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2023-6, pp. 107-127

Pour citer cet article :

Sara NORSTRÖM and Adelina HAJDINI, « The right to a fair trial during the Covid-19 pandemic in Sweden – in the light of digitized procedures », *Jurisdiction* 2023-6 [en ligne], *Les Cahiers d'e-Délib* 2022, pp. 107-127

Pour consulter cet article en ligne :

<https://www.jurisdiction.net/2023/07/the-right-to-a-fair-trial-during-the-covid-19-pandemic-in-sweden-in-the-light-of-digitised-procedures/>

The right to a fair trial during the Covid-19 pandemic in Sweden – in the light of digitized procedures

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The fight against the spread of Covid-19, which required physical distancing, challenged the functioning of all actors of the society. Among them the courts have been impacted and obliged to make procedural adjustments in order to preserve the right to a fair trial. It consequently challenged a fundamental pillar of democracy and the Rule of law. This paper aims to analyse how the Swedish courts have dealt with the adjustments made during Covid-19. The right to a fair trial is in Sweden laid down in Chapter 2, Section 11, in the Swedish Constitution/Instrument of Government (1974:152)¹ and complies with the right to a fair trial stated in Article 6 European Convention on Human Rights, ECHR². The most central measures to adjust to procedural requirements for complying to the right to a fair trial and its intrinsic principles transparency, equal treatment, presence in the courtroom and effectiveness was to digitise court procedures.

- 2 Significant digital advancements in court procedures came already around 2019 when the Swedish legislator made amendments in law to remove hindrances for an effective digitised court procedure³. The advanced stage of courts' digitalisation in Sweden allowed for prompt adjustments in order to protect public health against the spread of Covid-19. Making these adjustments brought the digitised

¹ Regeringsformen (1974:152).

² Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

³ Prop. 2019/20:189, *Digital kommunikation i domstolsprocessen*, p. 24.

procedure of Swedish courts even further along. The digitised procedure was a prerequisite for upholding the right to a fair trial during this time. It is noteworthy that the motivation for digitising court procedures in Sweden was effectiveness to begin with but switched to protecting public health when the pandemic started. It is interesting to study the possible conflict of interest between protecting public health and protecting the right to a fair trial.

- 3 During the Covid-19 pandemic, the courts maintained a wide margin of manoeuvre⁴. This correlates with the Swedish strategy for combating the Covid-19 pandemic which relies principally on soft law in form of recommendations enacted by the Public Health Agency of Sweden (*Folkhälsomyndigheten*)⁵. Although, the Swedish Government still issued some hard law as well, by for example limiting how many people were allowed at one public gathering. However, this did not apply to the Swedish courts because the Swedish legislation, the Public Order Act (1993:1617)⁶, does not define a court hearing as a public gathering.
- 4 The courts' wide room for manoeuvre meant that each court in the country could decide which adjustments to make for itself⁷. Although something in common for the courts, was that they all aimed to move their activities to the digital sphere as much as possible to avoid physical contact. The digitised procedure was a prerequisite to protecting the right to a fair trial while still protecting people's health and taking measures against the spread of the virus⁸. It is interesting to research how the courts' adjustment to the Covid-19 pandemic respected the right to a fair trial. The compliance with legal certainty guarantees equal treatment, transparency and effectivity found in Article 6 ECHR is especially important in a court procedure during a crisis like a pandemic.
- 5 The paper aims to analyse how Swedish courts handled the fast digital transition of court procedure during the pandemic, specifically regarding the right to a fair trial, regulated in Article 6 ECHR and the Swedish Constitution. More precisely the paper aims to discuss how the digitised procedure was a prerequisite to upholding the right to a fair trial and simultaneously protecting public health during the pandemic. It is of value to discuss the conflict of interest between protecting these two aspects. The Swedish courts' wide room for manoeuvre when adjusting to the pandemic is interesting to

⁴ Domstolsverket, "Frågor med anledning av pågående pandemi", *Sveriges Domstolar*, 19 November 2020, <https://www.domstol.se/nyheter/2020/11/restriktioner-med-anledning-av-pagaende-pandemin/>, accessed 13 February 2022.

⁵ Folkhälsomyndigheten, "Nya allmänna råd: Håll avstånd och ta personligt ansvar", *Folkhälsomyndigheten*, 01 April 2020, <https://www.folkhalsomyndigheten.se/nyheter-och-press/nyhetsarkiv/2020/april/nya-allmanna-rad-hall-avstand-och-ta-personligt-ansvar/>, accessed 13 February 2022.

⁶ Ordninglagen (1993:1617).

⁷ Domstolsverket, "Frågor med anledning av pågående pandemi", *Sveriges Domstolar*, 19 November 2020, <https://www.domstol.se/nyheter/2020/11/restriktioner-med-anledning-av-pagaende-pandemin/>, accessed 13 February 2022.

⁸ Södertörns tingsrätt, "Information med anledning av coronavirus", *Sveriges Domstolar*, 20 November 2020, <https://www.domstol.se/sodertorns-tingsratt/om-tingsratten/information-med-anledning-av-coronavirus/> accessed 13 February 2022.

analyse in relation to the challenges brought by the pandemic. Potential lessons to be learned can be discussed about a procedure in the digital sphere.

- 6 The paper will be divided into following chapters; chapter 2 will introduce the legal framework for the right to a fair trial, both in Article 6 ECHR and the Swedish legal order. The aspects of transparency, equal access and effectiveness of the right to a fair trial will be especially focused on. Chapter 3 presents how Sweden handled the pandemic and generally how the courts were affected by the pandemic. Chapter 4 presents digital access to court proceedings in Sweden. In the same chapter, the history of courts' transition to a digital era and the courts' digital proceeding is also presented. Chapter 5 examines the procedure of Swedish courts in accordance with a fair trial and the challenges brought by the pandemic. The chapter will focus on the following aspects: equal access to courts, public trials in courts, oral and written proceedings, and effectiveness in court proceedings. Chapter 6 provides a discussion and concluding remarks about the lessons that can be learned by the challenges brought by the Covid-19 pandemic in regards to upholding the right to a fair trial in Sweden.

1. THE RIGHT TO A FAIR TRIAL

- 7 The following chapter will introduce the right to a fair trial laid down in Article 6 ECHR and in the Swedish Constitution with a specific focus on the legal certainty guarantees transparency, equal treatment, presence in the courtroom and effectiveness found in this right. The Swedish Statutes regulating the court's proceedings will also succinctly be presented.

1.1. Article 6 ECHR

- 8 Article 6 in ECHR states that every person has the right to a fair trial. Relevant to this study is the first subparagraph that states: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]”* The right in Article 6 ECHR includes that the trial is held in a public hearing, especially when the question is about civil rights and obligations or accusations of crime⁹. The purpose of this rule is that the parties of a criminal case should be able to present their case in front of the court verbally. In addition to this, a public hearing has the purpose for the parties to hear witnesses¹⁰.
- 9 Although this right is not without exceptions; *“Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require,*

⁹ H. DANELIUS, *Mänskliga rättigheter i europeisk praxis – en kommentar till Europakonventionen om de mänskliga rättigheterna*, 5 u., Norstedts Juridik AB, Stockholm, 2015, p. 237.

¹⁰ H. DANELIUS 2015, p. 238.

or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

- 10 It must be noted though, that a limitation cannot be comprehensive to the extent that it diminishes the main content of the guaranteed right in Article 6.1 ECHR¹¹. For example, a valid exception was discussed in case *Campbell and Fell v. The United Kingdom* where The European Court of Human Rights (ECtHR) stated that it is reasonable to hold a non-public disciplinary hearing against a detainee in prison in the interest of upholding the public order¹².
- 11 This can be related to transparency in the courts which is a legal certainty guarantee.
- 12 The right to a fair trial can still be fulfilled even if the parties are not present in the courtroom. The European Court of Human Rights, ECtHR stated in case *Jallow v. Norway* that being present digitally in the hearing did not pose a violation of Article 6 ECHR in any meaningful way. It is to be noted that, in this case the defence was present in the courtroom and had a chance for communication with the party participating digitally. The ECtHR did not find that it placed the party who had to participate digitally in any substantial disadvantage to the physically present parties in the courtroom¹³. This case highlights the importance of legal certainty guarantees in a case for a party participating digitally, for example that they are able to communicate with their defence.
- 13 Article 6 ECHR is meant to give an effective and meaningful right to a fair trial which means that the courts need to hold a trial while a judgement would still have practical meaning for the parties involved¹⁴. In the case *Beneficio Cappella Paolini v. San Marino* the importance of effectiveness was highlighted because of a national case criticised by the ECtHR where the right to a fair trial was diminished because of a case procedure going on for 10 years¹⁵. The ECtHR deemed that a judicial review was denied. This case shows the importance of the principle of effectiveness in the right to fair trial, meaning that the procedural process should not be outdrawn unnecessarily.
- 14 The right to a fair trial should also be considered in terms of equal treatment as a legal certainty guarantee. One equal treatment concern could be fees that must be paid by the party before a trial is held, for example to cover the cost of the counterpart court fees or damages suit. This can in some cases make it impossible to get a trial for a party that cannot afford the fees. The ECtHR has deemed this to not be in alignment with Article 6:1 and pose a risk to the right to a fair trial in cases *Aït-Mouhoub v. France*¹⁶, *Kreuz v. Poland*¹⁷, and *Weissman and others v. Romania*¹⁸. Another equal treatment

¹¹ H. DANELIUS 2015, p. 183.

¹² ECHR, *Campbell and Fell v. The United Kingdom*, 28 June 1984, application no. 7819/77; 7878/77.

¹³ ECHR, *Jallow v. Norway*, 2 December 2021, application no. 36516/19, §§ 67, 68, 70.

¹⁴ H. DANELIUS 2015, p. 210.

¹⁵ ECHR, *Beneficio Cappella Paolini v. San Marino*, 13 July, 2004, Application no. 40786/98.

¹⁶ ECHR, *Aït-Mouhoub v. France*, 28 October 1998, application no. 103/1997/887/1099.

¹⁷ ECHR, *Kreuz v. Poland*, 19 June 2001, application no. 28249/95.

¹⁸ ECHR, *Weissman and others v. Romania*, 25 May 2006, application no. 63945/00.

concern that will be discussed later in this study, are language barriers that can risk the right to a fair trial in accordance with Article 6:1 ECHR. In *Cuscani v. The United Kingdom* the ECtHR deemed that the right to fair trial was violated because the judge did not take sufficient measures when he became aware that the defendant could not follow the court procedure adequately because of deficient comprehension of the English language¹⁹.

1.2. Article 6 ECHR reflected in the Swedish legal order

- ¹⁵ Chapter 2, Section 11, in the Swedish Constitution/Instrument of Government, states the right to a fair trial in a similar way as Article 6 ECHR. Chapter 2, Section 11, paragraph 2 in the Swedish Constitution/Instrument of Government states: "*Legal proceedings shall be carried out fairly and within a reasonable period of time. Proceedings in courts of law shall be open to the public*". An important legal certainty guarantee directly related to the right to a fair trial is effectiveness. The principle of effectiveness is explicitly expressed in Chapter 2, Section 11, paragraph 2 in the Swedish Constitution/ Instrument of Government that states legal proceedings in courts shall be carried out within a reasonable period of time. Even the principle of transparency is to be found in the wordings of Chapter 2, Section 11, paragraph 2 in the Swedish Constitution/ Instrument of government. This statute promotes transparency in court procedures in laying down the requirement of opening the proceedings in courts to the public. When it concerns the principle of equal treatment, it is not explicitly expressed in Chapter 2, Section 11 of the Swedish Constitution but stems from Chapter 1, Section 9 in the Swedish Constitution that also reflects the right to a fair trial. The preparatory works of the Swedish Constitution reformation states that equal treatment is an important part to the right to a fair trial²⁰.

1.3. General regulation for Swedish court

- ¹⁶ In addition to the stated right to a fair trial in Chapter 2 of the Swedish Constitution, the legal framework for trials and courts can also be found in Chapter 11. The Swedish courts are divided into three categories; general jurisdiction courts and general administrative courts. The third category of courts are so-called "specialised courts"²¹ and are established in accordance with the law, for example, in the field of migration law, Chapter 11, Section 1 in the Swedish Constitution/Instrument of Government. Chapter 11 also states in Section 3 that the courts shall be independent, meaning that they should not be influenced by the Riksdag²² nor a public authority. Furthermore, two of the most

¹⁹ ECHR, *Cuscani v. the United Kingdom*, 24 September 2002, application no. 32771/96.

²⁰ Prop. 2009/10:80, *En reformerad grundlag*, p. 160.

²¹ Our own translation (*special domstolar*).

²² The Riksdag is the Swedish legislator and part of the Government.

important statutes for the courts' that regulates the procedural process are the Swedish Code of Judicial Procedure (1942:740)²³ and the Administrative Court Procedure Act (1971:291)²⁴.

2. THE FIGHT AGAINST THE PANDEMIC IN SWEDEN

- 17 The following chapter introduces the Swedish approach to fighting the pandemic and will give a general understanding of the rules and regulations enacted for fighting the pandemic. As stated earlier, the hard law was not applicable to court activities but still affected the courts measures during this time.

2.1. The Swedish approach to fighting the Covid-19 pandemic

- 18 The Swedish Government's approach to fighting the pandemic was to rely on the Swedish citizens' high level of trust in the public authorities and did not rely on strict rules or a mandatory lockdown. The objective was to continue society's functions as normally as possible²⁵. The Government also delegated responsibility for handling issues related to the pandemic to the Public Health Agency. The purpose of the Public Health Agency during this time was to deliver recommendations (*allmänna råd*) to the citizens, companies and authorities. Another of its tasks were to issue statements on its field of expertise, for example, such as recommended restrictions²⁶. These recommendations from the Public Health Agency can be viewed as soft law.
- 19 Some of the rules regulated by soft law were the recommendations (not ruled in mandatory law) from the Public Health Agency. For instance, employers had to make sure, if possible, that employees worked from home and avoided unnecessary travel. Furthermore, it was advised that people over 70 years old and other high-risk groups should avoid close physical contact with others²⁷. One of the general rules of conduct required in work environments, for example, was to stay at home if one experienced any form of symptom related to Covid-19. This rule was also applicable if anyone else in a household did experience symptoms, and meant that members of the household had to stay home

²³ Rättegångsbalken (1942:740).

²⁴ Förvaltningsprocesslagen (1971:291).

²⁵ Regeringskansliet, "Strategi med anledning av det nya coronaviruset", *Regeringen*, 07 April 2020, <https://www.regeringen.se/regeringens-politik/regeringens-arbete-med-coronapandemin/strategi-med-anledning-av-det-nya-coronaviruset/>, accessed 13 February 2022.

²⁶ Folkhälsomyndigheten, "Nya allmänna råd: Håll avstånd och ta personligt ansvar", *Folkhälsomyndigheten*, 01 April 2020, <https://www.folkhalsomyndigheten.se/nyheter-och-press/nyhetsarkiv/2020/april/nya-allmanna-rad-hall-avstand-och-ta-personligt-ansvar/>, accessed 13 February 2022.

²⁷ Folkhälsomyndigheten, "Nya allmänna råd: Håll avstånd och ta personligt ansvar", *Folkhälsomyndigheten*, 01 April 2020, <https://www.folkhalsomyndigheten.se/nyheter-och-press/nyhetsarkiv/2020/april/nya-allmanna-rad-hall-avstand-och-ta-personligt-ansvar/>, accessed 13 February 2022.

in that case as well²⁸. The courts followed the Public Health Agency's recommendations of the work environment and had co-workers work from home when needed²⁹.

- 20 Regarding hard law, one mandatory regulation issued by the Government was a restriction on the number of people allowed at a public gathering, ruled in regulation (2020:114) on the prohibition of holding public gatherings and public events³⁰. This regulation had support from the Public Order Act and this act does not define a court hearing as a public gathering. Therefore, the regulation did not apply to courts and their activities³¹. Although the Swedish courts did not have to comply with this statute, they still decided to make adjustments to prevent the spread of the virus. In general, courts had a lot of room for manoeuvre regarding adjustments to the pandemic. The wide room for manoeuvre also meant that different courts in the country could take different measures³².

3. THE DIGITALISATION OF COURT PROCEDURES

- 21 This chapter will include the background and history of digitalisation in Swedish courts. In addition to this, a general description of the Swedish regulation for digitised court procedures will be presented.

3.1. History of Swedish regulation of digitised court procedure

- 22 The digitised procedure was a prerequisite for providing the right to a fair trial and protecting public health during the pandemic. A consequence of the pandemic for the Swedish courts was that they had

²⁸ Folkhälsomyndigheten, "Förhållningsregler till den som bor med en person som har covid-19", *Folkhälsomyndigheten*, 24 November 2021, <https://www.folkhalsomyndigheten.se/nyheter-och-press/nyhetsarkiv/2021/november/forhallningsregler-till-den-som-bor-med-en-person-som-har-covid-19/> accessed 13 February 2022. See also, FHM föreskrifter och allmänna råd om allas ansvar att förhindra smitta av covid19 mm HSLF-FS 2020:12.

²⁹ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 5-6.

³⁰ Förordning (2020:114) om förbud mot att hålla allmänna sammankomster och offentliga tillställningar.

³¹ Domstolsverket, "Frågor med anledning av pågående pandemi", *Sveriges Domstolar*, 19 November 2020, <https://www.domstol.se/nyheter/2020/11/restriktioner-med-anledning-av-pagaende-pandemin/>, accessed 13 February 2022.

³² Domstolsverket, Swedish National Courts Administration, published a general statement that gave information to the public about the fact that the courts did not have to follow the restrictions from the Government at the time of the pandemic and could decide for themselves, Domstolsverket, "Frågor med anledning av pågående pandemi", *Sveriges Domstolar*, 19 November 2020, <https://www.domstol.se/nyheter/2020/11/restriktioner-med-anledning-av-pagaende-pandemin/>. The role of the Swedish National Courts Administration is to provide service to the courts and in some cases to provide service directly to the public and authorities. (Domstolsverket, "Roll och uppgift", *Sveriges Domstolar*, 1 March 2022, <https://www.domstol.se/domstolsverket/om-domstolsverket/roll-och-uppgift/>, accessed 24 July 2022.)

to make a faster transition to the digital sphere regarding court access and procedure³³. Although, the digitalisation in courts was already a process set in motion before the pandemic started³⁴.

- 23 The Swedish courts can trace back the beginning of their digitalisation process to the middle of the 1990s. It began with a pilot project where the objective was to entrust certain courts with electronic communication equipment for audio and video transmission³⁵. The purpose was to give the parties and the witnesses in the court procedure another possibility to attend remotely, especially if they had a long travel time to be in the courtroom personally. This pilot project led to additional steps; a legislation reform being introduced on the 1st of November 2008 and brought significant changes to the trial procedure in the country's courts. The changes were made mainly in the Swedish Code of Judicial Procedure³⁶. The motivation was to take better advantage of modern technology and make changes in the courts' operation according to the technology evolution³⁷. With these new changes came new regulations, for example, general rules of conduct for participation in a trial by video conference³⁸. The courts could also receive documents from other public authorities digitally. An additional change was that criminal cases now could be initiated digitally³⁹.
- 24 The Swedish legislator decided in 2019 to make the communications in court procedures even more easy to function in the digital sphere. One of the reasons was that the legislator wanted to make room for a more effective procedure; therefore, all formal requirements that would hinder the use of digital communications would be adapted or removed⁴⁰. The switch to a more digital court proceeding also meant that new regulations regarding the use of different digital forms and electronic signatures would be implemented. It could even be possible to start a court procedure digitally. The ability to receive communication (files, applications, summons, notices etc.) via non-digital mediums would still be possible⁴¹.
- 25 In the preparatory works of the legislation from 2019⁴², the legislator acknowledged that not everyone could use specific digital forums, especially the use of the Swedish electronic signature (*bank-id*). Not everyone has an electronic signature, for example, foreigners may not have access to it (a Swedish

³³ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 5.

³⁴ Magnusson, 2021, p. 276.

³⁵ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 17.

³⁶ SOU 2008:93, *Parts insyn och ny teknik i domstol, m.m.*, p. 9-10

³⁷ SOU 2008:93, p. 24. See also: The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 17.

³⁸ SOU 2008:93, p. 26.

³⁹ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 17.

⁴⁰ Prop. 2019/20:189, p. 24.

⁴¹ Prop. 2019/20:189, p. 24.

⁴² Prop. 2019/20:189.

personal number is needed for *bank-id* to work), and arrested people do not have access to it since they are not allowed to use the internet or their phone. There is also an uneven use of the electronic signature in different age groups, between foreign-born and domestic-born, and between different income groups⁴³. This description in the preparatory works shows that the legislator has some awareness of the concerns with equal treatment when digitising court procedures. Furthermore, the legislator stated that when a judgement or any other document is signed digitally, it has to be an electronic signature intended in Article 3 in the EU regulation no 910/2014⁴⁴, as stated in the Swedish code of judicial procedure⁴⁵. The Swedish Bar Association (*Svenska Advokatsamfundet*), which was consulted during the legislative procedure observed that it should be clarified how to check the authentication of foreign electronic identifications or other identifications unknown to the court that are valid according to the EU regulation on electronic identification⁴⁶.

3.2. *The Supreme Court's internal work towards a more digitised procedure*

- 26 During the spring of 2019, a workgroup within the Supreme Court started overseeing its proceedings with the objective of opting for more digitalisation of its operations⁴⁷. The supervision for a more digital procedure was therefore already initiated before the pandemic. The purpose of the operation was to clarify the method used during digitised procedures. The process was organised in steps beginning from when a case is handed to the court until the case is finished. The digital process was to become possible to introduce in practice by the planned date of March 2020. In practice, the work towards digitised procedures meant, for example, to exchange physical case documents with digital management and to register the different elements in the digital system. This supervision process provided insights into how to make the digitised court procedure more effective⁴⁸. At the beginning of March 2020, which was when the pandemic started in Sweden, the changes in the procedure were enforced practically. The Supreme Court states that the earlier preparation was crucial to the smooth transition to the digital sphere that the pandemic required⁴⁹. As mentioned earlier, the digitised procedure made the right to a fair trial possible during the pandemic.

⁴³ Prop. 2019/20:189, p. 44.

⁴⁴ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

⁴⁵ Chapter 30, Section 8, Chapter 33, Section 1a, Chapter 48, Section 9, and Chapter 48, Section 17 in the Swedish Code of Judicial Procedure.

⁴⁶ Prop. 2019/20:189, p. 34

⁴⁷ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 19.

⁴⁸ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 19.

⁴⁹ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 5.

- 27 An example of a result of digitising courts procedure is that when a case from the lower courts is handed to the Supreme Court, the acts in the case are sent digitally by email and not in paper form by regular mail. This leads to new cases coming in at any time of the day, and not just with the physical morning mail. The management of documents was a demanding task before the digitisation phase but is now perceived as more effective by co-workers at the Supreme Court⁵⁰. For the court officials, this entails a nearly constant influx of new cases - which they can search by themselves in the computer system. The court officials get digital signals when measures need to be taken and are continually vigilant of new incoming cases. Certain digital security storage measures are taken to not risk losing any case-material in the digital management⁵¹. Further examples of the digitised procedure will be described in the next chapter.

4. THE PROCEDURE OF SWEDISH COURTS IN ACCORDANCE WITH A FAIR TRIAL AND THE CHALLENGES BROUGHT BY THE PANDEMIC

- 28 This chapter deals with the ordinary court process and the challenges brought by the pandemic in order to see what changed. The changes are analysed in terms of equality, transparency, participation and effectivity in the court procedure. The digitised court procedures were a prerequisite for a fair trial during the pandemic. However, there may be some potential lessons to learn from the use of digitised court procedure during the pandemic.

4.1. Equality concerning access to the court procedure

- 29 The Swedish courts shall pay regard in their work to the equality of all before the law, Chapter 1, Section 9, Swedish Constitution/Instrument of Government. However, the digital procedure may mean that not everyone has the same access to the court. Even other aspects of a fair trial may be challenged. For example, the fact that not everyone has access to the tools to start a court proceeding digitally, such as no access to the internet (for example, if the subject is arrested), or if the party does not use any form of electronic signature⁵². The lack of access to the digital procedure could impact equal treatment in the courts.

⁵⁰ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 20.

⁵¹ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 20.

⁵² Prop. 2019/20:189, p. 44.

4.1.1. The challenges brought by the pandemic in regard to the principle of equality in court procedures

- 30 During the pandemic when court procedures became more digital equal access could have been affected. As an example, for some people, the court proceedings could have become more difficult because of the increase in the use of digital tools⁵³. As mentioned earlier, not everyone has access to the internet or the digital tools needed for participation in the different steps in the court procedure. Furthermore, even if they do, individuals may not be knowledgeable in the use of digital tools. During the pandemic, in those cases, the courts gave the parties and other actors the possibility to attend the procedure physically⁵⁴. Another aspect that could have impacted equality in court procedure during the pandemic is language barriers that could occur when the digitised procedures were announced on the courts' website in limited languages⁵⁵.
- 31 Equal treatment in Swedish courts could have been affected during the pandemic due to the fact that Swedish courts had a wide room of manoeuvre to make adjustments in order to protect public health. This is because of the absence of hard law applicable to court operations. This could have led to people being treated differently at different courts in the country⁵⁶. However, in general, Swedish courts followed soft law issued by the Public Health Authority in the form of recommendations.

4.2. Transparency of the court procedures

- 32 The principle of transparency in the court procedure is that they should have a public hearing⁵⁷. Article 6 ECHR stipulates that trials shall be public, and the same applies according to Chapter 5, Section 1 of the Swedish Code of Judicial Procedure. However, there may be exceptions to that rule, such as maintaining national security if necessary. There are also times when the Swedish courts can decide whether a part of the hearing should occur without an audience, so-called "behind closed doors hearings". That can happen, for example, when confidential information in court is to be processed in a hearing according to Chapter 5, Section 1 of the Code of Judicial Procedure.
- 33 When the main hearing takes place, the general rule is that the public has the right to attend as the audience. However, the court can limit the number of spectators in the courtroom, if a restriction must be made to establish order in the courtroom or avoid congestion, Chapter 5, Section 9 of the Code of Judicial Procedure. However, this does not affect the openness of judicial proceedings because the right to a public hearing does not mean that everyone who wants to be present in a courtroom

⁵³ Brottsförebygganderådet, Rapport 2021:4, *Pandemins inverkan på rättskedjan*, s. 46.

⁵⁴ More about this in "5.2 Public trials of the court".

⁵⁵ S. DOMSTOLAR, "Other languages", *Sveriges Domstolar*, <https://www.domstol.se/other-languages/>, accessed 15 April 2022.

⁵⁶ Domstolsverket, "Frågor med anledning av pågående pandemi", *Sveriges Domstolar*, 19 November 2020, <https://www.domstol.se/nyheter/2020/11/restriktioner-med-anledning-av-pagaende-pandemin/>, accessed 13 February 2022.

⁵⁷ DANELIUS 2015, s. 237.

must be given a seat⁵⁸. How many people usually get access to participate in the main hearing differs between the courts. It depends on their capacity and size, but the courtrooms are often somewhere from 10 seats up to 40 in larger halls⁵⁹.

4.2.1. The challenges brought by the pandemic to the principle of transparency in court procedures

- ³⁴ To fight the pandemic, restrictions were issued on the number of people allowed at public gatherings. However, these restrictions did not include gatherings at the courts⁶⁰. Nonetheless, the courts still decided to make adjustments in order to protect public health. One example of a district court decision was to continue with regular hearings as planned but to take measures to reduce the spread of the virus. These measures consisted of limiting audience seats in courtrooms⁶¹. These restrictions are related to transparency of court procedure.
- ³⁵ Another example of a court adjustment is the Administrative Court in Stockholm (*Förvaltningsrätten i Stockholm*), which decided to reduce the number of listener seats during a hearing to avoid the spread of the virus. The court limited the possibility for the general public to attend as an audience by directing them to be seated in the “side halls” (rooms near the courtroom where the hearing was taking place) using images and audio transmission from the main hall (the courtroom where the hearing was taking place). Journalists were also obligated to pre-register if they would attend since there were only ten seats for the media⁶². The Svea Court of Appeal (*Svea hovrätt*) similarly held the court hearing in the physical courtroom, but with the alteration that the available seats were reduced and the media was prioritised in the seats available⁶³. This indicates that the courts mostly have chosen to have the court hearings physically but limit the audience seats to reduce the spread of the virus.

⁵⁸ P. O. EKELÖF, *Rättegång, första häftet*, 8 u., Norstedts Juridik AB, Stockholm, 2002, p. 152.

⁵⁹ See for example: Stockholms tingsrätt, “Studiebesök”, *Sveriges Domstolar*, 14 February 2022, <https://www.domstol.se/stockholms-tingsratt/om-tingsratten/besoka-tingsratten/studiebesok-av-skolklasser-och-foreningar/>, accessed 22 March 2022. Södertörns tingsrätt, “Våra lokaler”, *Sveriges Domstolar*, 16 March 2021, <https://www.domstol.se/sodertorns-tingsratt/om-tingsratten/besoka-tingsratten/vara-lokaler/>, accessed 22 March 2022. Västmanlands tingsrätt, “Studiebesök”, *Sveriges Domstolar*, 11 March 2022, <https://www.domstol.se/vastmanlands-tingsratt/om-tingsratten/besoka-tingsratten/studiebesok/>, accessed 22 March 2022.

⁶⁰ See chapter 3 “The fight against the pandemic in Sweden”.

⁶¹ Södertörns tingsrätt, “Information med anledning av coronavirus”, *Sveriges Domstolar*, 20 November 2020, <https://www.domstol.se/sodertorns-tingsratt/om-tingsratten/information-med-anledning-av-coronavirus/> accessed 13 February 2022.

⁶² Förvaltningsrätten i Stockholm, “Muntlig förhandling i mål om 5G-tillstånd”, *Sveriges Domstolar*, 09 March 2021, <https://www.domstol.se/forvaltningsratten-i-stockholm/nyheter/2021/04/muntlig-forhandling-i-mal-om-5g-tillstand/>, accessed 21 February 2022.

⁶³ S. HOVRÄTT, “Huvudförhandling i det s.k. Telia-målet”, *Sveriges Domstolar*, 14 September 2020, <https://www.domstol.se/svea-hovratt/nyheter/2020/09/huvudforhandling-i-det-s.k-telia-malet/>, accessed 21 February 2022.

4.3. Presence in the courtroom

- ³⁶ Regarding the presence in the courtroom, Chapter 5, Section 10 of the Swedish Code of Judicial Procedure stipulates that a person who takes part in a court hearing must appear in the courtroom. The second paragraph of the section, on the other hand, specifies that when there are reasons for it, the court may decide that participants shall be present by audio transmission or audio and video transmission. For the possibility to participate digitally, special prerequisites are, for example, if a participant in the hearing feels fear of being present in the courtroom or if it is necessary for security reasons, Chapter 5, Section 10, Paragraph 2, Point 2 and 4 of the Swedish Code of Judicial Procedure⁶⁴.
- ³⁷ The processing of a case in Swedish law can be either oral or written. Oral proceedings occur before the main hearing at the court, Chapter 43, Section 5, the Swedish Code of Judicial Procedure. The parties and others may then be presented and procedural activities may continue to be carried out by the court. However, an oral procedure does not require the parties to be physically present, Chapter 5, Section 10, the Swedish Code of Judicial Procedure. A party or other participant is still considered present at the oral hearing, even if it took place by contacting the courtroom by telephone or video⁶⁵. It is also qualified as an oral process if the party participates with a previously recorded audio or video recording presented at the time for the hearing. However, it is preferred that a meeting should be held where external participants are bound together⁶⁶.
- ³⁸ It is more common for the process in the administrative courts to take place in writing than in the general courts⁶⁷. Section 9 of The Administrative Court Procedure Act states that the procedure shall be in writing. The administrative courts generally have more cases that do not require the parties to be present and can be concluded with a written proceeding based on earlier official acts⁶⁸. Regarding the general courts, the district court (the lowest instance of courts among the Swedish general courts) can decide a criminal case after only a written proceeding in certain cases. For that to be possible, it is required that specific criteria are met; for example, if neither party has requested the main hearing or that it is a case where it is not relevant to choose a sanction other than a fine, Chapter 45, Section 10a, the Swedish Code of Judicial Procedure. A decision without a main hearing is not allowed if the defendant is under 18 years old⁶⁹. It is also more common to have the general higher courts decide a case without a main hearing. For example, the Supreme Court states, in case NJA 2020 p. 652, that there is a lower requirement for an oral hearing in the higher courts if a sufficient oral hearing has been held in the first instance.

⁶⁴ See chapter "3.1 The Swedish Approach to Fighting the Pandemic".

⁶⁵ P. O. EKELÖF, 2002, p. 38.

⁶⁶ M. MELLQVIST & K. WIDEMARK, *Processrätt - grunderna för domstolsprocessen*, 2 u., Lustus förlag, Uppsala, 2012, p. 33.

⁶⁷ M. MELLQVIST & K. WIDEMARK, 2012, p. 38.

⁶⁸ M. MELLQVIST & K. WIDEMARK, 2012, p. 38.

⁶⁹ M. MELLQVIST & K. WIDEMARK, 2012, p. 123.

4.3.1. The challenges brought by the pandemic in regard to presence in the courtroom

- 39 Many of Sweden's courts have chosen to hold hearings as regularly as possible but with certain restrictions and the opportunity to participate via other means of communication (some variation between the courts may occur)⁷⁰. However, this has still led to many hearings being cancelled. At the beginning of the pandemic, cancelled cases increased by almost double compared to before⁷¹. Being cancelled means that the cases are postponed to a later date, or alternatively that the parties reached a settlement⁷². More significant and complex cases were postponed in 2020 due to the difficulty of accomplishing them during the pandemic⁷³. It is important to keep in mind that it is mainly general courts that have cancelled cases, since the administrative court does not require an oral main hearing to the same degree⁷⁴.
- 40 As a general rule, the vast majority of cases in the Supreme Court are ruled after a written procedure, called determination without a hearing, Chapter 45, Section 10a, the Swedish Code of Judicial Procedure. In its report, the Supreme Court states that this custom of a written procedure was practical during the pandemic when physical meetings needed to be avoided⁷⁵. An adjustment within the court regarding presence in the courtroom is that co-workers have been able to work from home and access the same files accessible to the judges present at the court. However, the Supreme Court admits that the in-person meeting makes it easier to exchange insights or thoughts and discuss complicated questions in a court procedure. Physical presence in the courtroom could also make it easier to hear witnesses and manage who is talking at what moment⁷⁶.
- 41 An example on how the courts enabled presence in the court hearing during the pandemic was to allow the possibility for parties to participate digitally, either by telephone or video call. This could be applied if the parties in the court process experienced symptoms. If a party wanted to attend remotely

⁷⁰ Se for example: Svea Hovrätt, "Huvudförhandling i det s.k. Telia-målet", *Sveriges Domstolar*, 14 September 2020, <https://www.domstol.se/svea-hovratt/nyheter/2020/09/huvudforhandling-i-det-s.k.telia-malet/>, accessed 21 February 2022. Förvaltningsrätten i Stockholm, "Muntlig förhandling i mål om 5G-tillstånd", *Sveriges Domstolar*, 09 March 2021, <https://www.domstol.se/forvaltningsratten-i-stockholm/nyheter/2021/04/muntlig-forhandling-i-mal-om-5g-tillstand/>, accessed 21 February 2022.

⁷¹ Domstolsverket, "Antalet inställda förhandlingar ökar", *Sveriges Domstolar*, 2 March 2020, <https://www.domstol.se/domstolsverket/nyheter/2020/04/antalet-installda-forhandlingar-okar/>, accessed 21 February 2022.

⁷² Sveriges Domstolar, "Statistik med anledning av coronaviruset", *Sveriges Domstolar*, 01 March 2020, <https://www.domstol.se/om-sveriges-domstolar/statistik-styrning-och-utveckling/statistik/statistik-med-anledning-av-coronaviruset/>, accessed 07 March 2020.

⁷³ Brottsförebygganderådet, Rapport 2021:4, *Pandemins inverkan på flödet i rättskedjan*, p. 43.

⁷⁴ Domstolsverket, "Antalet inställda förhandlingar ökar", *Sveriges Domstolar*, 2 March 2020, <https://www.domstol.se/domstolsverket/nyheter/2020/04/antalet-installda-forhandlingar-okar/>, accessed 21 February 2022.

⁷⁵ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 5.

⁷⁶ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 5-6.

from home even though not experiencing any symptoms, it required contacting the court beforehand to see if that was possible⁷⁷.

5.4. Effectivity of Swedish court procedures

- ⁴² The court shall set a date for the main hearing as soon as possible after a summons has been issued, Chapter 45, Section 14 of the Code of Judicial Procedure. A requirement is that the proceeding occurs quickly, which Article 6 ECHR also establishes. The court needs to ensure that the parties and others that will attend are given a reasonable time to appear in court and an opportunity to prepare for the hearing, Chapter 32, Section 1 of the Code of Judicial Procedure. In Swedish law, there is no set deadline for a negotiation. The deadline can be affected by the scope and type of case. In cases where a person is in custody, particular demands are made for urgency. The main rule is that the hearing must begin no later than two weeks after the prosecution was brought up, Chapter 45, Section 14 of the Code of Judicial Procedure. However, there are exceptions to this rule. Chapter 45, Section 14, Paragraph 3 of the Code of Judicial Procedure prescribes that the main hearing can be delayed despite a suspect being detained if necessary for the investigation. Regarding effectiveness in the administrative courts specifically an oral hearing could be decided if it could lead to a faster conclusion of the case as stated in Section 9 the Administrative Court Procedure Act.
- ⁴³ A measure of effectiveness in the Swedish courts can be the number of cases that were filed relative to the cases that were decided in a year. For example, in 2019 about 390 000 cases were filed in Swedish courts and about 377 000 were decided.⁷⁸ How these numbers were affected during the first years of the pandemic will be shown in the next section.

4.4.1. The challenges brought by the pandemic in regard to the principle of effectivity of court procedures

- ⁴⁴ During the pandemic, the courts did a faster transition to digitalisation to protect public health and avoid physical encounters as far as possible⁷⁹. Digitalisation enabled effectiveness and made the right to a fair trial possible during the pandemic. The amount of decided cases increased by nearly six percent during the beginning of the pandemic⁸⁰. This is dependent on the fact that the number of

⁷⁷ Södertörns tingsrätt, "Information med anledning av coronavirus", *Sveriges Domstolar*, 20 November 2020, <https://www.domstol.se/sodertorns-tingsratt/om-tingsratten/information-med-anledning-av-coronavirus/> accessed 13 February 2022.

⁷⁸ Sveriges Domstolar, "Inkomna, avgjorda och balanserade mål", *Sveriges Domstolar*, 2021, <https://www.domstol.se/contentassets/13589d8fe7fc4e6c8b9a8ed42b16ea96/inkomna-avgjorda-balanserade.pdf/> , accessed 1 September 2022, p. 1.

⁷⁹ The Supreme Court, *The report of the Supreme Court's inner operation* (our translation of 'Högsta Domstolens verksamhetsberättelse'), 2020, p. 19.

⁸⁰ Domstolsverket, "Rekordmånga mål avgörs i domstol", *Sveriges Domstolar*, 17 August 2020, <https://www.domstol.se/nyheter/2020/08/rekordmanga-mal-avgors-i-domstolarna/> , accessed 1 September 2022.

cases filed also increased during this time.⁸¹ However, there were some negative effects on the courts' effectivity caused by the pandemic. The foremost consequence for effectivity induced by the pandemic was the increase in cancelled cases. Among the general courts, the district courts (*Tingsrätterna*) nearly doubled the percentage of cancelled cases during the beginning of the pandemic. The same happened to the different courts of appeal (*Hovrätterna*). Criminal cases were the type of cases that mostly got cancelled in the district courts because they are usually more complex⁸². The administrative courts did not cancel cases to the same degree⁸³. One reason might be that the administrative courts have more cases that do not require the parties to be present⁸⁴. The rise in cancelled cases can affect the effectiveness of the processing of the case in question and could lead to consequences for the parties involved. Something to note is that the different Swedish courts in the different parts of the country were affected in varied ways by the pandemic. This could mean that the impact on effectiveness in different parts of the country varied. For example, the courts in the Stockholm region were affected the hardest by the pandemic, and they had to cancel the most cases⁸⁵.

5. DISCUSSION AND CONCLUDING REMARKS

- ⁴⁵ Digitalisation has been a prerequisite for upholding the right to a fair trial during the pandemic. However, certain lessons can be learned from the challenges posed by the pandemic with regard to the reinforcement of the digital process of the court procedure. Legal questions can be posed with the point of departure of the legal certainty guarantees equal treatment, transparency, presence in the courtroom and effectivity laid down in Article 6 ECHR as well as in Chapter 2, Section 11 of the Swedish Constitution/ Instrument of Government.
- ⁴⁶ Regarding equal treatment in the right to a fair trial, people already vulnerable to society's fast transition to the digital sphere could have become even more vulnerable when the courts quickly transitioned to digitised procedures during the pandemic. For example, these could be people who may not be as accustomed to using technology. In general, Swedish courts seem to have abided by equal treatment during the pandemic. Earlier preparation and discussion about equal treatment in digitised court procedures in the preparatory works may have contributed to this⁸⁶.

⁸¹ Sveriges Domstolar, "Inkomna, avgjorda och balanserade mål", *Sveriges Domstolar*, 2021, <https://www.domstol.se/contentassets/13589d8fe7fc4e6c8b9a8ed42b16ea96/inkomna-avgjorda-balanserade.pdf/>, accessed 1 September 2022, p. 1.

⁸² Brottsförebygganderådet, Rapport 2021:4, *Pandemins inverkan på flödet i rättskedjan*, p. 43.

⁸³ Domstolsverket, "Antalet inställda förhandlingar ökar", *Sveriges Domstolar*, 2 March 2020, <https://www.domstol.se/domstolsverket/nyheter/2020/04/antalet-installda-forhandlingar-okar/>, accessed 21 February 2022.

⁸⁴ Mellqvist & Widemark, 2012, p. 38.

⁸⁵ Domstolsverket, "Antalet inställda förhandlingar ökar", *Sveriges Domstolar*, 2 March 2020, <https://www.domstol.se/domstolsverket/nyheter/2020/04/antalet-installda-forhandlingar-okar/>, accessed 21 February 2022.

⁸⁶ Prop. 2019:20/189, p. 44 and more.

- 47 During the pandemic, one aspect that could have affected transparency is the public access to the actual hearing. Courts limited the number of people in the courtroom in order to protect public health. The difference in the size of the courtrooms could also significantly affect the public's right to attend as an audience in the hearing, especially when social distancing was implemented. A method applied by the courts, which could be noted, was to prioritise seats for the media and thus indirectly make the hearing accessible to the public while still limiting the audience to reduce the spread of the virus⁸⁷.
- 48 In Swedish courts the transition to the digital sphere had been in progress before the pandemic⁸⁸. The Supreme Court's report of the process leading to the digitised procedure before the pandemic seems to emphasise effectiveness and seems to be the court's motivation to digitise court activities. However, the general aim in all the Swedish courts during the pandemic was to protect public health by reducing physical meetings as much as possible. This led to a faster adjustment to a digitised procedure in the Swedish courts. This means that the pandemic pressure has contributed to a faster transition to the digital era, even if Swedish courts already had this process going before the start of the pandemic.
- 49 In conclusion, digitalisation in Swedish courts was a prerequisite for a fair trial during the pandemic. According to the Supreme Court's report, the fast transition went fairly smoothly because of earlier preparation and the fact that digitalisation of court procedures already was a work in progress in Sweden. However, in this paper, some potential lessons and aspects to consider regarding digitised court procedures and the question of the compliance with the requirements of a fair trial during the pandemic were discussed. They will still be of relevance, even out of the context of the Covid-19 pandemic, as the digitisation of court's procedure continues.

⁸⁷ Svea Hovrätt, "Huvudförhandling i det s.k. Telia-målet", *Sveriges Domstolar*, 14 September 2020, <https://www.domstol.se/svea-hovratt/nyheter/2020/09/huvudforhandling-i-det-s.k.telia-malet/>, accessed 21 February 2022. Förvaltningsrätten i Stockholm, "Muntlig förhandling i mål om 5G-tillstånd", *Sveriges Domstolar*, 09 March 2021, <https://www.domstol.se/forvaltningsratten-i-stockholm/nyheter/2021/04/muntlig-forhandling-i-mal-om-5g-tillstand/>, accessed 21 February 2022.

⁸⁸ See Chapter 4 of this article.

RESUME :

Cet article est une étude sur la manière dont le droit à un procès équitable énoncé à l'article 6 de la CEDH a été confirmé dans les procédures judiciaires suédoises en ce qui concerne les défis posés par la pandémie. Il inclura les ajustements que les tribunaux suédois ont apportés à leur procédure afin de protéger la santé publique. Il traite également de la marge de manœuvre des tribunaux en raison de l'absence de droit contraignant pour les opérations judiciaires pendant cette période. Les ajustements des tribunaux seront analysés sur la base des garanties de sécurité juridique, de transparence, d'égalité de traitement et d'efficacité de l'article 6 CEDH. L'un des résultats des ajustements causés par la pandémie a été une transition plus rapide vers l'ère numérique. La transition des tribunaux suédois vers la sphère numérique était un processus déjà en cours, ce qui a facilité la transition. Néanmoins, il existe un possible conflit d'intérêts entre le respect du droit à un procès équitable et la protection de la santé publique, comme évoqué dans cet article. Une brève introduction sur la façon dont la Suède a abordé la lutte contre la pandémie est incluse.

SUMMARY:

This article is a study on how the right to a fair trial in Article 6 ECHR was upheld in Swedish court procedures in regards to challenges brought by the pandemic. It will include the adjustments Swedish courts made to their procedure in order to protect public health. It also discusses the courts wide room for manoeuvre due to absence of hard law for court operations during this time. The courts adjustments will be analysed with basis in the legal certainty guarantees transparency, equal treatment and effectiveness in Article 6 ECHR. One of the results from the adjustments caused by the pandemic was a faster transition to the digital era. The Swedish courts transition to the digital sphere was a process already in progress and this resulted in an easier transition. Nonetheless, there is a possible conflict of interest between upholding the right to a fair trial and protecting public health as discussed in this article. A short introduction on how Sweden approached the fight against the pandemic is included.

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