

Access to justice in times of corona

Access to justice in times of corona

*When COVID-19 makes the case for greater digitalisation of justice**

Written by Emma van Gelder, Xandra Kramer and Erlis Themeli, with thanks to Elisabetta Silvestri (University of Pavia), Georgia Antonopoulou, Alexandre Biard and Betül Kas (Erasmus University Rotterdam, ERC-Co project 'Building EU civil justice: challenges of procedural innovations - bridging access to justice')

** posted on 7 April, text updated on 8 April*

The disruption of society as a result of the pandemic has naturally also affected our justice system. While there is no total lockdown in The Netherlands, as of 16 March people working in non-vital sectors are required to stay at home, schools and universities are closed, and events and social gatherings are forbidden. These measures also meant that courts in the Netherlands had to restrict their daily activities. All courts were closed on 17 March and will stay closed in any case until 28 April 2020. This means that most court proceedings are postponed for the time being. To proceed with continuing obligations and proceedings, thereby ensuring ongoing access to justice, judiciaries around the world are increasingly adopting various forms of technology in their court procedures.

This blogpost sets out the Dutch approach of the judiciary to the COVID-19 crisis, and highlights some global examples of other approaches.

COVID-19's disrupting effect to the functioning of the court system

COVID-19 caused a sudden lockdown of courts. Court hearings are delayed, resulting in complaints that the backlog in the judiciary will grow, and attorneys have urged for more cases to be processed. Against the background of the health safety measures by the RIVM (National Institute for Public Health and the

Environment), the public is temporarily no longer allowed to attend the few court hearings that still do take place. The lockdown of courts and offices emphasises the need for remote access to courts and better communication between courts and their constituents.

The adoption of a General Regulation during the COVID-19 crisis

The Dutch Judiciary has taken steps to respond to these problems by adopting a general regulation on case-handling by the Judiciary during the COVID-19 period. The starting point of this regulation is that the courts will continue to deal with *urgent* cases, which are divided into *serious* urgent cases and *other* urgent cases. Urgent cases include certain hearings in criminal cases, insolvency cases, and family cases, particularly those concerning child protection. Judges work with digital files and have secured remote access from home. Law firms are also expected to have their staff working from home whenever possible, though not all law firms are closed.

The General Regulation deals among others with the attendance of courtroom hearings (Para. 1, sub 1.1 General Regulation), the use of secure email (Para. 1, sub 1.2 General Regulation) and closed hearings (Para. 1, sub 1.3 General Regulation). In principle oral hearings with the physical attendance of the parties will not take place during the COVID-19 period, unless the judge decides otherwise. Both *serious* and *other* urgent cases will take place as much as possible in writing or through telephone (video) connection. If the judge decides that an oral hearing with physical presence of the parties should take place, the guidelines of the RIVM are taken into account. Where possible, livestreaming will be used. Procedural guidelines that allow documents and messages to be sent through post or fax, can be sent via a safe email channel of the Judiciary.

Also there is a proposal pending on separate temporary 'urgent' COVID-19 legislation (spoedwetgeving *COVID-19 Justitie en Veiligheid*), proposed by the Minister of Legal Protection, Sander Dekker, and by the Minister of Justice and Security, Ferdinand Grapperhaus. This proposal was submitted to the House of Representatives (*tweede kamer*) on 8 April 2020. It will expire on the 1st of September 2020, but with the possibility to extend it's application. This proposal for legislation allows communication that normally is prescribed to take place physically, to take place through electronic means such as audio or video livestream. This enables annual general meetings to be held online or a testament

by a notary to be signed online.

Positive side-effects: enhanced use of technology

Often, radical innovations are dictated by crisis. A positive side effect of the current health crisis is that it may boost the digitisation of the judiciary that has been severely hampered in the Netherlands (see our blogpost on EUCP; more extensively: Xandra Kramer, Eris Themeli and Emma van Gelder, *e-Justice in the Netherlands: The Rocky Road to Digitised Justice*, 2018). To enable the functioning of the General Regulation, the IT department of the judiciary has extended the facilities for a telephone and video connection between the judiciary and external parties. Another side-effect boosting digitisation in the Dutch Judiciary regards the introduction of secure email to be used by parties and for filing procedural documents and communicating messages as of 9 April 2020. Several safeguards are required for the use of email, regarding the subject of the email and the capacity of the attachments to the email. Regarding signatures, no digital signature is prescribed, but a 'wet' signature scanned and uploaded through PDF (see para. 1.2.4 under 6 of the General Ruling). The moment of receipt of the e-mail within the secured email system of the Judiciary counts as the time of receipt (see para. 1.2.5 of the General Regulation).

Perhaps the most important side effect of this crisis would be the experience with these implemented facilities. Using remote access to courts, secure emails, video conferencing and other electronic means for a protracted period will provide the Ministry of Justice and Security important lessons on how to better utilize these. Video conferencing is of course not new in the Netherlands, but it is not used at a wide scale, particularly not in civil cases.

Challenges

While these side-effects must be praised, in reality there are a number of challenges caused by this 'sudden' shift towards digitisation that cannot be neglected. The lack of face-to-face contact results in an absence or lesser extent of non-verbal cues such as body language, tone of voice, facial expression. Especially in family law cases – often involving emotional discussions – this may prove a challenge and can risk miscommunication. Another challenge relates to the identification of parties; if e-mail is used, it can be difficult to ensure that the documents are also received by the correct person. In the Netherlands, judicial

officers play an important role in securing the correct service of documents. Another challenge – although less relevant in the Dutch context – relates to vulnerable users having no or limited access to the internet or having minimum skills with digital technology. The absence of an offline channel forms a challenge for access to justice in certain cases.

The exclusion of public attendance during a court hearing, challenges the principles of a public hearing and transparency. To counter these challenges, attendance of maximum of three journalists is still allowed, and more decisions are published on the website of the judiciary (*rechtspraak.nl*). For example, the website of the administrative law department (*Afdeling Bestuursrechtpraak*) of the Council of State, states that decisions are temporarily published online and posted on their internal website and *rechtspraak.nl*.

Also, across the Dutch borders, examples of challenges are found. For example, small criminal cases in France – such as ‘immediate appearances’ (*comparution immédiate*), rarely allow for online hearings or other forms of digitalisation.

In Germany, since 2013 § 128a ZPO (German Civil Procedure Code) gives the possibility of using video-conferences for the oral negotiation and the hearing of evidence in civil litigation. Although all German states have equipped their judiciaries with the necessary technology, they are not widely used in practice. The current approach to face the corona crisis consists rather of the postponement of non-urgent proceedings. However, first signs towards a stronger move of the digitization of justice appears to be driven by the judiciary of Nord-Rhine-Westphalia.

Other global developments

Similar approaches to the COVID-19 crisis can be seen around the globe.

For instance, the UK has adopted the Coronavirus Act 2020 (hereinafter: Act). Regarding provisions on digitisation, Point 53 and 54 of the Act enshrine the expansion of the availability of live links in criminal proceedings and in other criminal hearings. Furthermore, point 55 and 56 of the Act rule that public participation in proceedings will be conducted by video or audio, and live links are used in magistrates’ court appeals for requirements or restrictions imposed on a potentially infectious person. The Economist, quotes in a paper of 4 April 2020, that before the COVID-19 crisis, about 200 cases a day were being heard at

least partially via conference-call and video link in the UK. By March 31st this number had increased to around 1800 cases.

Richard Susskind, launched a new website at the outset of the corona crisis, in order to create a platform to share experiences of 'remote' alternatives to traditional court hearings. The website provides an overview of interesting developments on a global level. In any event, Susskind can be delighted as he has noted a *sudden spike of sales* of his recent book 'Online courts and the future of justice'.

Also in Italy extensive measures for the administration of justice during the Covid-19 period are adopted. A recent statutory instrument (18 March 2020), which applies until 15 April 2020, rules that most cases are postponed and all deadlines provided for by laws are suspended. Exceptions apply to certain urgent cases. From 16 April 2020 through June 30, other measures can be taken which comply with the health safeguards concerning COVID-19, for example court access can be limited. The Court of Cassation uses video technology to decide appeal cases. It required an adaption of the procedural rules to allow video connection for the judges unable to travel due to the COVID-19 crisis.

In Canada, some courts are encouraging counsel and the public to use alternative dispute resolution forms in order to reduce delays now that many court hearings are postponed for the time being. The use of technology in out-of-court dispute resolution is more widespread and accepted, resulting in various forms of online dispute resolution (ODR). For example, in the COVID-19 period, ODR procedures offer benefits of virtual hearings centralizing disputes regardless of geographical distances between parties, paperless processes, flexibility and convenience enabling parties to participate from their own home computer. Positive side-effects are cost and time reductions as online procedures eliminate *inter alia* travel costs. In any case, the Covid-19 crisis may lead to a 'wake-up' call among lawyers and parties to consider the ability of ODR/ADR as a viable option of dispute resolution.

In Colombia, on 19 March new procedural rules were enacted to allow for virtual conferences and videoconferencing in Colombian Courts.

In Brazil, Brazilian courts work with the Cisco system enabling videoconference for court proceedings.

Also in Kenya, digitalisation is welcomed, as a Kenyan Judge has used Zoom for remote hearings and is now planning to oversee more than 20 court hearings over video link, including verdicts, rulings on appeals as well as applications.

Conclusion

It remains to be seen if the rapid uptake of digitisation will continue after the COVID-19 crisis comes to an end. In any case, the present health crisis shows the ability to implement emergency legislation and of the judiciary to amend a vast array of procedures in a short period of time.