Editorial

Virtual Criminal Justice and Good Governance during COVID-19

Covid-19 demands that we embrace the ‘positivistic approach of good governance’.¹ This claim presupposes three things. First, that we see ‘good governance’ as part of the legal system – this means identifying the principles of good governance, their development as legal norms, and ensuring the necessary enforcement of those norms.² Second, that good governance is nothing but empty rhetoric if we do not take that last point seriously – the relevant principles must be *enforceable as rights*.³ Third, that COVID-19 has thrown our legal systems into very risky and unprecedented territory. Individual rights are, perhaps justifiably so, at immense risk. This is clearly evident in the domain of criminal justice. Of particular interest here is the mass roll-out of ‘virtual attendance’ at criminal hearings via video links (VLs). Why is this of particular interest? Unlike other emergency measures (such as the suspension of jury trials or the introduction of radical public order/health offences), there is evidence to suggest the widespread use of VLs had political momentum pre-COVID 19.⁴

1 H. Addink, *Good Governance: Concept and Context* (OUP, 2019) p. 6.

2 *Ibid.*

3 C. Tomuschat, *Human Rights. Between Idealism and Realism* (OUP, 2003) pp. 84–109.

4 This claim is based on numerous government proposals in the UK seeking to expand virtual justice pre-COVID 19. See in particular Sir Brian Leveson’s ‘Review of Efficiency in Criminal Proceedings Final Report’. 2015. Retrieved 9 July 2020, www.judiciary.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/; see also the strong joint statement on ‘Transforming our Justice System’ in 2016 from The Lord Chancellor, Lord Chief Justice, Senior President of Tribunals 2016: “It is time for innovation in our system. The resolution of cases has historically revolved around advocacy before a judge in a physical courtroom...As the courts and tribunals are modernised we will need fewer buildings, used more efficiently

VLs are not entirely new in the criminal justice system. In the UK, prison to court VLs were first used in the early 1990s for case management and remand hearings. The rationale was simple: to save money⁵ and increase convenience for defendants.⁶ Police station to court VLs followed soon after – this enabled adult defendants in custody or at a police station to attend certain preliminary and/or sentencing proceedings.⁷ Crucially, in both cases the defendant does not get the final say on whether to have a VL hearing or a face-to-face hearing. The decision is made ‘in the interests of justice’ by the judge or the bench, depending on the trial in question. Research on this (pre-COVID 19) revealed that the ‘interests of justice’ test was seldom applied, instead defendants were more likely to be automatically booked to appear on video from the police station with no clear procedures for the defence counsel to make representations on the matter.⁸ A number of practical problems were noted: functional delays due to connectivity, poor audio and poor video quality.⁹ A number of substantive problems also ensued: decrease in trust and rapport between counsel and client, reduction in defendant’s opting to have legal representation (compared to face-to-face hearings), increased concerns over confidentiality, reduced means for in-court hearing communication (VLs require full interruption of the hearing in order for the defendant to raise a problem/issue with her counsel), and logistical issues in arranging meaningful post-court consultation.¹⁰

with courtrooms which are more adaptable. In many cases, attending hearings in person will only be needed where there is no other alternative; parties will be able to engage virtually or online rather than have to take time to attend hearings in person”. Retrieved 9 July 2020, www.gov.uk/government/publications/transforming-our-justice-system-joint-statement.

5 Money could be saved by reducing transport costs and court custody staff.

6 Convenience could be improved by avoiding long journeys in uncomfortable prison vans and potential prison moves. Note that the research on these early VLs was quite positive, see: <http://lexiconlimited.co.uk/wp-content/uploads/2013/01/Videolink-magistrates.pdf> and also <http://lexiconlimited.co.uk/wp-content/uploads/2013/01/Videolink-Crown.pdf>.

7 Part 3A of the Crime and Disorder Act 1998.

8 P. Gibbs, *Defendants on video – conveyor belt justice or a revolution in access?* (Transform Justice, October 2017) p.7. Retrieved 9 July 2020, www.transformjustice.org.uk/wp-content/uploads/2017.

9 *Ibid*, p.8; see also Public Accounts Committee (PAC), ‘Transforming Courts and Tribunals – Conclusions and Recommendations’ (20 July 2018). Retrieved 9 July 2020: https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/g76/g7605.htm#_idTextAnchor004.

10 See the Ministry of Justice research on virtual courts from police stations. Retrieved 9 July 2020, www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report; see also the 2016 Transform Justice Report. Retrieved 9 July 2020 www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf.

Notwithstanding these problems, the use of VLs was – through necessity – dramatically increased in the UK due to the COVID-19 outbreak. The Coronavirus Act 2020 was passed on the 25th March allowing courts to remain ‘open’ whilst complying with public health requirements. Courts in England and Wales could now essentially conduct entire proceedings using VLs.¹¹ Less than one month after the new law was passed, 90% of all judicial hearings in England and Wales were using VLs. The subsequent research once again pointed to the aforementioned problems. A survey of frontline workers (solicitors, barristers, judges, magistrates, police officers, CPS staff and appropriate adults) demonstrated ‘a deeply worrying picture’ of the criminal justice landscape under lockdown.¹² 44% of respondents reported that remote hearings ‘make it significantly more difficult for defendants to participate in the proceedings’; 67% thought that the remote hearings had ‘a significant negative impact on the ability of defendants and their lawyers to communicate before and during hearings’; 75% believed that remote hearings had made it harder for defendants and their lawyers to obtain, present, and challenge evidence; and 60% expressed that the use of video-link or telephone had a noticeably negative impact on the overall fairness of the hearings.

The UK is not, of course, the only jurisdiction to use VLs in courtrooms as a response to the COVID-19 crisis. In the UAE all hearings moved on to Microsoft Teams (one may assume raising serious cyber security concerns),¹³ in the US videoconferencing has been permitted for certain criminal trials,¹⁴ Singapore have extended existing practice to further increase VLs in court,¹⁵ while the Supreme Court of Norway recently handed down an online judgement in a criminal case about the penalty for a sexual assault, on the basis of written submissions only.¹⁶ Moreover, there is an argument that the digital transformation of court services is not just a reaction to COVID-19 but to the reality that

11 Note specific exception for jurors, who would continue to participate in person (Section 53 and Schedule 23 of the Act).

12 Fair Trials, ‘Justice under lockdown – A survey of the criminal justice system in England & Wales between March and May 2020’. Retrieved 9 July 2020, www.fairtrials.org/sites/default/files/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf.

13 Norton Rose Fulbright Report, ‘COVID-19 and the global approach to further court proceedings’ (April 2020). Retrieved 9 July 2020, www.nortonrosefulbright.com/en/knowledge/publications/bbfeb594/covid-19-and-the-global-approach-to-further-court-proceedings-hearings.

14 *Ibid.*

15 *Ibid.*

16 Richard Susskind, 2020, “COVID-19 shutdown shows virtual courts work better” *Financial Times*, 7 May. Retrieved 9 July 2020, www.ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a.

many court systems around the world were, pre-crisis, already 'largely broken'. It is, for example, reported that Brazilian and Indian courts (both civil and criminal) face a backlog of 80 million and 30 million cases, respectively.¹⁷ Technology may be the only sustainable solution. The most utilised online court system in the world is that in China, which has implemented significant information and communication technology (ICT) as central to its recent judicial reform process.¹⁸ 'Internet Courts' in Hangzhou, Beijing and Guangzhou have been processing entire proceedings online since 2017, a 'mobile court' app can be downloaded on WeChat (China's most popular social media app) using facial recognition technology to authenticate the parties, evidence and audio messages can be uploaded directly on the app, and the Beijing Internet Court have developed bots to determine hearing outcomes, non-human judges powered by artificial intelligence. As experimental as all of this seems, the reality is that court systems around the world need to be looking carefully at the latest technology available. However, it is clear that in doing so procedural good governance must be prioritised more than ever.

In the European legal context, procedural good governance principles have been concretely developed via the jurisprudence on Article 6 of the European Convention on Human Rights; namely, *fairness* (the right to effective participation,¹⁹ adequate representation,²⁰ administration of evidence,²¹ and the principle of immediacy)²² and *public participation* (the principle of publicity,²³ and right to an oral hearing and presence at the hearing).²⁴ These principles of good governance are, one way or another, enforceable human rights in 47 Council of Europe Member States and they cannot be swept aside in the pursuit of efficiency, cost-cutting or crisis management. It is very likely that the problems outlined above in the UK are also problems in the other 46 Member States. The key common governance challenge is therefore one of

¹⁷ *Ibid.*

¹⁸ Mimi Zou, 2020, "Virtual Justice in the Time of COVID-19." University of Oxford Business Law Blog. 16 March. Retrieved 9 July 2020, www.law.ox.ac.uk/business-law-blog/blog/2020/03/virtual-justice-time-covid-19.

¹⁹ *Stanford v. the United Kingdom*, ECtHR 1994, para 26; *Murtazaliyeva v. Russia* ECtHR 2018, para 91.

²⁰ *Pakelli v. Germany*, ECtHR 25 April 1983, para 31.

²¹ *Khan v. the United Kingdom*, ECHR 2000, para 34; *P.G. and J.H. v. the United Kingdom*, ECtHR 2001, para 76; *Allan v. the United Kingdom*, ECtHR 2002, para 42.

²² *P.K. v. Finland*, ECtHR, 9 July 2002.

²³ *Riepan v. Austria*, ECtHR 2000, para 27; *Krestovskiy v. Russia*, ECtHR 2010, para 24; *Sutter v. Switzerland*, ECtHR 1984, para 26.

²⁴ *Jussila v. Finland* ECtHR 2006, para 40; *Tierce and Others v. San Marino*, ECtHR 2000, para 94; *Hermi v. Italy*, ECtHR 2006, paras 58–59.

change. How do we move away from traditional courtroom hearings (due to choice or necessity) in a way that respects the above listed human rights?

As valuable as Richard Susskind's insights are on how online courts can improve access to justice,²⁵ we cannot ignore the numerous reported issues. Details matter. National governments across Europe need to invest in more research (concrete evidence and impact assessments) on existing modernisation programmes – specifically the use of VJs in criminal trials – and preferably comparative national studies involving researchers from jurisdictions beyond Europe more versed in the potential of courtroom technology. More specifically, the UK government can make an immediate start by building on the research which informed the Video Enabled Justice Evaluation and respond to the recommendations set out therein.²⁶ Each one of the concrete dependencies listed at the end of the Evaluation – staff/training needs, technological infrastructure, and communication channels prior, during and after hearings relate to a specific enforceable human right and therefore to the principles of good governance. Justice online must not be allowed to become justice denied.

Adam McCann

Editor EJCL; Lecturer in Criminal Justice and Medical Ethics,
University of Exeter, Exeter, United Kingdom
a.mccann@exeter.ac.uk

-
- 25 Susskind indeed outlines a number of reasons to be positive about emerging technologies and makes convincing arguments about the existing flaws in pre-COVID 19 face-to-face proceedings. R. Susskind, *Online Courts and the Future of Justice* (OUP, 2019).
- 26 See Video Enabled Justice Programme: University of Surrey Independent Evaluation. Retrieved 9 July 2020, www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf.