon*, I would now like to discuss some of our experiences in the Netherlands. The doors of the courts in the Netherlands were closed on 16 March 2020 and reopened in the middle of May 2020. During those two months, numerous measures were adopted to ensure that the courts' own personnel, the participants in proceedings, but also journalists and the general public, could again have access to our courts and courtrooms.

Many hearings were postponed because of the temporary closure. And the backlog grew rapidly.

The Dutch courts employed various methods to continue administering justice during the crisis.

The first was to dispose of cases by means of a decision in camera, without a hearing, which is only possible if procedural law allows it. The courts also instituted a second round of written pleadings in lieu of the public hearing. Some hearings were conducted by telephone or video or in the form of a hybrid hearing, sometimes in combination with live streaming of the hearing.

Live streaming presented us with a number of dilemmas.

* Can the court alone decide to stream a hearing live, or is the consent of the parties required? My court assigned greater weight to the right to a public hearing than to privacy, partly with a view to ensuring that participants and other interested parties could follow the hearing.
* Can a video recording also be made available after the hearing? And for how long? There were objections to this from both our own judges and from some lawyers. On the other hand, other lawyers, academics and the press were very enthusiastic about the service we offered.
* Our own Data Protection Officers warned me that live streaming without the consent of all of the participants at the hearing, and posting the video recordings on the court's website after the day of the hearing, could be in breach of the core principles underlying the EU General Data Protection Regulation (GDPR) such as purpose limitation and data minimisation. My counter-argument was that the processing of personal data was necessary for the performance of a task of public interest, the public administration of justice.

Modification of national procedural law in the Netherlands

In the Netherlands, the legislature amended procedural law to allow for video hearings, under the Temporary Dutch COVID-19 Justice & Security Act (*Tijdelijke wet COVID-19 Justitie en Veiligheid)*[5]. Section 2 of the Act reads:

"If, in connection with the COVID-19 epidemic, it is not possible to proceed with a physical hearing in civil and administrative legal proceedings, an oral hearing may be conducted via a two-way electronic means of communication."

In other words, it is for the court to decide whether the hearing will be conducted remotely. The court may consider the wishes of the parties in making that decision, but is not obliged to do so. However, an important caveat is that the judge can only exercise this power if physical hearings are unable to proceed because of the COVID-19 crisis.

The end of the COVID-19 crisis is hopefully in sight and it will soon be possible to hold all hearings physically again. But that raises a question of its own: should we really want that? Remote hearings have some drawbacks, but also many benefits. In my opinion, it would be a good thing if the legislature incorporated in our procedural laws the option of holding digital, remote hearings. At the same time, the legislature could also stipulate for which areas of law, procedures and legal persons a digital hearing can be held, the rules that apply, who decides whether a hearing may be conducted digitally and whether the consent of the parties is required.

[5] The Act entered into force on 24 April 2020. Section 2 was implemented with retroactive effect to 16 March 2020.

Case-law from the Netherlands

Like the ECHR, the highest courts in the Netherlands have had to decide on issues of procedural law arising from the COVID-19 crisis. I would like to briefly mention a number of judgments here.

No hearing

The first case is one that was heard by the Council of State[6] and was followed by a complaint to the ECHR: the case of Ibrahim BAH against the Netherlands[7]. The case concerned an applicant whose asylum application in the Netherlands had been rejected. He was placed in immigration detention with a view to his deportation. Mr Bah, invoking Articles 5 and 6 of the Convention, complained that his rights under those provisions had been violated because he had not been heard in person by the Regional Court. The Strasbourg Court found the application manifestly ill-founded, and referred to the following circumstances:

* the practical problems during the first weeks of the pandemic;
* the *de facto* impossibility of hearing the applicant in person at the time;
* the fact that the Regional Court had endeavoured to hear the applicant in person or by video conference;
* the fact that the Regional Court had explained in detail why it had been unable to do so;
* the fact that the applicant was represented by and heard through his lawyer;
* the importance of the applicant's other applicable fundamental rights, namely the right to have the lawfulness of his detention decided "speedily" by a court; and
* the general interest of public health.

There are also some lessons to be drawn from a number of judgments of the Dutch Supreme Court[8].

If it is not reasonably possible, or would not be responsible, for the applicant to be physically present at the hearing, an alternative form of participation in the hearing may be chosen; in principle, participation by means of a two-way video connection is the better option in this regard. If no such connection is possible, in urgent cases it may be decided to hear the case by telephone, provided the requirements of a fair trial are met.

Hearing and ruling in public?

An interesting judgment of the Dutch Supreme Court[9] concerned the question whether a hearing that could not be attended by the public because of the outbreak of the pandemic met the requirements of a public hearing. Referring to the relevant case-law of the ECHR, the Supreme Court found as follows.

* Not every restriction of access to the courtroom deprived the hearing of its public character.
* It was relevant that parties and the press had been admitted to the courtroom. This provided a sufficient guarantee of scrutiny. The non-admission of the public did not detract from that. Furthermore. the complaint that the judgment had not been pronounced in public failed, because the parties and the press were able to be present.

[6] Council of State (*Raad van State, Afdeling bestuursrechtspraak*), 7 April 2020 (ECLI:NL:RVS:2020:991).
[7] European Court of Human Rights, 22 June 2021, no. 35751/20.
[8] Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), 25 September 2020 (ECLI:NL:HR:2020:1509) and 9 April 2021 (ECLI:NL:HR:2021:505).
[9] Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), 15 December 2020 (ECLI:NL:HR:2020:2008).

Hybrid hearing

There have been hybrid hearings in the Netherlands, at which some parties were physically present and others participated through video conferencing. This was due to travel restrictions, but also to people being confined to their homes because they were infected or required to go into quarantine.

Mandatory quarantine also applied to judges if a person in their household had COVID-19, but it did not prevent them from performing their work.

The Supreme Court[10] had to rule on an appeal in a criminal case. At the level of the appellate court the case was heard by a three-judge chamber, with two of the judges present in the courtroom and the third participating through video conferencing.

The Supreme Court ruled that, in view of the exceptional circumstances, the principle that a hearing must be public, as laid down in Article 6 of the Convention, was complied with, provided the following conditions were met.

- No more than one judge participated via video conferencing.
- The judge's absence had to be directly linked to the outbreak of the pandemic.
- The two other judges had to be present in the courtroom.
- The judge participating by means of two-way audio-visual communication could not be tasked with leading the examination during the hearing.
- That judge had to be able to form a clear impression of the proceedings in the courtroom and to participate unhindered in the communication process, and had to be visible and audible to those present in the courtroom.

Undue delay (Article 6 of the European Convention)

Finally, I would like to mention a judgment delivered in February 2021 which extended the maximum reasonable period for the highest courts to render judgment on account of the logistical problems ensuing from the pandemic. In the Netherlands, that period is in principle two years, but can be shorter or longer depending on the circumstances of the case.

The Trade and Industry Appeals Tribunal[11] found that the COVID-19 crisis was an *exceptional and unforeseeable situation* and as such constituted sufficient grounds for adopting a period longer than two years as a reasonable period. The deadline was extended by four months to take account of the period for which the court buildings had been closed, and by two months for the rescheduling of hearings that had been postponed.

Physical and digital

Dear colleagues, we are entitled to compliment one another. Generally speaking, the courts performed well during the pandemic, really well. We did everything in our power to uphold the rule of law and safeguard fundamental rights by continuing to hear cases – with the use of digital tools.

[10] Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), 15 December 2020 (ECLI:NL:HR:2020:2037).
[11] Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven* - CBB), 16 February 2021 (ECLI:NL:CBB:2021:158).

The pandemic prompted a wide range of procedural changes across countries. Whilst not all countries envisage the changes being permanent, it is likely that the business of courts across Europe will incorporate more technological solutions going forward, even after the pandemic.

A danger is that we will fall back into the default position and return to our former ways once the pandemic has been brought under control. My wish is that the courts should carefully reflect on what we have learned during the pandemic and which methods we should continue to use or need to improve, particularly in terms of addressing fundamental rights. These rights are a living instrument and leave sufficient room for their transposal to today's society, and tomorrow's. The challenge is to deliver a modern, efficient and public system of administration of justice.

One of the first points that needs to be considered in that context is whether the dominance of print communication over digital communication ("the paper ceiling") is still justifiable in 2021.

The same applies to the primacy of physical presence over digital presence. What is the future of justice: is a court a service or a place? – a relevant question posed by Professor Richard Susskind.

The right to appear in person before a judge can be of great importance, depending in part on the type of case. But providing a few seats for the press and the general public in a court building somewhere in Europe is "old school" transparency, which adds little to clarity and controllability, to the transparent administration of justice.

We therefore need to step up. We should combine physical hearings with digital services such as improved digital access and digital filing, drafting and e-signing. The technology for video conferencing must be improved. We should end the use of standard office video-conferencing software and invest in court software, secure and under our control, with which we can better safeguard the fundamental rights at stake. The video technology of the near future will close the gap between physical and digital hearings.

Transparency and/or privacy

An interesting aspect of the upscaling of digital technologies in the administration of justice is the conflict between, on the one hand, the right to a public hearing and, on the other hand, respect for private life and the protection of the personal data of judges, parties, witnesses and others attending a hearing.

The case-law of Europe's highest courts, under both the Convention and the Charter, has taught us that there is no absolute ranking of fundamental rights and that rights must be reviewed in relation to their function in society, weighed against other fundamental rights in accordance with the principle of proportionality and, in the event of conflict, reconciled where possible.

But what does that mean in the event of a conflict between the right to a public hearing and privacy in court proceedings? I am not aware of any judgments of the highest European courts on that question. What does conducting a hearing and pronouncing a judgment in public mean in 2021?

The Anglo-American concept of public justice differs greatly from that of many European countries. Since 1955, the US Supreme Court has produced audio recordings of hearings, which are published for the public. Documents from cases heard by the federal courts are in principle also available to the

public. That raises the question: what is our concept? What is the European tradition? Do we have a European tradition? The practice of the ECHR on the publication of case documents and of recordings of hearings seems to correspond with the vision of the American courts. The European Court of Justice (ECJ), however, seems to take a different approach.

Case documents

As regards case documents, in Rule 33 of the Rules of Court the ECHR emphasises the public character of all documents. As a rule they are accessible to the public. In the procedure before the ECJ documents are NOT accessible to the public, only to the parties.

Hearings

As to hearings, the ECJ switched over to digital video hearings during the pandemic. Audio recordings are made, not video recordings. And the audio recordings are in principle mainly intended for internal use, not for the parties and certainly not for the press and the general public.

Rule 63 of the Rules of Court of the ECHR is clear: hearings shall be public.

Since 2007, the ECHR has released video recordings (webcasts) of hearings on the Court's website. It is a fantastic service: the hearings in the morning are available online the very same day in the afternoon. But this service is not without an impact on the privacy of persons who attend the hearing. The quality of the video recordings is so good that the name tags of experts and members of the public are clearly legible. With artificial intelligence and face-recognition software, it will not be difficult to discover the personal details of members of the public. Is that the price we have to pay for the right to a public hearing in this day and age? Should the Court change camera positions and show only the judges and the experts?

Judgments

We see a similar approach by the Strasbourg Court when it comes to the question whether personal data should be removed from judgments in the version that appears on the website. The ECHR's principal rule is that judgments must be published in full, unless there are exceptional circumstances. The Court leaves it to the initiative of the parties to submit a request for anonymity in good time[12].

Conclusion / Dialogue

The procedures in Strasbourg and Luxembourg are not similar, which may explain some of the differences. Overall however, my impression is that the Strasbourg and Luxembourg Courts take a different approach. Whilst both courts try to reconcile the fundamental rights at stake, in Luxembourg the interest of protecting the privacy of parties apparently outweighs the interest of a public hearing. In Strasbourg the public character of the proceedings and the hearing is leading.

I would like to end here with an appeal to my fellow judges to engage in a dialogue on lessons learned from the pandemic period, and on this conflict between fundamental rights.

[12] See Rules 33 and 47 of the Rules of Court, and the guideline on requests for anonymity.

A dialogue within our courts and between our courts, but also with the legislature and other stakeholders: such a dialogue is essential for finding a new balance between the aforementioned fundamental rights in this digital age. Courts in all countries have to seek that balance, which is quite a challenge. Therefore some guidance from the European courts would be most welcome.