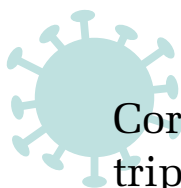


When crisis politics sowed doubts about the tripartition of power

What corona teaches us about the rule of law in a time of crisis

Brief

2



Corona as a magnifying glass for the tripartition of power

Was there uncertainty in Denmark about who partially shut down the courts in the first wave? And what does that mean for the tripartition of power?

The days surrounding the closure of Denmark on March 11, 2020, were marked by the precarious state in which the corona crisis had plunged the whole of Europe. The Danish Government had a clear message: If the chains of infection were to be broken and society's most vulnerable were to be protected, action had to be taken quickly. And things moved quickly thereafter.

Laws were changed and new, extensive legislation was introduced to protect us from the virus. Weeklong hearings, where all of the details of a bill are usually scrutinized, were settled in a few hours without the usual consultation process. Red-eyed ministers and MPs were on TV morning, noon and night, explaining the new rules that had been adopted after yet another marathon session.

All ten of the political parties in the Danish Parliament – and society in general – supported this “crisis policy of necessity”. And surveys have found unprecedented confidence in the population that the decision-makers made the best and most necessary decisions for the country.

All of the phases of the legislative work were formally complied with and special legislation was given an expiration date. The Danish Epidemic Act, which gave unprecedented powers to the Minister of Health, is in effect until March 2021.

But the crisis policy did not merely accelerate the decision-making process. In the field of justice, it could potentially challenge the fundamental tripartition of power in terms of judicial, legislative and executive branches, which is essential to our democracy. Because uncertainty emerged about who should actually be shutting down the courts.

The decision itself – to slow down the activity – seems obvious and is certainly what would have happened, regardless of the decision-maker; the doubt is not about the decision itself but about who made it. For was it the courts themselves who, independently of others, decided on the partial closure? Or was it on assignment from another authority?

This uncertainty rendered the corona crisis a kind of magnifying glass that shows us an area where we, as a society, must devote greater attention in the future. Because even though the decision to close the courts was sensible in this particular situation, was made with the best intentions and was accepted in the name of pragmatism, the doubt in this regard is indicative of a greater problem in principle; namely, in times of crisis, are we either unsure of the right decision-making processes or potentially willing to compromise on the most fundamental principles of our democracy and the rule of law?

Who is authorized to open and close the courts? Why didn't anyone sound the alarm when doubt arose? Did the same thing happen in other European countries? And what can we learn from the process for when we next face a major crisis?

This brief draws attention to what the lockdown has shown about the importance of clear decision-making processes and the respect for principle when pragmatism prevails in a time of crisis. And it makes recommendations for a "crisis plan" for the courts, which would help clarify the tripartition of power in the next major crisis and transparency for the citizenry when and if the pillars of democracy are tampered with.

Happy reading!

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Djøf's Corona Task Force

The basis: Fair trials and independent courts

The basis for the evaluation in this brief is The Constitutional Act of Denmark and the European Convention on Human Rights (ECHR), which guarantee the fundamental freedoms of all 47 Council of Europe Countries:

- > Article 6 of the ECHR on fair trials, including the right to a public hearing before an independent and impartial tribunal within a reasonable time.
- > Article 3 of the Danish Constitution on the tripartition of power and articles 61, 62, 63 and 64, which deal with the independence of the courts from the government.

Timeline: Corona-lockdown of the Courts of Denmark 2020

March 13:

The courts introduce emergency preparedness. Only critical cases will be dealt with. Domstol.dk, the Courts of Denmark website, states that the individual court – taking into account the authorities’ recommendations – organizes their work locally.

April 8:

The Courts of Denmark announce that they are closely following the government announcements about the gradual reopening of society. Most employees continue to work from home. The emergency preparedness is extended.

In an email to the courts, the director of the Danish Court Administration writes, among other things.

“The Prime Minister got ahead of me yesterday in relation to the information I had received from the Ministry of Justice, and she already made her announcement about the gradual reopening of society last night.

The courts are not included in the first phase of the reopening, and I spoke today with Johan Legarth [the head of department in the Ministry of Justice], who has confirmed that the extension until May 10 will be assumed to also include us. However, he cannot yet say whether more will be opened up before May 10.

We will discuss the announcement tomorrow in the crisis team, including whether the extension may give rise to reconsider the scope of critical tasks to be carried out until May 10.”

April 17:

Announcement is made on Domstol.dk that “following government recommendations and based on the health authorities’ feedback, the Danish Court Administration has decided that the courts will gradually reopen on April 27, 2020.”

July 6:

Information, a Danish daily newspaper, runs an article about the lockdown together with an interview with Danish Court Administration Director Kristian Hertz. The article describes how, after dialogue with the Ministry of Justice, the courts were told to close and only deal with cases defined as critical by the Ministry, and that it was up to the government when the courts could reopen. Both the Ministry of Justice and the Danish Court Administration reject the notion that this interference has been excessive. In the interview, Kristian Hertz comments on the dialogue with the Ministry and the need to act quickly, which is why much of the early dialogue primarily took place orally.

● August 1:

Information prints a new article on the lockdown based on access to documents in emails and minutes from meetings. The minutes indicate that some courts interpreted the dialogue with the Ministry of Justice as being an injunction from the government.

● September/October:

The Minister of Justice regularly answers questions from, e.g., the Parliamentary Legal Affairs Committee, where he explains the current situation and refers to emails and documents from the Danish Court Administration, which accounts for the handling of the lockdown, the assessment of critical cases and the gradual reopening. The answers indicate that the decisions were made by the correct bodies.

Questions are also asked about whether the Danish Court Administration's contingency plan could enter into force at the national level when the law stipulates that it is up to the individual court to make decisions.

To this, via the Minister of Justice, the Danish Court Administration responds to the Legal Affairs Committee, *"that it is always up to the individual court to assess whether and how cases should be prioritized and processed. The Danish Court Administration has generally, in its communication in connection with the closure and reopening of the courts, both internally and externally, clarified that it will be up to a concrete assessment in the individual court whether a case meets the conditions to be 'critical' and should therefore be dealt with in person in the emergency preparedness period."*

An internal working group established by the Danish Court Administration in September is in the process of preparing recommendations for procedures that will apply in future crises on par with the corona crisis. The courts also participate in the investigation of COVID-19 carried out by the parliament.

● September 10:

The Minister of Justice is in consultation on the lockdown. He points out that the courts could have said "no" to closing at any time.

● October 23:

The government makes wearing a mask or visor mandatory in large parts of the indoor public space (public transport, retail, restaurants, parts of the education sector, the hospital system, cultural facilities, etc.). The courts are not on the list, and it is left to the individual court to assess whether masks will be required.

● November 5:

The government introduces special restrictions for North Jutland after the spread of a mink virus variant. The courts were not subject to the restrictions, but have themselves made recommendations for a temporary crisis team.

Two corona learnings relating to the rule of law

Djøf's Corona Task Force evaluation of the process surrounding the closure of the courts has produced two key observations:



Learning 1:

The tripartition of power was pressure-tested and found wanting

When the crisis hit, doubts emerged as to whether it was inquiries from the political level with the Ministry of Justice as an intermediary that led to the lockdown and the subsequent decisions about the plan for the reopening of the courts. If that were the case, the watertight bulkheads between the legislature, the executive and the judiciary branches would have sprung a leak. There should be no doubt about who makes such an intrusive decision. This kind of uncertainty has not been immediately seen in the other European countries with which we compare Denmark in this brief. It would be appropriate for the decision-making process for the courts to be clarified to ensure the independence of the courts and eliminate any possible doubt.

As new restrictions were introduced in the second wave (e.g. requirements for masks and local restrictions in northern Jutland), there was no longer any doubt: The courts were not covered by the new restrictions.

Although the result would probably have been the same in the first wave, the central experience is that we must keenly maintain the tripartition of power. With this debate, the corona crisis became a reminder of how pragmatism and trust in authorities can have a downside; namely, that the fundamental principles of the rule of law fall into the background.

Recommendation:

We ought to strengthen our awareness through the public conversation regarding the tripartition of power. The fundamental separation of powers must not even be changed during crises – perhaps especially not during crises. This must be beyond any doubt. Changes to normal procedures must be decided by the appropriate authority to maintain independence and promulgated directly from the authority to the public to ensure transparency.



Learning 2:

The decision-making processes were unclear within the court system

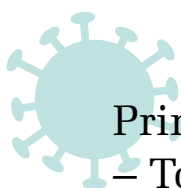
The uncertainties regarding the process surrounding the closure of the Danish courts are multiple-sided; for the doubts that have since been expressed by parts of the judiciary as to whether the decision came from another authority were not immediately met by a clear denial of any potential interference.

The courts are in fact made up of a number of independent entities, the courts and judges, which do not function as a single organization and where it can be difficult to act together. This could argue for a clarification of the internal procedures of the judiciary, which ensures that the right actors take the joint decisions that apply to the whole organization and announce them clearly.

The Danish courts do actually have a contingency plan, but COVID-19 clearly demonstrated that it primarily took into account any possible accidents in the individual courts and that it was geared to a lesser degree to crises of a national character. This is particularly evident in how the contingency plan describes that cases and resources must be able to be moved and coordinated between courts should a court building be inaccessible. This focus on a few inaccessible courthouses is insufficient in a situation such as the spring of 2020, where all of the court buildings were affected. The plan is primarily about coordination, the focus of which is on the exposure of individual courts to threats and risks, meaning that it is more about local preparedness than readiness for an extensive national crisis.

Recommendation:

The decision-making processes for the courts should be clarified so that in future crises, the best conditions possible exist to maintain the independence of the courts. This could be achieved by, for example, ensuring that a contingency plan explicitly takes into account the tripartite separation of powers and transparency for the citizens when the pillars of democracy are being tinkered with. Djøf's Corona Task Force provides five recommendations for such a contingency plan on page 15.



Principles do not apply only in peacetime – To the contrary

In the days around March 11, 2020, like almost everything else in Denmark, the courts partially closed down. Some defendants may have breathed a sigh of relief at the thought of having their case adjourned. Others – including detainees – could fear being remanded in custody for extended periods of time, and civil cases were adjourned indefinitely. The courts began a slow, gradual reopening, which has since been debated publicly. At the crux of this debate was the question: Who decided to close?

The Danish Constitutional Act

Article 3 states that “Legislative authority shall be vested in the King and the Parliament conjointly. Executive authority shall be vested in the King. Judicial authority shall be vested in the courts of justice”.

In other words: The courts are independent and neither the government nor the parliament can dictate their actions.

This brief does not raise questions about the decision itself. Looking at a number of other European countries, there is a clear tendency for judicial activity to be sharply reduced. The pandemic was raging, and no one was interested in exposing the population to unnecessary infection. But the question as to how the decision to shut was made and who made it goes to the core of our rule of law. If it was not entirely the courts themselves that decided to shut down, doubts are raised about one of the fundamental pillars in the tripartition of power: that the courts, the judiciary, are independent of the executive; namely, the government.

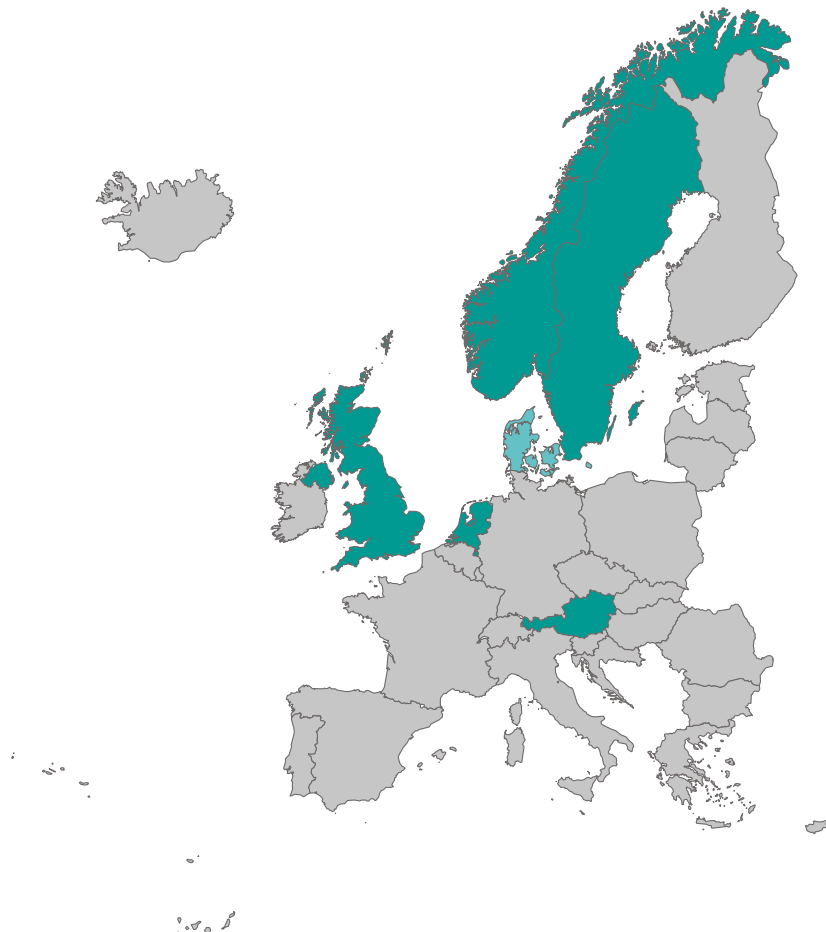
The independence described in Article 3 of the Danish Constitution is crucial for us, as citizens, to feel confident that no one with an interest in a particular outcome can influence the outcome of our lawsuits, and that no political or financial interests are determining which cases are prioritized.

Maintaining trust in the judicial system becomes particularly important in a crisis. Acute crises require urgent action, but this action must always respect the principles of the rule of law and protect fundamental human rights.

But are the principles really important if the result had been the same or virtually identical? We find the answer to this question in the countries where the principles are violated to a completely different degree than was the case in Denmark.

Looking at the global situation, the Freedom House think tank has determined that 158 out of 190 countries have implemented new legislation and changed procedures leading to setbacks for the democratic rights of ordinary citizens – with the corona virus as justification. This applies to both Western democracies and totalitarian states, albeit in completely different ways and to completely different degrees. Among other things, several authoritarian regimes have conducted online court hearings without the presence of defense attorneys.

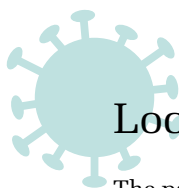
The courts of Europe reduced their activity



In Denmark, the lockdown has raised doubts as to whether the tripartition of power was maintained, as some believe that there were “directives from the government to the Danish Court Administration”, while others maintain that the courts themselves made the decision. As far as we can document, none of the five countries with which we have drawn comparisons (Sweden, Norway, the Netherlands, Austria and the UK) have had reports of a similar process or doubt.

Obviously, Denmark is not an authoritarian country. But that is indeed how it is supposed to be, and there must never be any doubt. Precisely in order to maintain the basic principles that we in Denmark believe cannot be bent or compromised, we must pay special attention when the crisis hits.

The debate about the lack of clarity has possibly had the positive consequence that the new restrictions introduced in response to the second wave have clearly exempted the courts and left it to the courts to decide for themselves.



Lockdowns always have human consequences

The partial closure of the courts also had consequences that for many were far more acute than “merely” the principled perspective. Because when the courts’ contingency plan comes into force, a number of cases will naturally be delayed.

All cases without deadlines were downgraded. This applied to all criminal and civil cases alike. Only so-called critical case areas were addressed, which included cases involving preliminary examinations (grundlovsforhør), the extension of deadlines, arrest periods that could not be postponed due to the principle of proportionality, bailiff actions (fogedforretninger) that cannot be postponed, the picking up of children who are in danger of being smuggled out of the country and the like. Registration cases (tinglysningssager) were also processed. Which leaves all ordinary criminal cases and all civil cases. In the case of the latter, the postponement could have major human consequences for the victims, the accused and any parties to cases who had to live in uncertainty without a decision in their case.

ECHR article 6: The right to a fair trial within reasonable time

Most of the infringements of Article 6 brought before the European Court of Human Rights (ECHR) concern slow proceedings.

In the light of the ECHR case law, it must be concluded that a case should not stand still for more than 9 months, as this could be a violation of Article 6.

Article 6 of the European Convention on Human Rights, which addresses access to justice, guarantees that a case can be heard within a reasonable period of time. A contingency plan naturally changes what is considered a “reasonable period of time,” depending on case type, but for the individual defendant or victim, the principle remains of great importance. This problem applied to all of the European countries in which cases were delayed significantly, and Denmark is faring quite well in the European context compared to other countries in terms of average case processing times and the effort to catch up since reopening. In June, the Danish government allocated DKK 7 million to reduce the case backlog that amassed as a result of the corona crisis.

Early in the crisis, the Danish courts tried to manage as much work as possible from home workplaces – and since the reopening with alternative solutions such as collaboration with a convention center in Copenhagen, Bella Center, which made it possible to fulfil distancing requirements. The Danish Court Administration had allowed employees to work from home, and the courts used telephone meetings as much as possible to prepare cases in several legal areas. As all civil cases are processed digitally, the judges could prepare the cases from home. A number of cases were arranged and some were settled. To the extent that the parties could agree and the courts could deem doing so suitable, civil cases were dealt with in writing. For the sake of legal certainty, judges refrained from dealing with criminal cases digitally. Despite these measures, the Danish Court Administration reported a case backlog resulting from the partial closure, where several thousand cases were postponed.

The courts have clearly felt the reduced capacity resulting from COVID-19. This is apparent in the statistics for concluded court cases in the Danish courts for the first half of 2020. Here, a total of 11% fewer cases have been closed in the district courts (byretten) in the first half of 2019; and at the same time, the case-processing times for small cases and bankruptcy cases in district courts have increased. The pending cases have increased by 11% overall. The case backlog in the courts has thus grown as a result of COVID-19 despite efficient work in the courts. In connection with the reopening, a number of cases were processed over the course of the entire day and evening and even on weekends and public holidays.

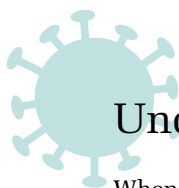
The flow of cases in the district courts						
Office and area of responsibility	Received	% in relation to last year	Concluded	% in relation to last year	Ongoing	% in relation to last year
district courts	312,690	-6%	308,023	-11%	166,632	7%

Key figures from the Danish Courts (from domstole.dk)

Several European countries tried to solve this challenge by using digital instruments more than is the norm in the court system.

In Sweden, for example, this meant that the courts, despite reduced activity in the spring, could announce in August that they had completed more cases than in 2019. In England, court hearings were even held via Skype and Zoom, and resources were allocated in Austria to ensure sufficient bandwidth in home offices and to ensure the secure exchange of sensitive information over the Internet.

At the same time, plexiglass and other creative measures were being experimented with in countries throughout Europe to ensure safe distances between those present in the courtrooms when physical meetings were necessary. This has also been part of the solution in the gradual reopening in Denmark.



Unclear decision-making mucks things up

When crisis hits, decisions must be made quickly. It is therefore crucial that there is no doubt about the decision-making processes: Who decides what, and how far can they go?

The Danish courts are not one single organization, but instead a number of independent courts with independent judges. This means, among other things, that the courts as a whole are not represented by a unified voice in the public debate. It also means that in a crisis affecting all of the courts across the nation, it is not possible to turn to a single organ that is capable of taking decisions of a judicial nature on behalf of all of the Danish courts. This may have affected how the courts were closed.

Danish Courts

The Courts of Denmark consist of 24 district courts, the higher courts, a number of other courts, councils and boards, and an agency. In addition to which are the courts in the Faroe Islands and Greenland.

The courts do not constitute a single organization.

The Danish Court Administration (DCA) is responsible for administering and developing the Danish courts. Led by a board of directors and a director, the DCA operates under the Ministry of Justice, but it is politically independent, meaning that the Minister of Justice cannot decide on the DCA or change its decisions.

The crisis team established by the Danish Court Administration has had doubts as to who actually decided that the courts should close and what the crisis team should be doing. According to the contingency plan, the crisis team is responsible for establishing and maintaining a sense of perspective, to coordinate actions and resources, and to coordinate the internal and external communications of the Danish courts about the incident. But how this is reflected in the competence of the crisis team is not stated in the contingency plan.

At the same time, in a response to the Danish Parliament to the announcement made by the Danish Court Administration, the Ministry of Justice refers to how the courts' contingency plan was not designed to include a national closure but geared more to an accident or terror attack that would only affect a single court. Thus, the contingency plan has not accounted for a nationwide crisis, which is also apparent in the description of the areas of application for the plan, where security threats are primarily presented in local terms, not the nation as a whole.

In an interview with the Danish newspaper Information, the director of the Danish Court Administration has explained that the starting point was the contingency plan. But precisely because it does not account for everything, improvisation became necessary. Nobody had imagined a pandemic striking Denmark that could affect all of the courts across the country, and the decision-making processes for such a situation were therefore not addressed.

The crisis team can be used in all forms of major accidents and catastrophes, and it will be possible to activate it in connection with the following types of events:

- Large-scale absenteeism (due to illness, strikes etc.)
- High-profile cases
- Torrential rain
- IT breakdowns
- Power outages
- Security incidents
- Other situations where it is deemed necessary

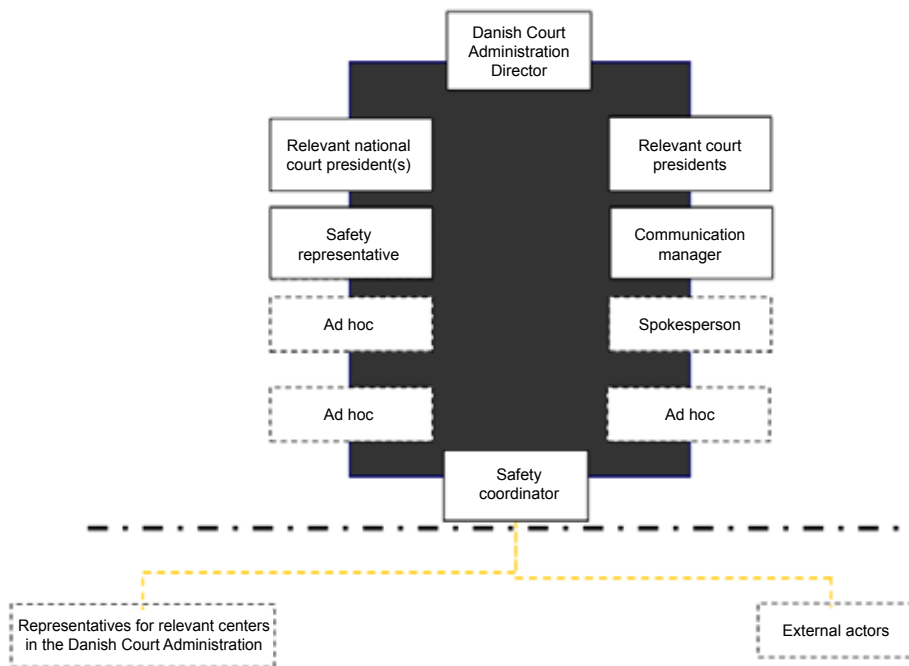
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From the Danish Court Administration contingency plan (from domstole.dk)

Several aspects of the course of events took place orally. Nothing was written down, and the documentation for who ultimately made which decisions is therefore missing. This was because it was a *"completely extraordinary situation in which we had to act quite quickly. So it was an oral discussion [...]"*, as the Danish Court Administration director has explained. The situation was exceptional, but the contingency plan, which is designed to function in extraordinary situations, stipulates that the crisis team must maintain all essential information and decisions in writing. Thus, the contingency plan does not recognize the need or necessity to switch to oral communication. The contingency plan also describes how written communication is necessary to ensure that there is agreement and clarity on what the crisis team has been informed about and the decisions it makes.

The court communicates with the public via the Danish Court Administration, including the www.domstol.dk website. But the traditions for direct communication between the courts and general society are not the same as in the political sphere. A lack of general awareness as to how there are independent authorities that communicate independently of state power can challenge the need to announce important changes in procedures in a crisis situation, and it is extremely important to be equipped for public communication precisely in a crisis situation. The contingency plan also focuses on this, stating that critical situations require timely and correct communication to all stakeholders. In this context, it is stated that a high level of information must be maintained in crisis situations towards the press, society in general and the Danish court employees. The purpose of these communications is to prevent misinformation and not least to ensure trust among users, citizens and employees.

In September, the board of the Danish Court Administration announced that it had set up a working group to update the contingency plan. This was a step on the path to clearer decision-making processes. However, this does not change the fact that the courts as such are not part of a single, common organization, and a number of cross-cutting processes are therefore necessary to provide the best framework for acting jointly in a crisis situation. This is particularly important to be aware of with regard to the crisis team operations, which, with its various actors, reflect the fact that the courts are not part of a single, common organization.



*The Courts of Denmark crisis team, as described in the Danish Court Administration contingency plan
(from domstole.dk)*

It is therefore necessary that the contingency plan ensures the tripartition of power and clarifies decision-making procedures, rules for procedural changes, and what the courts must be able to deal with jointly and at the national level. Djøf's Corona Task Force has prepared five recommendations.



Five recommendations for the courts contingency plan that respect the tripartition of power

Djøf's Corona Task Force recommends that the following recommendations be included in the contingency plan, which is to be put in motion in response to the next national crisis:

1. The starting point should be that as many cases as possible are processed, taking into account the crisis in question and, thus, the circumstances.
2. The courts' internal common processes are strengthened and clarified – for example, through a central crisis management group, which can meet in the event of a crisis and which has a clear mandate to prepare recommendations to courts and judges so that they can act effectively in a crisis situation.
3. Effective and visible communication channels should be established directly from the courts to the general public, which can be used in crisis situations and when changing normal practice, so that there is no doubt about where decisions in the area have been made.
4. National uniformity is a high priority for the benefit of citizens, but a contingency plan should be drawn up and scaled both geographically and in relation to various threats.
5. The contingency plan must directly and transparently state to the public the criteria for how to prioritize between cases – should doing so prove necessary.



Cases: Comparable countries maintained the independence of the courts

The data collected by Djøf's Corona Task Force reveal that all of the case countries with which we have drawn comparisons have reduced their judicial activity early in the corona crisis and maintained the independence of the judiciary. All of the selected countries are comparable to Denmark in the legal area. The courts are independent, and the constitution ensures the separation of powers (except the UK, where the parliament is basically sovereign and the "rule of law" is not enshrined in a constitution. The independence of the courts is recognized in practice).

Denmark

Organization

The Danish courts consist of 24 district courts (byretter), two national courts and a highest authority, the Supreme Court, all of which act independently of state organizations. In addition, the Danish Court Administration has the task of administering and developing the Courts of Denmark. While it is under the purview of the Ministry of Justice, it is politically independent.

Lockdown

On March 13, 2020, the Courts of Denmark transitioned to a state of emergency preparedness that handled only critical cases and thus restored a partial closure. The critical cases areas included cases that were bound by deadlines or were particularly intrusive, including constitutional hearings, extensions of time limits, rulings on urgent interventions, the enforcement of cases in the area of family law etc. The individual court assessed whether a case was critical. The employees on the critical cases appeared physically in the courts, while the remaining 90% worked from home. The teleworking employees performed tasks such as the preparation of civil cases and case processing based on written materials, such as notarial transactions. The courts used telephone and video conferencing as much as possible. The Danish courts reopened on April 27, following a detailed reopening plan that opened up the possibility that all types of cases could be processed. For health reasons (e.g. distance requirements), however, exceptions were made for jury cases.

Case processing

In Denmark, the processing of all civil cases has been digitized, as are a number of criminal cases. The court employees, including the judges, were quickly established secure home access to their computers and were able to carry out all the tasks that did not require in-person communication. A large number of civil cases could thus be resolved. The use of telephone- and video conferencing could not be applied to all non-critical cases, which left a pile of unresolved cases. In the first half of 2020, during the closure, 11% fewer cases were closed in the district courts compared to the first half of 2019. At the same time, the processing times for small claims and bankruptcy cases increased. The government has allocated DKK 7 million to eliminate the pile of cases.

The social debate

Particular criticism was raised of cancelled family cases. The newspaper Information shifted the focus of the debate in July. After getting access to public documents and emails from the Danish Court Administration, Information raised doubts as to whether the Ministry of Justice had intervened in the closure of the courts. This has sparked debate, particularly among politicians, as to whether the lockdown was unconstitutional.

The data collection is based on publicly available sources, such as government websites, and is therefore subject to the possibility that there may be circumstances that have yet to emerge. Based on the available material, Denmark is apparently the only country among this selection of some of the countries with which we usually compare ourselves that has had a situation where respect for the independence of the judiciary has been called into question in the public debate.

The Netherlands

Organization

The Netherlands is divided into 11 districts, each with its own court. Each court has a number of local court offices. The district court consists of a maximum of five departments, including the administrative law department, the civil justice department, the criminal justice department and the cantonal department. The 11 districts are divided into four areas, each with its own appellate court. On top of this is the Supreme Court in the Hague. The judiciary is independent and does not fall under the Dutch Ministry of Justice. As in Denmark, there is the tripartition of power.

Lockdown

Between March 17 and May 11, 2020, all of the Dutch courthouses were closed except in cases of special urgency. All other cases were dealt with by written procedure or by audio and video conference. On May 11, 2020, all of the courts reopened for all criminal cases as well as child and family law cases. The judiciary has followed the guidelines issued by the health authorities regarding safety and the organization of work. It does not appear as though the decision was made under pressure or due to encouragement.

Case processing

Only prioritized cases were dealt with, and as far as possible without people having to show up physically. Measures have been taken to ensure the functioning of the judiciary, including the possibility of holding court hearings via video conferencing and conducting legal proceedings in writing.

The social debate

The citizens of the Netherlands have protested against the government being given authority to issue laws and regulations.

Norway

Organization

In Norway, each court constitutes its own independent organization, which is geographically delimited on the basis of the rules of jurisdiction. There is not usually any exchange of cases between courts at the same level, and the courts have no joint management. The ordinary courts consist of the Supreme Court, six courts of appeal and 60 district courts. According to Article 95 in the Norwegian Constitution, "The authorities of the State shall ensure the independence and impartiality of the courts and the members of the judiciary."

Lockdown

In connection with the Corona outbreak, the Norwegian courts limited their operations. Many cases were postponed. The court administration recommended that the courts immediately reduce their activities to the most necessary work. Some 80–90% of all court cases in March were either cancelled or postponed.

Case processing

On March 27, the government passed a temporary regulation that would make it possible to conduct more cases in new ways, including the use of video. The district courts in Stavanger and Sør-Trøndelag were among those to take advantage of this opportunity. As of September 2020, all of the courts are open, but there is a significant backlog and many cases are delayed.

The social debate

Norway has had a major political debate about the "Corona Act," including the delegation of legislative authority from the Storting to the Government. In March 2020, the Government submitted a proposal, according to which it should have a power of attorney/the competence to lay down provisions with legal content, including deviation from current legislation. The proposal was significantly curtailed by the Storting, and was thus passed with significant changes.

Sweden

Organization

The Swedish courts consist of 80 independent courts. No authority, government or parliament can dictate how a court should rule in a case. The Constitution stipulates that judges cannot be discharged.

Lockdown

While the Swedish courts have not been closed, particularly in the beginning of the pandemic, they did generally choose to cancel and postpone negotiations. The district courts' share of the total number of cancelled hearings had risen to 86% in early April. Part of the reduced activity is due to the fact that 30% of the judges are 70 years old or older and therefore cannot be present because they are deemed to be at risk. The courts have prioritized the most critical cases. The courts themselves have decided how they want to act, and there have therefore also been differences in how cases have been processed in the different Swedish regions.

Case processing

In August, the Swedish court administration announced that the courts have managed to adapt to the corona situation and that they are no longer forced to cancel lawsuits due to the virus. As of August 1, the Swedish courts had completed 6% more cases than at the same time the previous year. This was partly due to the introduction of video and other digital aids.

Great Britain

Organization

England, Wales, Scotland and Northern Ireland all have their own court systems. On top of that is a Supreme Court, which functions as the final appellate body for cases from England, Wales and Northern Ireland as well as for civil cases from Scotland.

Lockdown

The courts have not been closed down at the national level, and priority courts have been open. The Lord Chancellor (minister of justice) and Lord Chief Justice (head of the judiciary) have been in dialogue on how the courts should function during the crisis. The final decision was made by the Lord Chief Justice – and thus by the courts themselves.

Case processing

While it has not been possible for the English courts to maintain "business as usual" during the pandemic, the courts have been able to process cases digitally to some extent. Court hearings have been held via Skype. A number of cases have been processed in writing. The government and parliament have given the judiciary more and better options through laws, including electronic/digital court proceedings.

Austria

Organization

The Austrian legal system is separate from the administrative system at all levels. The prosecution is separate from the courts. The Austrian constitution guarantees the independence of the judiciary. No body within or outside the judiciary can issue any instruction to a judge in connection with a decision on a specific subject; not even the Federal Ministry of Justice.

Lockdown

As in Denmark, there has been no total closure; however, court activity has been reduced. Several physical security measures have been introduced. From March 15 to May, the courts were in a state of emergency preparedness.

Case processing

In mid-March, the Ministry of Justice announced that only critical cases would be processed. Courtroom opening hours were shortened. The Minister of Justice emphasized that, to the extent possible, the courts should continue to function in accordance with the rule of law, but that the individual judges must decide for themselves whether a case can be carried out in-person.

It was announced mid-April that trials could be heard if a two-meter distance between all those present could be maintained. Where it was not possible to maintain such a distance, plexiglass was installed. Masks became mandatory, but the individual judges decide for themselves how this requirement is to be met.

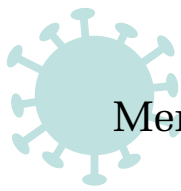
In this period, Austria has re-equipped itself digitally, particularly to strengthen and secure home offices, video conferencing, adequate bandwidth and the secure exchange of confidential or sensitive information. Notaries can continue to provide their services, such as authenticating documents and preparing notarial documents using electronic communication. Until now, this electronic procedure has only been allowed when setting up a limited liability company.

What we've done

The task force has collected information on how selected European countries have handled their judiciary during the corona pandemic. The data are collected from publicly available sources. In brief 2, we have focused on the European countries with which we often compare ourselves and which have organized their legal system in a manner that is largely similar to our own in Denmark. The selected countries are Norway, Sweden, the Netherlands, Austria, and the United Kingdom.

The corona briefs can all be found at www.djoef.dk/coronataskforce

Here, you will also find our interactive map of Europe, where you can compare the extent of restrictions on human rights across Europe and find information about the corona initiatives in other EU countries.



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About the Djøf Corona Briefs

In connection with the corona crisis, Denmark has adopted historically intrusive laws affecting our human rights. Now, we have come so far with dealing with the actual crisis that we can begin to look at what we learned from it; not only from a health perspective, but also from the perspective of human rights and democracy. As well as what we did in comparison with our European neighbors.

Djøf's Corona Task Force has been commissioned to shine a spotlight on democracy, freedom, and rights during and after the corona crisis. Crisis legislation must not become routine. Restrictions on very basic freedoms must not become permanent. The long-term objective is to use the corona crisis to learn for the next time a comprehensive crisis hits; whether it is a health crisis or a different kind of crisis.

Other publications in the corona briefs series:

- > Coronabrief 1: When we put freedom on hold – what the corona crisis has taught us about human rights in a time of crisis (September 2020)
- > Coronabrief on retail and small business (expected December 2020)
- > Coronabrief on democracy and a summary of the work of the task force (expected February 2021)

Djøf has set up the task force and appointed its members with the aim of supporting a qualified debate on the future handling of similar comprehensive crises with consequences for democracy and human rights. The task force draws its own independent conclusions, but it has been established by Djøf, which is responsible for secretariat service. The work of the members is voluntary and unpaid.

Questions and inquiries regarding Djøf's Corona Task Force can be directed to Chief Policy Advisor Astrid Gufler agu@djoef.dk

