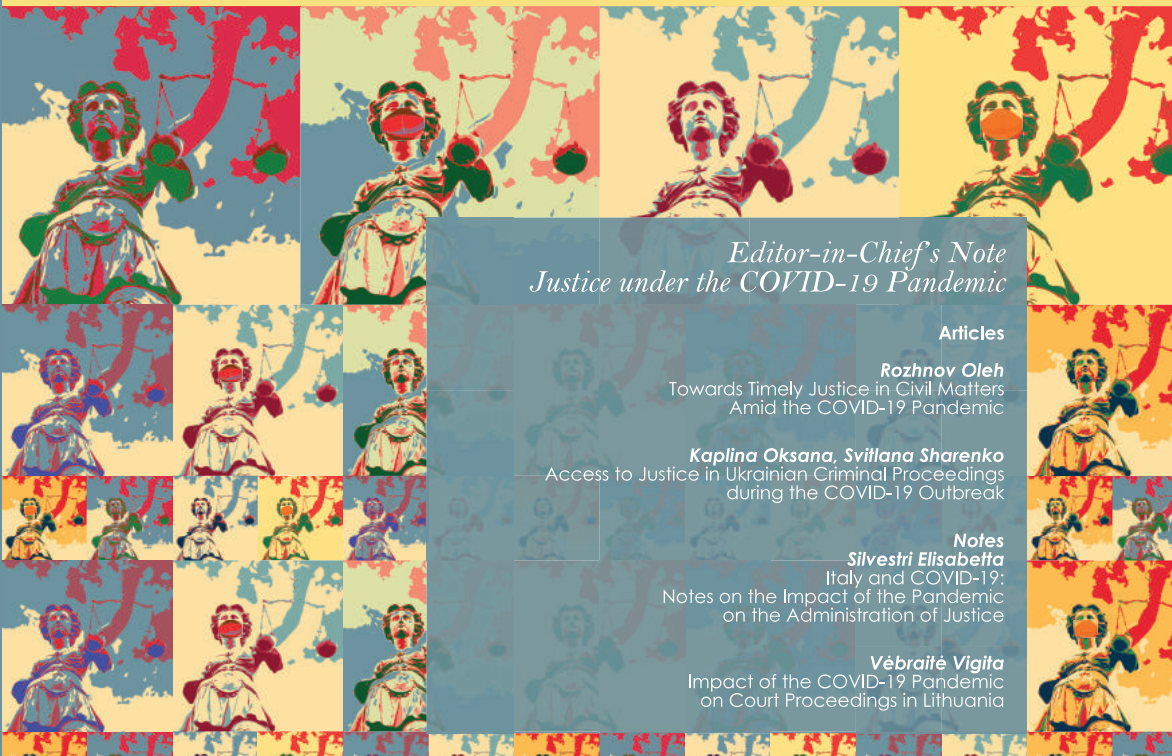
ISSN 2663-0575

ACCESS TO JUSTICE IN EASTERN EUROPE



ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by East European Law Research Center

AJEE is an English-language journal covering a variety of issues related to access to justice and the right to a fair and impartial trial. The specific area of interest of AJEE is the law in East European countries such as Ukraine, Poland and Lithuania and other countries of the region which share special features in the evolution of their legal traditions. While preserving the high academic standards of scholarly research, AJEE provides the opportunity for its contributing authors and especially young legal professionals and practitioners to present their articles on the most current issues.

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ISSN 2663-0575
EELRC
Publishing House VD 'Dakor'

Access to Justice in Eastern Europe

Issue 2/3 (7) September 2020

doi.org/10.33327/AJEE-18-3.2-3

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ABOUT SPECIAL DOUBLE ISSUE 2-3/2020 'JUSTICE UNDER THE COVID-19 PANDEMIC'

The 2020 COVID-19 pandemic has touched all mankind. Our health is put at risk and our everyday lives have been transformed. Many social institutions no longer function effectively in the new reality of the measures governments have taken and the lockdowns ordered in an attempt to halt or at least mitigate the danger. The efforts of authorities and researchers all over the world are directed at the creation of approaches to deal with the new reality and the issues it raises. These efforts include the development of special adaptive regimes that will ensure the possibility of effectively performing everyday social functions now and, if needed, in the future.

Access to justice is an integral element of a rule-of-law democratic state, a common value of human civilization, the effective implementation of which symbolizes the high level of our social evolution. In the context of the rapid spread of the coronavirus, the hospitalizations and lockdowns, the public health measures such as mask-wearing and social distancing, the duty to administer justice properly and in a timely manner has become a difficult task. The general lack of preparedness by legislative and judicial institutions beforehand, and the seemingly ad hoc approaches and development of actions in response to the pandemic have led to outcomes the meaning and consequences of which we will be contemplating and evaluating for a long time.

This special double issue of our journal is symbolic. The arrival of COVID-19 in the early months of this year has had an impact on all spheres of our lives, including scientific and publishing activities. The disruption of plans and schedules, and, most importantly, the changes in our perceptions and feelings about the reality around us which the pandemic has brought with it, have affected us directly, too.

The preparation of a special issue devoted to access to justice in Eastern Europe amid the challenges brought about by the pandemic is an attempt to attract attention and intensify research in this subject area. In this way, we join scholars all over the world who are contributing to similar studies. In particular, we should note the ELI Principles for the COVID-19 Crisis[1], the special issue 'Civil Justice and COVID-19[2], edited by Bart Krans and Anna Nyland, and the joint project of the UNDP, WHO and others 'COVID-19 Law Lab'[3].

1 European Law Institute, 'ELI Principles for the COVID-19 Crisis' < https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf> accessed 30 August 2020.

2 Bart Krans and Anna Nyland (eds), *Civil Justice and COVID-19* <https://septentrio.uit.no/index.php/SapReps/issue/view/465?fbclid=IwAR0HDrBxo0t_ag9x2rvL9TYx55Z86WHz-Bh6n2YzygQHXK_dVXaBvBYefXU > accessed 30 August 2020.

3 COVID-19 Law Lab <https://COVIDlawlab.org> accessed 30 August 2020.

The challenges of access to justice which are directly related to the pandemic should be analyzed and include dealing with, in particular, organizing the work of the judiciary, administering justice and changing approaches to the methods of resolving disputes, even if the results can only be interim at best. By dedicating this special issue of our journal to the topic of Justice under the COVID-19 Pandemic we want to emphasize the need to unite efforts in order to draw lessons from the experience.

With this in mind, we include notes as well as articles in this special issue. 'Notes' comprises contributions in AJEE that give a brief introduction to the topic, in this special issue the challenges COVID-19 raises for certain jurisdictions. Here, academics and practitioners may share the interim results of their research, which is something that will be helpful for other ongoing studies and contribute to the common efforts against the negative consequences of COVID-19, as well as invite reviewer feedback.

Among such notes we have an excellent contribution by *Elisabetta Silvestri* which presents an overview of the solutions devised by the Italian authorities to handle civil disputes in the time of COVID-19, in particular, concerning the deadlines and hearings in civil cases.

The Lithuanian experience shows us a different approach taken amid the pandemic – in Lithuania there has been no special legislation for court proceedings in response to COVID-19. In Vigita Vebraite's note, she describes the most important effects of the pandemic on court proceedings and discusses the lessons that could be learned from the situation.

The Polish strategy towards the administration of justice during the COVID-19 pandemic is similarly controversial, perhaps problematical; but that is for the determination of the reader, who is invited to read attentively the note by *Bartosz Szolc-Nartowski*.

The note, written by Costas Popotas, is based on his presentation given at the online conference 'The COVID-19 crisis – Lessons for the Courts', organized by EGPA Permanent Study Group XVIII 'Justice and Court Administration'[4]. The positive experience of the Court of Justice of the EU is highly demanded and is worse deep studying and sharing even outside of the Union.

The Ukrainian experience of justice under COVID-19 is presented in four articles, with the general focus on the organization and functioning of the judiciary, and special attention to its financing, as well as peculiarities in relation to consideration of civil and criminal matters.

The first of these articles written by *Serhii Prilutskyi* and *Olga Strieltsova* describes the main challenges that the Ukrainian judiciary faces this century and especially those amid the pandemic. The state of affairs seems to be the logical consequence of deeply systemic problems that have accompanied the evolution of the judiciary in Ukraine since it became an independent state, at that time and still today significantly influenced

4 EPGA Study Group / K2 < http://www.justizforschung.ch/index.php/homepage/egpa-study-group > accessed 07 September 2020 and EGPA Permanent Study Group XVIII ‚Justice and Court Administration' < https://egpa.iias-iisa.org/PSG_XVIII_JUSTICE_AND_COURT_ADMINISTRATION.php# > accessed 07 September 2020.

by both the post-Soviet legal heritage and the complex of contemporary challenges the Ukrainian judiciary faces – from the onset of military actions in the east of Ukraine to the COVID-19 outbreak. The pandemic shows how vulnerable the judiciary is. One path forward is to find a new vision and a new understanding of the judiciary in order to ensure its normal functioning, as well as to ensure accessible and effective justice, perhaps partly through lessons learned in the experience with the pandemic.

One of the most difficult steps taken in Ukraine during the pandemic has been the provision of normal funding for the work of government agencies, including the judiciary. In the article by *Tetiana Korotenko* and *Iryna Kondratova* a study of existing approaches to the financing of the judiciary in Ukraine is undertaken, in particular an assessment is made of the measure as a result of which the salary of judges was reduced during the lockdown. Using the example of a complex court case which passed all judicial instances in the state as well as studies of the main approaches that were implemented in independent Ukraine, the authors offer conclusions about the possibility of the financial autonomy of the judiciary.

Traditionally in Ukraine, procedural timeframes have been established by law or decided by judges with the aim of having a fair and timely trial and establishing equal access to justice for both parties. Today, new legislative COVID-19 regulations break with this approach and create a new vision of trial timeframes. In his article, *Oleh Rozhnov* explores the determination of timeliness in the consideration and resolution of civil cases under the conditions of a lockdown in response to the pandemic. In particular, the author criticizes the adoption by the legislator of measures for the automatic extension of procedural deadlines as those that violate the basic principles of civil proceedings and the right of a person to a quick and fair trial.

The most important issues of access to justice and fundamental rights in criminal matters are offered in the article by *Oksana Kaplina* and *Svitlana Sharenko*. Some significant remarks are made in their study concerning the derogation of the European Convention and the various measures intended to help maneuver through, as well as successfully deal with the main challenges to the judiciary in matters of criminal law under the conditions of the COVID-19 pandemic in Ukraine.

We wish to thank all the co-authors of this special double issue of our journal for their contributions to the worldwide efforts of scholars researching the impact of COVID-19 in various areas of legal science. Let us hope that this joint endeavor is successful in helping all of us through these challenging times and making us more the wiser.

It should be noted that AJEE systematically publishes articles related to topical issues concerning the judiciary and procedural reforms. The scope of articles also includes the development of access to justice in East European countries, as well as new proposals and approaches for solutions to a variety of problems in this region. To this end, we would like to offer a partial list of the research subject areas most in demand for further articles from a scholarly perspective.

Research which aims at contributing to and helping the further development of access to justice in the face of the challenges accompanying the processes of globalization and internationalization of the law, in particular the crisis of the transitional period and the economic crisis, unveiling the effects of the pandemic, etc., are highly welcome.

We serve to establish foundations for the international dissemination and a better understanding of East European law, particularly the law of post-Soviet states from a transnational perspective and its further harmonization and approximation with European Union law.

Another seminal area of research we are interested in is SDG 16 and ways to implement peace, justice and strong institutions in Eastern Europe for sustainable development. Sustainable and resilient justice, as well as all aspects of friendly justice and adaptive justice and the implementation thereof are the most sought-after topics, and they are highly recommended for our contributors.

Issues concerning public and private justice, as well as e-justice, also have always been within the scope of our attention. New articles in these spheres would be a great contribution to our journal. Along with the subject areas already mentioned, fundamental methodological questions of procedural law and related areas, traditionally fall within the interest of AJEE.

Our commission aims at providing guidance for our potential authors in the range of topical issues for research. This guidance is just that, and should not be considered obligatory or binding.

We would also like to share some ideas regarding new parts of AJEE presentation. We invite potential authors to contribute 'Case notes' on the most important recent decisions on procedural law from East European state jurisdictions, the European Union and the European Court of Human Rights, which have influence over civil procedural law and practice. 'Case notes' is designed to stimulate discussion among legal scholars and to serve both practitioners and academics – who are equally welcome to contribute articles – from a variety of jurisdictions.

The second novel part of AJEE is a 'Reform Forum'. Access to justice in Eastern Europe is subject to endless reforms aimed at providing a fair and just trial. The challenges in achieving this goal confront legislators in all of the jurisdictions. In the light of this, AJEE has undertaken to maintain a forum for discussing the most recent reforms, in particular, draft proposals, law amendments, etc., and invites all interested parties, including academics and practitioners, who may represent and provide relevant and well-argued positions. The peer reviews accepted by AJEE will certainly contribute to this study going forward, as will the open discussion of each specific reform proposal.

With great pleasure we announce that AJEE is now indexed in the Web of Science Core Collection, ESCI. On behalf of the Editorial Team and Board, I want to express my sincere gratitude to everyone who contributed to this achievement and my hope to continue our high-quality scholastic publishing collaboration with scholars and researchers in the sphere of access to justice in East European countries.

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Access to Justice in Eastern Europe,
Issue 2/3 (7) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.2-3

S Prylutskyi, O Strieltsova
'The Ukrainian Judiciary under 21st-Century Challenges' *(2020) 2/3(7) Access to Justice in Eastern Europe 78-99.*
10.33327/AJEE-18-3.2-3-a000027

THE UKRAINIAN JUDICIARY UNDER 21st-CENTURE CHALLENGES*

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Summary: 1. Introduction. – 2. Judiciary Regulation in Ukraine and the Theoretical Dogmas. – 3. Two Views on the 'Court' Concept and Their Implementation in Ukraine. – 4. The 2016 Judiciary Reform in Ukraine in the Light of the EU Ukraine Association Agreement. – *4.1. The System of Courts.* – *4.2. Status of Judges.* – *4.3. Related Institutions of the Judiciary.* – 5. Ukraine and International Courts' Jurisdiction: A Challenge to National Sovereignty? – 6. Ukrainian Justice under Internal Separatist Terror and External Military Aggression. – 7. The Global

* *Received: 23.07.2020. Revised: 10.08.2020. Approved: 14.08.2020*

COVID-19 Pandemic as a New Challenge to Ukraine's Justice. – 8. Concluding Remarks.

Thirty years after the declaration of its independence, Ukraine, unfortunately, has not yet managed to modernize its legal system to a level of proper efficiency. This is largely due to the dichotomy of the previous international strategy of our state between the two vectors of development, the old eastern and the new western one, which actually retarded the movement forward. The contradiction between these views on the prospects of Ukraine's development of the younger generation and the generation that continued to carry the memory of its historical past, was no less significant. Corruption is deeply rooted in the system of public administration and was purposefully supported by internal and external opponents of Ukraine's independence and overcoming these relics is a fundamental task in asserting sovereignty.

Remnants of the post-Soviet legal doctrine, which preserve the defining categories of judicial law in an ossified form, such as 'court', 'judiciary', 'justice', have become a serious obstacle to the formation of the new state and its legal system. This significantly limits the ability to ensure effective legal regulation of relations connected with the administration of justice in the state.

An overview of the theoretical and normative foundations that underlie the Ukrainian judiciary and the justice system points to obvious gaps and inconsistencies. It is indisputable that the modernization of the legal system of Ukraine, in particular, in the sphere of the organization of the judiciary, requires a renewed scientific vision based on the doctrine of judicial law and which should attempt to combine Ukrainian traditions and the Western European viewpoint.

Key words: access to justice, rule of law, court, judiciary, judicial law, the EU-Ukraine Association Agreement, COVID-19 pandemic, justice under COVID-19.

1. INTRODUCTION

The formation of Ukraine as a sovereign republic[1] after the collapse of the USSR proved to be a strategically difficult task. In fact, in the early 1990s, the state did not go through a stage of passionate explosion of the young political nation of the Ukrainian people, because at that time the dominant part of social structure was the so-called 'Soviet Man' and the political nation of independent Ukraine was just emerging. In reality, Ukraine went through an economic, political, and historical rejection2 of the system of government, which was already dead but deeply rooted. That is why for a long time Ukraine remained a post-Soviet republic with relevant traditions and experiences of the past, in particular, concerning the formation of legal doctrine.

1 Declaration of State Sovereignty of Ukraine [1990] Vidomosti of the Verkhovna Rada 31/429 <https://kon.rada.gov.ua/laws/show/55-12#Text> accessed 22 July 2020.

2 Resolution of the Verkhovna Rada of the Ukrainian SSR 'On the Proclamation of Independence of Ukraine' [1991] Vidomosti of the Verkhovna Rada 38/502 <https://zakon.rada.gov.ua/laws/show/1427-12#Text> accessed 22 July 2020.

At the same time, Ukraine's unique geopolitical position at the intersection of Europe and Eurasia has determined the desire of each of these regions, represented by the EU and the Russian Federation respectively, to bring it into the orbit of its own influence. The choice of a specific strategic course for Ukraine involved not only joining certain (European or Eurasian) integration transnational structures,[3] but above all it was a factor in choosing one of the models (Western or Eastern) of state and legal development with its inherent institutions, principles, world views, etc. In fact, it was a question of determining the civilizational vector of Ukraine's further development in the long run.

For some time, Ukraine managed to adhere to the policy of so-called 'multi-vector balancing'. On the one hand, European integration was proclaimed the priority of foreign policy,[4] on the other, Ukraine participated in some integration projects within the CIS[5] and built bilateral relations with other former Soviet republics based on the principles of good neighborliness, cooperation and partnership.[6] One of the purposes of such balancing was to obtain political and economic preferences and international financial assistance.[7] In fact, Ukraine has become a strategic corridor for the transit of energy from the Russian Federation to the EU and Eastern Europe, which has long determined its position on the 'political map' and at the same time influenced the course of reforms, including in the judiciary.

At the same time, after the Orange Revolution (2004-2005) and especially after the Revolution of Dignity (2013-2014), Ukraine enshrined at the constitutional level that the priority direction of its further development is the European one. Thus, in 2018, Ukraine renounced its international 'neutrality' and at the constitutional level proclaimed the 'European identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course.'[8] An important factor in this movement of the state was the definition of a strategic course to reform the justice system (towards

3 The Law of Ukraine 'On Accession of Ukraine to the Council of Europe' [1995] Vidomosti of the Verkhovna Rada 38/287 <https://zakon.rada.gov.ua/laws/main/398/95-вр#Text > accessed 23 July 2020. Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine [1994] OJ L49/3 <https://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=659> accessed 10 August 2020.

4 Decree of the President of Ukraine № 615/98 of 11 June 1998 'On Approval of the Strategy of Ukraine's Integration into the European Union' [1998] Official Gazette of Ukraine 24/870; Decree of the President of Ukraine № 1072/2000 of 14 September 2000 'On the Program of Ukraine's Integration into the European Union' [2000] Official Gazette of Ukraine 39/1648; the Law of Ukraine on the National Program of Adaptation of the Legislation of Ukraine to the Legislation of the European Union № 1629-IV of 18 March 2004 [2004] Vidomosti of the Verkhovna Rada 29/367.

5 See, for example, the Resolution 'On the Accession of the Verkhovna Rada of Ukraine to the Agreement on the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States' of 3 March 1999 [1999] Vidomosti of the Verkhovna Rada 16/110.

6 See, for example, the Treaty of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, signed on 31 May 1997, ratified on 14 January 1998, expired on 1 April 2019.

7 See, for example, the Order of the Cabinet of Ministers of Ukraine 'On Signing the Agreement on Financing (State Building Contract for Ukraine)' № 452-p of 7 May 2014 <https://zakon.rada.gov.ua/laws/show/452-2014-p#Text> accessed 23 July 2020.

8 The Law of Ukraine 'On Amendments to the Constitution of Ukraine (regarding the strategic course of the state for acquiring full-fledged membership of Ukraine in the European Union and the North Atlantic Treaty Organization)' [2019] Vidomosti of the Verkhovna Rada 9/50 <https://zakon.rada.gov.ua/laws/show/2680-19#n6> accessed 22 July 2020.

its democratization and efficiency) to stabilize the internal situation in Ukraine and to prevent possible social crises in the future.[9]

However, the current stage of structural reforms of the justice system is complicated by a number of factors of both legal and non-legal nature, including: doctrinal incoherency and conceptual uncertainty of the reform process; inconsistency of constitutional and legislative provisions; internal terrorist separatism and external military aggression; coronavirus pandemic, etc. The above and other challenges clearly demonstrate the instability of the judiciary and its unwillingness, as a part of the state mechanism, to effectively perform its functions. The causes and grounds of this phenomenon, as well as possible ways of improvement, will be discussed later in this article.

2. JUDICIARY REGULATION IN UKRAINE AND THE THEORETICAL DOGMAS

The basis of the Ukrainian legal system organization is the Constitution of Ukraine of 1996 (hereinafter – the CU). In 2016, after the Revolution of Dignity, it underwent significant reforms, especially in the organization of the domestic justice system. In the current version, the CU operates with such defining categories as 'judicial power' (Art. 6), 'court' (Art. 124) and 'the system of justice' (Art. 131). These categories are interrelated and reveal their meaning through each other and generally form the legal basis of judicial law.

Defining the meaning of 'judicial power', the legislator in Art. 1 of the Law of Ukraine 'On the Judiciary and the Status of Judges' of 2016[10] (hereinafter - the Law), indicated that in accordance with the constitutional principles of separation of powers, the judicial power in Ukraine is exercised by independent and impartial courts formed in accordance with the law. Herewith, the judicial power is exercised by judges and jurors, in cases determined by law and by the administration of justice within the framework of the respective court procedures.

The analysis of the norms of the Law indicates that the legislator, unfortunately, did not give a clear definition of the judiciary, but only formulated the general criteria and features of the judiciary that are characteristic of Ukraine. First of all, the legislator turned to the classical theory of separation of powers, according to which the *judiciary should be a separate component of a single state power*.[11] One of the key features of the judiciary is that it should come from a single sovereign power in the state, as well as that it should be separated from other forms and types of state power.

The doctrine of separation of powers and judicial independence came to fruition in the development of the Constitution, and Alexander Hamilton formulated the familiar characterization of the judiciary as the weakest of the three branches of government -

9 OV Streltsova, *Konstytutsionalizatsiia protsesu asotsiatsii Ukrainy z Evropeiskym Soiuzom: teoriia I praktyka [Constitutionalization of the process of association of Ukraine with the European Union: theory and practice]* (Alerta 2017).

10 The Law of Ukraine 'On the Judiciary and Status of Judges' [2016] Vidomosti of the Verkhovna Rada 31/545 <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 22 July 2020.

11 A Hamilton, J Jay, J Madison, *The Federalist: A Commentary on the Constitution of the United States* (JB Lippincott & Co 1864).

no liberty, if the power of judging be not separated from legislative and executive powers.[12] (P. 1346-1347) At the same time, the courts remain the standard-bearer of good government among the three branches, because judges enjoy independence from political windstorms, as a result of both their service during 'good behavior' and the strict prohibitions against political activity.[13]

In Ukraine, the constitutional provision of the Art. 6 of the CU established that the state power in Ukraine is exercised on the principles of its division into legislative, executive and judicial powers and the bodies of legislative, executive and judicial power shall exercise their authority within the limits established by this Constitution and in accordance with the laws of Ukraine. Thus, the legislator identified three main features of the judicial power in Ukraine: 1) the judicial power is exercised by the courts; 2) such courts must be established by law; 3) such courts must be independent and impartial.

Problems related to the organizational and procedural unity of the judicial power have become one of the cornerstones of the Ukrainian judicial system today. Uncertainty about the balance of autonomy, independence and unity of the judicial power has led to an imbalance in the judiciary. The distortion of the role of the structure of the judicial system brought about the absolutization of the autonomy of its respective branches and caused attempts to create independent judicial subsystems, without taking the connecting factors into account.[14]

This state of affairs is largely due to the fact that the problems of the unity of the judicial powers are quite new for the Ukrainian jurisprudence and practice and their theoretical understanding and doctrinal disclosure is still under development.

The Art. 124 of the CU established that justice in the state is administered exclusively by the courts and the delegation of the court functions or the appropriation of these functions by other bodies or officials is not permitted. At the same time, Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention)[15], which became an integral part of national legislation, established that everyone has the right to a fair and public trial within a reasonable time by an independent and impartial court or tribunal established by law.

Thus, the constitutional and convention provisions must be consistent and not contradict each other.

At first glance, the above constitutional provisions are as clear and definite as possible. For the Ukrainian legal opinion, the perception of the court solely as a state body whose legal status is determined by the judicial system is quite archaic. Being a body of state power and the bearer of judicial power as a kind of state power, the court can only be in the form of state courts defined by the Constitution and laws of Ukraine and therefore no other bodies can be endowed with the functions of exercising judicial power.

12 Ronald M George, 'Challenges Facing an Independent Judiciary' (2005) 80 NYU L Rev 1345.

13 Joan Humphrey Lefkow, 'Thinking about an Independent Judiciary' (2006) 33 Litig 3.

14 IV Iurevych, 'Pryntsypy iednosti sudovoi vlady' ['The principles of unity of the judiciary'] (Candidate of Law thesis, Yaroslav Mudryi Ukrainian National Academy of Law 2012).

15 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 22 July 2020.

Undoubtedly, the court, which is held by the state and on behalf of the state, is one of the most widespread and stable incarnations of Ukrainian social institutions today.

In the domestic legal circulation, the concept of 'court' has a number of different meanings. Thus, in the general theory of law and in constitutional law, the term 'court' is understood mostly as a generalized concept of a body empowered to exercise one of the branches of state power - the judicial one.[16] In this sense, the court is a body of judicial power without specifying which court it is, where it is located, what its competences are, and so on.

In the second sense, the court is a specific judicial institution that has additional characteristics that clarify and individualize, as well as determine its territorial and substantive jurisdiction.

The third meaning is clearly related to persons who pass on judgements, i.e. judges, regardless of their number. Both a judge who renders a sentence or decision alone and a court composed of several judges all act as a court.

Thus, in the state approach, the term 'court' usually refers to:

(a) a state body, a body of the judicial power; (b) an element of the judicial system which, in combination with other similar elements, forms a systemic integrity – the system of courts; (c) a party to judicial proceedings.17

In addition, the legislation of Ukraine uses such terms as *'the system of judiciary'*[18], *'the system of justice'*[19], *'system of courts'*[20] *and 'system for ensuring the operation of the judiciary'*[21].

The unity of the judicial system is ensured by: 1) uniform principles of organization and activity of courts; 2) a single status of judges; 3) binding rules of procedure defined by law for all courts; 4) unity of judicial practice; 5) obligatory execution of court decisions in the territory of Ukraine; 6) a single procedure for organizing and thus insuring the operation; 7) financing of courts exclusively from the State Budget of Ukraine; 8) resolving issues of internal activity of courts by bodies of judicial self-government.

A systematic analysis of the above provisions of the law gives grounds to claim that the concepts of *'the system of judiciary'* and *'system of courts'* have the same meaning and are therefore synonymous. At the same time, the *'the system of justice'* is much broader in its content and includes, among other things, the *'system of courts (of judiciary)',* and accordingly, the system of judiciary is a component of the system of justice. This is discussed in more detail below.

16 IE Marochkin, LM Moskvych (eds), *Porivnialne sudove parvo [Comparative judicial law]* (Pravo 2008).

17 D Baronin, 'Pravovyi status sudu v Ukraini' ['Legal status of the court in Ukraine'] (Candidate of Law thesis, Yaroslav Mudryi National University of Law 2015).

18 The Law (n 10) Art. 125 CU, Art. 3, 17, 19, 31, 36, 39, 46, 52 etc.

19 Art. 131 of the CU, Art. 15, 92, 93, 104, 147, 148, 150, 151, 153, 160, 161 of the Law (n 11).

20 Paragraph 12 of the Transitional Provisions of the CU, Art. 126 of the Law.

21 Art. 147 of the Law (n.10).

3. TWO VIEWS ON THE 'COURT' CONCEPT AND THEIR IMPLEMENTATION IN UKRAINE

Ukraine's entry into the European legal space was conditioned by the need to adopt common legal values and, in our opinion, the way of European legal thinking, where the legal phenomenon of the court is not limited to its understanding as a body of state power.

Thus, Western European legal understanding allows for the existence and operation of a non-state court, whose decisions are recognized by the state and ensured by public coercion.

The ECtHR in the case of *Romashov v. Ukraine*[22] found that according to Art. 221 of the Labour Code of Ukraine, the commission in the field of labour disputes is the first instance the appeal to which should be used in accordance with paragraph 1 of Art. 35 of the Convention. The ECtHR thus ruled that the decision of the labour disputes commission in the applicant's case can be equated to a court decision and that the state is liable for its non-execution. The ECtHR also noted that the execution of a judgment must be regarded as an integral part of the trial, in this case – of the proceedings before the labour disputes commission.

In addition, the ECtHR noted that Art. 6 of the Convention secures everyones right to have any claim relating to his civil rights and obligations brought before *a court or tribunal;* thus, in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. By this, the ECtHR recognized the labour disputes commission as a court of first instance, whose decision is binding and must be enforced by the state.

However, such a comprehensive approach of the ECtHR to the court as a unique social and legal institution, directly contradicts Art. 124 CU and the national doctrine on the basis of which this norm was formed. Therefore, paraphrasing A. Lewis, if the courts will deal with the basic values of a society, when they limit the power of the state, when they find that the wishes of a majority overstep constitutional boundaries, they are likely to be attacked[23].

A reflection of this doctrine is an opposite to the ECtHR's view of the court, which has developed in the practice of the Constitutional Court of Ukraine (hereinafter - CCU). The domestic body of constitutional judicial control in *the case on the tasks of arbitration tribunal*[24] established that the possibility of submission by the state to arbitration tribunals, disputes between parties in the field of civil and commercial law are recognized as a foreign practice based, inter alia, on international law.

The CCU also referred to the case law of the ECtHR and stated that it was lawful for individuals and / or legal persons to apply to an arbitration tribunal, if the refusal from

22 *Romashov v. Ukraine* (App no 67534/01) ECHR 27 July 2004 https://zakon.rada.gov.ua/laws/show/980_227#Text> accessed 22 July 2020.

23 Anthony Lewis, 'An Independent Judiciary' (1999) 43 St Louis U LJ 285.

24 Decision of the Constitutional Court of Ukraine in the case N 1-3/2008 on the constitutional petition of 51 People's Deputies of Ukraine on the constitutionality of the provisions of paragraphs seven, eleven of Article 2, Article 3, paragraph 9 of Article 4 and Section VIII 'Arbitration Self-Government' of the Law of Ukraine 'On Arbitration Courts'(case on the tasks of the arbitration court) 10 January 2008 <https://zakon.rada.gov.ua/laws/show/v001p710-08#Text.> accessed 22 July 2020.

state court services was a free decision of the parties to the dispute (Decision in the case Deweer v. Belgium of 1980[25]).

However, the CCU came to the conclusion that justice is an independent branch of state activity, which courts carry out in a court hearing and deciding civil, criminal and other cases in a special, statutory procedural form.

Arbitration of disputes between the parties in the field of civil and commercial relations is a type of non-state jurisdictional activity, which arbitration courts carry out on the basis of the laws of Ukraine by applying, in particular, arbitration methods.

The function of protection, provided for in paragraph 7 of Art. 2 and Art. 3 of the Law 'On Arbitration Courts' (2004)[26], is implemented by arbitration courts in the settlement of disputes between the parties in civil and commercial relations within the law defined by Art. 55 CU by arbitration rather than administration of justice.

Thus, by not recognizing the functions of justice in arbitration courts, the constitutional jurisdiction deprived them of the legal status of a court, because justice in Ukraine is administered exclusively by courts (Art. 124 CU).

However, while not recognizing arbitration courts as judicial bodies, the state ensures the enforcement of their decisions. In this regard there was an independent decision of the CCU (case on the execution of arbitral awards),[27] which stated that arbitral awards are executive documents and therefore enforceable.

Another deviation from the classical understanding of 'court' are the relevant state bodies, which are not part of the court system, but are endowed with judicial jurisdiction. Thus, to ensure the realization of the fullness of state power within the national legal systems, bodies may be formed and function, the powers of which include the exercise of court jurisdiction among other things. In Ukraine, an example of such a body is, in particular, the High Council of Justice, which exercises specialized disciplinary jurisdiction in the field of justice.

The decision of the ECtHR in the case of *Oleksandr Volkov v. Ukraine*[28] states that there is nothing to prevent a specific national body, which is not part of the judiciary, from being called a 'court'. An administrative or parliamentary body can be considered a 'court' in the substantive sense of the term, which will lead to the possibility of applying Art. 6 of the Convention to civil service disputes.

In addition, the ECtHR noted that the High Council of Justice, the Parliamentary Committee and the plenary of the parliament jointly served as a court in deciding the

25 *Deweer v. Belgium* (App no 6903/75) ECHR 27 February 1980 <http://hudoc.echr.coe.int/eng?i=001-57469> accessed 21 August 2020.

26 The Law of Ukraine 'On Arbitration Courts' [2004] Vidomosti of the Verkhovna Rada 35/412 <https://zakon.rada.gov.ua/laws/show/1701-15#Text> accessed 21 August 2020.

27 Decision of the Constitutional Court of Ukraine in the case N 1-8/2004 on the constitutional appeal of the joint venture 'Mukachevo Fruit and Vegetable Cannery' on the official interpretation of the provisions of paragraph 10 of Article 3 of the Law of Ukraine 'On Enforcement Proceedings' (case on enforcement of arbitral awards) 24 February 2004 <https://zakon.rada.gov.ua/laws/show/v003p710-04#Text> accessed 22 July 2020.

28 *Oleksandr Volkov v. Ukraine* (App no 21722/11) ECHR 9 January 2013 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-115871%22]}> accessed 22 July 2020

applicant's case and making a binding decision. The binding decision to dismiss the applicant was subsequently reviewed by the Supreme Administrative Court of Ukraine, which is a court within the national judicial system in the classical sense of the word.

The ECtHR in its case law indicates that Art. 6 of the Convention 'does not preclude the setting up of arbitration tribunals in order to settle certain disputes. The word "tribunal" is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country'.[29]

The key features that such a body must have in order to be a 'court' are: the ability to make binding decisions (*power of decision*); acting on the basis of the law and within the established procedure; acting within its own competence (and not outside it); independence and impartiality.[30]

The ability to pass a binding judgement in a case is an element of the broader sense of a 'fair trial', the so-called *'full jurisdiction'* in matters of fact and law. It includes, in particular, the power to overturn, in matters of facts and law, decisions of lower bodies, as well as the possibility of a comprehensive study of the facts and a complete review of the legal assessment of the circumstances of the case by lower courts (*sufficiency of review*).

The criterion of full jurisdiction includes, inter alia, the quality of the judgment, including the sufficiency of the established circumstances, the comprehensiveness of the legal assessment, the validity and proper motivation of such assessment (conformity of the assessment to the established circumstances, basis of the assessment on the provisions of legislation while taking into account the ECtHR case law).

All of this, as a result, has a direct impact on the effectiveness of the decision of the relevant instance on the actual restoration of rights, which have been the subject of judicial protection. The failure to provide any of the above-mentioned aspects of 'full jurisdiction' has the effect of violating the guarantee of consideration of the case by the 'court' within the meaning of Art. 6 of the Convention.[31]

4. THE 2016 JUDICIARY REFORM IN UKRAINE IN THE LIGHT OF THE EU UKRAINE ASSOCIATION AGREEMENT

The process of the substantive updating of the CU in 2016 was aimed at forming constitutional principles for the democratization of socio-political life in Ukraine, the approximation of the national political and legal system to European values and principles and the improvement of domestic legislation. These are the changes that have been on the agenda for a long time in the context of the constitutional reform in Ukraine.

29 *Transado-Transortes Fluviais do Sado, S.A. v. Portugal* (App no 35943/02) ECHR 16 December 2003 <http://echr.ketse.com/doc/35943.02-en-20031216/view/> accessed 22 July 2020.

30 Martin Kuijer, 'The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings' (2013) Human Rights Law Review 13(14) 777-794.

31 Maryna Magrelo, 'Avtonomna kontseptsiia poniattia "sud" iak osnova instytutu spravedlyvoho sudu' ['An autonomous concept of "court" as the basis of the institution of a fair court'] (2013) Visnyk Akademii Advokatury Ukrainy 2 (27) 70–77.

At the same time, these are the constitutional transformations that the European Union insists on, considering them as a necessary condition for the further development of associative relations with our state and the realization of its European integration aspirations.

This approach is reflected directly in the text of the Association Agreement between Ukraine and the EU.[32] Thus, Art. 3 and 6 of the Agreement define the desire of Ukraine and the EU to cooperate to ensure that their internal policies are based on common principles, such as the stability and effectiveness of democratic institutions, the rule of law and respect for human rights and fundamental freedoms, good governance, market economy, balanced development, etc.

Specifying these provisions, Art. 14 of Chapter III 'Justice, Freedom and Security' stipulates that in the framework of cooperation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels, in the areas of administration in general and law enforcement and the administration of justice in particular. It is emphasized that, among other things, the cooperation of the Parties will aim at strengthening the judiciary, improving its efficiency, safeguarding its independence, impartiality and combating corruption.

This EU approach to supporting and promoting internal reforms in Ukraine has been detailed in other documents concluded between the Parties.[33]

4.1. The System of Courts

An important novelty of the CU in the version of 2016 is that from now on, individual courts, as bodies of state power, can be formed, reorganized or dissolved only by adopting a separate law. The draft of such a law should be submitted to the Verkhovna Rada of Ukraine only by the President of Ukraine after consultations with the High Council of Justice (hereinafter – the HCJ).

Prior to these changes, the establishment of courts was the exclusive prerogative of the President of Ukraine, which created the preconditions and a significant lever of presidential influence on the judiciary. The new procedure aims at increasing the level of independence of the judiciary from political influence by protecting it from artificial manipulation with the organization of individual courts.

As the Venice Commission rightly pointed out, the stability of the judiciary and its independence are closely linked. Citizens' trust in the judiciary can only grow in a stable constitutional and legislative framework.[34]

32 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/ < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01)&from=EN > accessed 22 July 2020.

33 EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement < https://www.kmu.gov.ua/storage/app/imported_content/news/doc_248012532/en15.pdf> accessed 23 July 2020.

34 Opinion No 969/ 2019 on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies [2019] CDL-AD 027 <https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)027-e> accessed 22 July 2020.

In accordance with Part 3 of Art. 125 CU, the highest court in the judicial system of Ukraine has now become the Supreme Court, which replaced the previous Supreme Court of Ukraine.

The novelty of the CU has become the consolidation of a separate specialization of courts in administrative cases. In particular, Part 5 of Art. 125 CU establishes that administrative courts act in order to protect the rights, freedoms and interests of a person in the field of public relations.

The innovations also affected the structuring of Ukraine's system of courts. In particular, in accordance with Art. 125 CU, the judicial system in Ukraine is built on the principles of territoriality, specialization and is determined by law. The new version of the Law, specifying the constitutional provisions, stipulates that the system of courts is built on the principles of territoriality, specialization and instance hierarchy (Art. 17).

According to the new model, the court system of Ukraine is comprised of: 1) local courts; 2) courts of appeal; 3) The Supreme Court as the highest court in the court system. In addition, to consider certain categories of cases, the legislative possibility of establishing high specialized courts in the court system of Ukraine is established. Detailing these provisions, the Law in Section 4 'High Specialized Courts' provides for two types of high specialized courts in the court system of Ukraine to hear certain categories of cases, namely: the High Court on Intellectual Issues35 and the High Anti-Corruption Court.[36]

4.2. Status of Judges

The problem of the independence of the judiciary is directly related to the organization of the status of judges in accordance with the principles of a democratic system[37]. It is the independence of judges that has been a stumbling block on the path to radical change during all the thirty years since the proclamation of independence of Ukraine. That is why the second important aspect of the constitutional changes in the field of justice was the reform of the constitutional and legal status of judges, as a result of which it underwent significant changes.

The most important achievement is that at the constitutional level, the classical mechanism of irremovability of judges has been established, which is not limited to any probation period. Thus, according to Part 5 of Art. 126 of the CU it is established that the judge holds a position indefinitely.

The innovations also affected the regulation of judicial qualifying requirements. On the one hand, they were raised, in particular: the age threshold was raised from 25 to 30 years and the maximum limit for holding a judicial position was set, which must not

35 Decree of the President of Ukraine № 299/2017 on the establishment of the Supreme Court of Intellectual Property <https://zakon.rada.gov.ua/laws/show/299/2017#Text> accessed 22 July 2020.

36 The Law of Ukraine 'On High Anti-Corruption Court' [2018] Vidomosti of the Verkhovna Rada 24/212 <https://zakon.rada.gov.ua/laws/main/2447-19#Text> accessed 22 July 2020.

37 See more in: Izarova Iryna, 'Independent judiciary: experience of current reforms in Ukraine as regards appointment of judges' in Katarzyna Gajda-Rosczynialska and Dobroslawa Szumilo-Kulczycka (eds), *Judicial Management Versus Independence of Judiciary* (Walters Kluwer 2018) 242–263.

exceed 65 years; the requirements for professional experience in the field of law were increased from three to at least five years; the novel criteria for evaluating a candidate for the position of a judge - competence and fair practice were introduced.

At the same time, the requirement that a candidate for the position of a judge must have resided in Ukraine for at least ten years has disappeared from the provisions of the CU (Part 3 of Art. 127). Such a constitutional digression, in our opinion, unjustifiably weakens the classical idea of patriotism and the personal connection of a citizen with his country.

The changes also affected the mechanism of forming the judiciary. In Part 1 of Art. 128 CU it is established that the appointment to the position of a judge is carried out by the President of Ukraine on the proposal of the High Council of Justice in the manner prescribed by law. Thus, the following provisions were cancelled: five-year probation period for judges who were appointed for the first time; gradual formation of the composition of judges with the participation of various branches of government (first appointment by the President, subsequent appointment by parliament). Also, to replace the High Council of Law ('Vyscha Rada Yustytsii'), a modernized body was introduced under the new name of the High Council of Justice ('Vyscha Rada Pravosuddia').

It can be assumed that in the near future this mechanism, combined with the principle of irremovability of judges, will significantly reduce both political and corrupting influences on judges during their selection and appointment. However, the judicial system, in a sense, floats on a sea of public opinion, as it was rightly noted[38], and the great crisis of its legitimacy continues to be an indisputable reality of the domestic judicial system.

4.3. Related Institutions of the Judiciary

4.3.1. High Council of Justice

The reorganization of the High Council of Justice was an important transformation of 2016. According to the new version of Art. 131 CU, it was established that in Ukraine there is a High Council of Justice, which: 1) submits applications for the appointment of a judge; 2) make decisions regarding the violation of incompatibility requirements by a judge or prosecutor; 3) considers appeals against decisions of a relevant body on bringing a judge or prosecutor to disciplinary responsibility; 4) makes a decision on dismissal of a judge; 5) gives consent to the arrest of a judge or his detention; 6) makes a decision on temporary suspension of a judge from the administration of justice; 7) takes measures to ensure the independence of judges; 8) decides on the transfer of a judge from one court to another.

The HCJ consists of twenty-one members, ten of whom are elected by the Congress of Judges of Ukraine from among judges or retired judges, two are appointed by the President of Ukraine, two are elected by the Verkhovna Rada of Ukraine, two are elected by the Congress of Advocates of Ukraine, and two are elected by the All-Ukrainian

38 Stephen Breyer, 'An Independent Judiciary' (2010) 20 Experience 20.

Conference of Prosecutors and two are elected by the congress of representatives of legal education institutions and scientific institutions. The procedure for electing (appointing) HCJ members is determined by law. The President of the Supreme Court is an ex-officio member of the HCJ.

It is worth noting that the current constitutional format of the HCJ fully (unlike the previous High Council of Law, which operated from 1998 to 2016) meets key European standards for such bodies. In particular, according to item 1.3. The European Charter on the Statute for Judges (1998) [39] it is stated that

> 'In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit, are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.'

As further commented in the Opinion of the First Study Commission of the International Association of Judges on 'The Role and Functions of the High Council of Justice or a Similar Body in the Organization and Management of the National Judicial System',

> A High Council of Justice may be a means of strengthening the independence of the judiciary and the judges in carrying out their judicial functions. Therefore, it is important that a High Council or analogous body enjoys a strong degree of independence or autonomy from other governmental powers. Where a High Council of Justice or analogous body is not structured in such a way that promotes and protects the independence of the judiciary there is always a danger that it may undermine that independence. It is essential that a High Council of Justice or analogous body has a majority of judges among its members. Such judges should be elected by their peers or be members by virtue of their specific judicial office, but not be selected by the government or parliament. In any case, such a body should be a means by which a buffer is placed between the judiciary and the other powers of government, so that it can protect the judiciary from undue influence from those powers rather than be an instrument of it. A High Council of Justice or an analogous body or the judiciary should play a major role in the appointment, promotion, discipline or training of judges.[40]

4.3.2. Prosecution office

The reform has led to serious conceptual changes in the legal status of the prosecution office. A separate Chapter VII of the CU under the name 'The Prosecution Office' became void. Instead, the legislator introduced a new Art. 131-1 to section VIII 'Justice' which establishes the operation of a prosecution office in Ukraine. Once integrated into

39 European Charter on the Statute for Judges [1998] < https://rm.coe.int/16807473ef> accessed 6 August 2020.

40 First Study Commission of Judicial Administration and Status of the Judiciary, 'Conclusions on the role and function of the High Council of Justice or Analogous Bodies in the organization and management of the national judicial system' [2003] <https://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/I-SC-2003-conclusions-E.pdf> accessed 23 July 2020.

the justice system, the prosecution office can now be seen as an independent institution of the judicial power. The fact that the prosecution office is an integral part of the justice system is evidenced by the powers vested in this body, in particular: 1) the maintaining public prosecution in court; 2) the organization and procedural leadership during pre-trial investigation, decision of other matters in criminal proceeding in accordance with the law, supervision of undercover and other investigative and search activities of law enforcement agencies; 3) the representation of interests of the state in the court in exceptional cases and under procedure prescribed by law.

In addition, the legislator extended some of the previous constitutional powers vested in the prosecution office. In particular, paragraph 9 of Section XV of the 'Transitional Provisions' of the CU states that the prosecution office continues to perform the function of pre-trial investigation until the agencies, to which the function is transferred under the law, will have been launched. The Prosecution office will continue to perform a supervising function concerning the observance of laws and enforcing court decisions in criminal cases and the application of other measures of coercion related to the restraint of the personal freedom of citizens, until the law on the establishment of a dual system of regular penitentiary inspections takes effect. In fact, the role of the prosecution office was reduced to the implementation of state policy on combating and prosecuting crime.

It is also worth noting that the prosecution office has lost such important constitutional powers as: representation of interests of citizens in court in cases as specified by law and the supervision of ensuring human and civil rights and freedoms, supervision of the observance of laws by the executive authorities, local governments, and their officials (Art. 121 CU). According to CCU judge opinion, by depriving the prosecution office of these functions, citizens will in fact be deprived of one of the institutional guarantees of rights and freedoms. From a formal point of view, this approach contradicts Art. 55, part 5 of the CU, which states:

'Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law'. [41]

Sharing this approach, we believe that by depriving the prosecution office of supervisory powers in the field of human rights protection, the legislator has significantly limited the guaranteed constitutional rights of citizens to legal protection and thus advocates the interests of the state. The means and mechanisms of the prosecutions response to identified violations of the public interest could be an important and valuable tool, in particular for the prompt pre-trial settlement of disputes.

At the same time, a violated but not protected private human right causes greater harm to public interests (morality, public rights and freedoms, universal values, etc.) than to a person, who does not insist on protecting his rights and freedoms in court.

41 The Decision of the Constitutional Court of Ukraine in the case on the appeal of the Verkhovna Rada of Ukraine on issuing an opinion on the compliance of the draft law on amendments to the Constitution of Ukraine (on justice) with the requirements of Articles 157 and 158 of the Constitution of Ukraine, a separate opinion of the judge of the Constitutional Court of Ukraine I D Slidenko < https://zakon.rada.gov.ua/laws/show/nb08d710-19#Text > accessed 22 July 2020.

4.3.3. The Bar

The constitutional novelty of 2016 was Art. 131-2, which determined the status of the bar. This norm established that the bar operates in Ukraine to provide professional legal assistance. It is noteworthy that the Constitution classifies the bar (as well as the prosecution office) to the justice system.

The bar is guaranteed its independence, which, in fact, gives grounds to talk about the formation of the principle of independence of the bar as one of the defining constitutional principles of its activities. The fundamentals of the organization and functioning of the bar and advocates' activity in Ukraine is defined by law.

The advocates' monopoly on judicial activity is enshrined at the constitutional level. In particular, it is imperatively established that only an advocate can represent another person before the court and defend a person against prosecution.

Minor exceptions to this rule are allowed. Thus, it is stipulated that the law may provide for exceptions to representation in court in 1) labour disputes; 2) social rights protection disputes; 3) disputes related to elections and referendums; 4) small claims, as well as 5) while representing minors or adolescents, who were declared legally incapable or partially legally incapable by law.

4.3.4. Constitutional Court of Ukraine

The CCU place and role in the structure of the judiciary deserves a separate scientific and applied analysis. This is due to the fact that after the reform of 2016, this body has ceased to be part of the unified system of courts and justice of Ukraine, despite the fact that it is still called 'court'.

Within our study, we should underline, that the separation of the CCU from the unified system of the judiciary, and consequently the autonomous functioning of the body of constitutional judicial jurisdiction, seriously called into question the principle of unity of the judiciary and, consequently, the integrity and unity of the judiciary of Ukraine.

5. UKRAINE AND INTERNATIONAL COURTS' JURISDICTION: A CHALLENGE TO NATIONAL SOVEREIGNTY?

A separate aspect that directly relates to the concept of the court deals with its supranational (international) level. In this regard, it should be recalled that international courts are not bodies of a particular state. However, states that have become founders or participants of international courts shall recognize their jurisdiction, submit to their decisions and enforce them.

In 2016 Art. 124 CU was supplemented with provisions stipulating that Ukraine may recognize the jurisdiction of the International Criminal Court (ICC) under the conditions laid down in the Rome Statute of the International Criminal Court.[42]

42 Rome Statute of the International Criminal Court [1998] <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx > accessed 7 August 2020.

Ukraine once failed to recognize the jurisdiction of the ICC and to ratify the Rome Statute, which was signed by Ukraine on 20 January 2000, because the CC found it unconstitutional. In its decision of 2001 on the constitutional petition of the President of Ukraine for an opinion on the compliance of the CU with the Rome Statute of the International Criminal Court (the Rome Statute case), the CCU clarified the following.[43]

Art. 1 of the Rome Statute, emphasizes that while being a permanent institution that has the power to exercise its jurisdiction over persons for the most serious crimes of international concern, the ICC complements national criminal jurisdictions. A similar provision is contained in Paragraph 10 of the Preamble to the Statute. Complementary to the national criminal jurisdictions nature of the ICC is specified in a number of other articles of the Statute, in particular, in paragraph 2 of Art. 4, according to which the Court may exercise its functions and powers on the territory of any State Party; in paragraph 1.a of Art. 17, according to which the Court accepts a case not only at the request of a State Party, but also on its own initiative, when the State over which it has jurisdiction is 'unwilling or genuinely unable to carry out the investigation or prosecution.'

This significantly distinguishes the ICC from other international judicial bodies, in particular the ECtHR, the possibility to apply for protection of the rights and freedoms to which are enshrined in Part 4 of Art. 55 of the CU. Such international judicial bodies initiate proceedings only upon the application of individuals and a person may apply to them only after the use of all domestic remedies.

Thus, in contrast to the international judicial bodies provided for in Part 4 of Art. 55 CU, the legal nature and jurisdiction of which are subsidiary, the ICC complements the system of national jurisdiction.

The possibility of such a supplement to the judicial system of Ukraine was not provided for in Section VIII 'Justice' of the CU. This gave the CCU reason to conclude that Paragraph 10 of the Preamble and Art. 1 of the Statute are not consistent with the provisions of Part 1, Art. 3. 124 CU, and therefore the accession of Ukraine to this Statute in accordance with Part 2 of Art. 9 CU is only possible after appropriate changes have been made.[44]

Thus, the necessary addition to the provisions of the CU paved the way for Ukraine to join the Rome Statute of the ICC and significantly expanded the nature and influence of the international court on the national legal system by recognizing its jurisdiction and the submission to national decisions. Therefore, after the final ratification of the Rome Statute of the ICC, the question of whether there is a single system of courts in Ukraine will be questionable.

To sum up, in the legal system of Ukraine there is a situation in which the concept of 'court' includes: state bodies (institutions) that are part of a single judicial system of Ukraine; the composition of the court (panel of judges, sole judge) which exercises state judicial power on behalf of Ukraine; a non-governmental body exercising judicial

43 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the President of Ukraine to issue an opinion on the compliance of the Rome Statute of the International Criminal Court (the case of the Rome Statute) with the Constitution of Ukraine. Case № 1-35 / 2001 of 11 July 2001 № 3-в/2001 <http://www.ccu.gov.ua/sites/default/files/ndf/3-v/2001.doc> accessed 22 July 2020.

44 Decision (n 43).

jurisdiction recognized by the state; a state body that is not part of the unified system of the judiciary of Ukraine and exercises judicial jurisdiction; an international court whose jurisdiction is recognized in Ukraine.

6. UKRAINIAN JUSTICE UNDER INTERNAL SEPARATIST TERROR AND EXTERNAL MILITARY AGGRESSION

Ukraine, being a unitary state, has a single system of state courts. The existence of a single and complete system of courts should make it impossible for the judicial power to be replaced by other bodies or subjects of power. The unity of the judicial system affirms the sovereignty of state power and strengthens it. However, the regions of Ukraine that have undergone temporary occupation or illegal change of their constitutional and legal status are under a special legal regime.

Due to the fact that the occupation authority of the Russian Federation has been established on the territory of the Autonomous Republic of Crimea, and accordingly, the judicial authorities of the occupying state operate on these territories, the exercise of judicial power in Ukraine is limited. As a result of this Ukrainian citizens cannot protect their constitutional rights and freedoms, in particular, to exercise their right to a fair trial. In order to restore and guarantee the constitutional right of a person to judicial protection (Art. 55 CU), the Law of Ukraine 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine' (2014)[45] was adopted. This law established that the occupied territory of Ukraine is an integral part of the state, to which the Constitution and laws of Ukraine apply. The date of the beginning of the temporary occupation is 20 February 2014.

According to the provisions of this Law, due to the impossibility of administering justice by the courts of the Autonomous Republic of Crimea and the city of Sevastopol on the temporarily occupied territories, their jurisdiction was changed.

Thus, with the help of legislative regulation the legal territorial jurisdiction of local courts under occupation was replaced with temporary jurisdiction on the territory of Ukraine, where its sovereign power is ensured.

At the same time, the Law of Ukraine 'On the Administration of Justice and Criminal Proceedings in Connection with the Anti-Terrorist Operation' (2014)[46] provides that due to the inability to administer justice by certain courts in the area of the anti-terrorist operation the territorial jurisdiction of cases in such courts shall be changed. The hearing of civil, administrative, commercial, criminal cases and cases of administrative offenses shall be held by local and appellate courts determined by the President of the Supreme Court.

45 The Law of Ukraine 'On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine' [2014] Vidomosti of the Verkhovna Rada 26/872 <https://zakon.rada.gov.ua/laws/show/1207-18#Text> accessed 22 July 2020.

46 The Law of Ukraine 'On the administration of justice and criminal proceedings in connection with an anti-terrorist operation' [2014] Vidomosti of the Verkhovna Rada 39/2009 <https://zakon.rada.gov.ua/laws/show/1632-18#Text> accessed 22 July 2020.

Compiling a list of such local and appellate courts in the area of the anti-terrorist operation, which cannot administer justice, was the responsibility of the State Judicial Administration of Ukraine. Appropriate notices were then sent to the heads of the higher specialized courts (which operated until 2016) to make decisions under the above-mentioned law.

It is clear that such legislative measures have become only a formal means of legal recognition of the existing problem, for which Ukraine was not ready in advance. Fascinated by the concept of 'rule of law' and 'rule of law state', as well as relying on their formal neutrality in the geopolitical system of the world, the ruling Ukrainian elite in 2010 completely abandoned military justice,[47] and as a result significantly weakened the foundations of national sovereignty. The restoration of military justice (military courts, prosecution office and investigative bodies) is extremely important for Ukraine on the way to establishing its political, territorial and legal sovereignty.

The situation in which Ukraine finds itself is already forcing it to prepare the legal system for the format of 'transitional justice'. As it was rightly pointed out,

> 'Transitional Justice explores two principal questions: (1) "What legal approaches do societies in transition adopt in responding to their legacies of repression?" and (2) "What is the significance of these legal responses for these societies' liberalization prospects?". The answers posed by both realist and idealist accounts of justice in transition are unsatisfying both, for the failure to explain the significance of law's rule in periods of radical political change and the relation between normative responses to past injustice and a state's prospects for liberal transformation'.[48]

7. THE GLOBAL COVID-19 PANDEMIC AS A NEW CHALLENGE TO UKRAINE'S JUSTICE

The global pandemic of COVID-19 in 2020 which spread into most countries of the world and, in particular, into the territory of Ukraine, put a number of issues related to legal regulation and organizational support of justice in the new social realities on the agenda. Unprecedented and atypical measures to limit social contacts, introduced to prevent the spread of infection, also affected Ukraine. These measures influenced the practical implementation of constitutional and legislative provisions related to the observance of democratic principles of justice.

In particular, Art. 129 CU establishes one of the fundamental constitutional principles of justice - the publicity of the trial. Concretizing this constitutional norm, the Law[49] provided that the consideration of cases in courts is open, except in cases established by law. Any person has the right to be present at an open court hearing. If a person

47 The Law of Ukraine 'On the Judiciary and Status of Judges' [2010] Vidomosti of the Verkhovna Rada 41-42, 43, 44, 45/529 <https://zakon.rada.gov.ua/laws/show/2453-17?find=1&text=військ#w1_8> accessed 22 July 2020.

48 Laura Provinzino, 'Transitional Justice' (2001) 26 Yale J Int'l L 288.

49 The Law (n 10).

commits actions that indicate contempt of court or of the participants in the trial, such person may be removed from the courtroom by a reasoned court decision.

Persons present in the courtroom and media representatives may take photographs, video and audio recordings in the courtroom, using portable video and audio equipment without obtaining a separate court permit, but are subject to restrictions established by law. The court hearing is broadcast with the permission of the court. If all participants in the case participate in the court session by videoconference, the course of the court hearing must be broadcast on the Internet.

Photographs, video recordings, as well as broadcasting of the court hearing in the courtroom must be carried out in a way that does not create obstacles in the conduct of the hearing and the exercise by the participants of the trial of their procedural rights. The court may determine the place in the courtroom from which the photographs or video recording are to be taken.

Consideration of the case in a closed court session is allowed by a reasoned court decision only in cases specified by law.

When considering cases, the course of the trial is recorded by technical means in the manner prescribed by law.

Participants of the trial are provided with the opportunity to participate in the hearing by videoconference on the basis of a court decision in the manner prescribed by law. The obligation to arrange a videoconference rests with the court that received the court decision to hold the videoconference, regardless of the specialization and instance of the court that made the decision.

Court hearings are held exclusively in a specially equipped courtroom, which is suitable for the parties and other participants in the trial. This allows exercising the procedural rights granted to the participants to the case and performing their procedural duties.

This Law also stipulates that court decisions, court hearings and information on cases considered by the court are open, except in cases established by law. No one shall be restricted in the right to receive oral or written information in court on the results of his/her court proceedings. Any person has the right to free access to a court decision in the manner prescribed by law.

Information about the court hearing the case, the parties to the dispute and the subject of the claim, the date of receipt of the statement of claim, appeal, cassation appeal, application for review of the court decision, stages of the case, place, date and time of the hearing is open and must be immediately published on the official web portal of the judiciary of Ukraine, except the cases provided by law.

Given the threat of the mass spread of viral infection, especially in public places, which include courts, the question of the need to temporarily restrict (adjust) the implementation of the constitutional principle of publicity of the trial has become quite acute. To this end, the following regulations have been established by law. [50] First of

50 The Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)' [2020] Vidomosti of the Verkhovna Rada 18/123 < https://zakon.rada.gov.ua/laws/show/540-IX#Text> accessed 22 July 2020.

all, in civil, administrative and commercial litigation, the court has the right to decide to restrict access of persons, who are not participants in the trial, to a court hearing during quarantine established by the Cabinet of Ministers of Ukraine in accordance with the Law of Ukraine 'On Protection of Citizens from Infectious Diseases', [51] if the participation in a court hearing will endanger the life or health of a person.

At the same time, during the quarantine established by the Cabinet of Ministers of Ukraine to prevent the spread of coronavirus (COVID-19), participants in civil, administrative and commercial proceedings were given the right to participate in court hearings by video conference outside the court, using their own technical means. Confirmation of the identity of the party to the case can now be carried out using an electronic signature. If the person does not have such a signature, the confirmation of his/her identity shall be done either in the manner prescribed by the Law of Ukraine 'On the Unified State Demographic Register and Documents Proving Citizenship of Ukraine, Identity of a Person or Special Status'[52] or by the judicial administration of Ukraine.

It is worth noting that in 2018 in Ukraine a system 'electronic court' began to work in a test mode.[53] By creating their personal account in this system, citizens, representatives of organizations and institutions have obtained the opportunity to significantly reduce their time to submit or receive various documents related to litigation. A person registers in this system with his/her own digital signature and creates an account through which he/she receives all documents electronically to his/her email address. What is very convenient, is that in the future the person does not need to register again. This system creates all procedural documents and, when a judge signs a decision with his / her digital signature, a copy is automatically sent to the single register of court decisions and to the person who has registered in the electronic court and is a party to the case. [54]

In addition, in the framework of civil, administrative and commercial litigation, procedural time limits have been extended for the period of quarantine. This concerns the lime limits for changing the subject or grounds of the claim, increasing or decreasing the value of claims, submission of evidence, requesting evidence, providing evidence, and deadlines for revocation and response to revocation, objection, explanations of a third party on the claim or revocation, leaving the statement of claim without motion, return of the statement of claim, filing a counterclaim, administrative proceedings, appeal, consideration of appeal, cassation appeal, cassation appeal consideration, submission of an application for review of a court decision in newly discovered or exceptional circumstances, etc.

51 The Law of Ukraine 'On protection of the population from infectious diseases' [2000] Vidomosti of the Verkhovna Rada 29/228 <https://zakon.rada.gov.ua/laws/main/1645-14#Text> accessed 22 July 2020.

52 The Law of Ukraine 'On the Unified state demographic register and documents which confirm citizenship of Ukraine certify person or its special status' [2012] Vidomosti of the Verkhovna Rada 51/516 <https://zakon.rada.gov.ua/laws/show/5492-17#Text> accessed 22 July 2020.

53 Order of the State Judicial Administration of Ukraine No 628 'On testing the subsystem "Electronic Court" in local and appellate courts' [2018] <https://dsa.court.gov.ua/dsa/inshe/14/N-628_e_court_testing> accessed 22 July 2020. See also H Boscheinen-Duursma, R Khanyk-Pospolitak, 'Austria and Ukraine Comparative Study of E-Justice: Towards Confidence of Judicial Rights Protection' (2019) Access to Justice in Eastern Europe 4(5) 42-59.

54 Ihor Bahaiev, 'Quarantine restrictions have contributed to the development of distance litigation and e-court' <http://rsu.gov.ua/ua/news/igor-bahaev-clen-radi-suddiv-ukraini-karantinni-obmezenna-spriali-rozvitku-distancijnogo-sudocinstva-ta-elektronnogo-sudu> accessed 22 July 2020.

It was determined that the time limits set by the court may not be less than the period of quarantine related to the prevention of the spread of coronavirus disease (COVID-19).[55]

At the same time, due to the specifics of the respective legal relations, criminal proceedings in courts of all instances should be conducted openly. The investigating judge and the court received the right to decide on restricting access of persons, who are not participants in the trial, to the court session during the quarantine, established by the Cabinet of Ministers of Ukraine in accordance with the Law of Ukraine 'On Protection of Citizens from Infectious Diseases',[56] if the participation in the hearing threatens life or health of a person. The investigating judge and a court may decide to conduct criminal proceedings or a part of it in a closed court session, only if it is necessary to ensure the safety of persons involved in criminal proceedings.

Temporarily, for the period of quarantine established by the Cabinet of Ministers of Ukraine in order to prevent the spread of coronavirus disease in Ukraine (COVID-19), a special procedure has been established for judicial control over the rights, freedoms and interests of persons in criminal proceedings and consideration of certain issues during court proceedings. In particular, this concerns the procedure for appointing the investigating judge[57]. Thus, if it is impossible to appoint an investigating judge in the relevant court (other than the High Anti-Corruption Court), the local court must file a reasoned request to transfer the petition, which must be considered by the investigating judge to another court within the jurisdiction of one appellate court, or to the court within the jurisdiction of different courts of appeal.

8. CONCLUDING REMARKS

The experience of the Ukrainian state evolution over the past thirty years, in particular, the judiciary functioning, leads us to the following thoughts and comments.

A real state is formed when a political nation - a sovereign - is born from the mass of population. The Ukrainian people, as a political nation, first loudly declared themselves in 2004-2005 with their peaceful resistance (the Orange Revolution) to the mass violation of the fundamental foundation of a democratic republic - free and equal rights to elect. And it was then that the fire of constitutional disobedience was extinguished by legal means in the Supreme Court of Ukraine, when the highest court of the state applied the principle of the rule of law in practice. [58]

55 The Law (n 50). ***Editor's note:*** For more information about timing in trial under COVID-19 pandemic, see O Rozhnov 'Towards Timely Justice in Civil Matters Amid the COVID-19 Pandemic' (2020) 2-3 (7) Access to Justice in Eastern Europe 100-114.

56 The Law (n 51).

57 ***Editor's note.*** For more information about access to justice in criminal matters amid COVID-19 in Ukraine, please, see *O Kaplina and S Sharenko* 'Access to Justice in Ukrainian Criminal Proceedings During COVID-19 Outbreak' (2020) 2/3 (7) *Access to Justice in Eastern Europe 115-133.*

58 Decision of the Judicial Chamber for Civil Cases of the Supreme Court of Ukraine on the case on the complaint against the decisions, actions and inaction of the Central Election Commission to establish the results of the repeat voting in the presidential election [2004] <https://zakon.rada.gov.ua/laws/show/n0090700-04#Text> accessed 22 July 2020.

The second and rather difficult step on the way to sovereignty was taken by the Ukrainian people in 2013-2014, when the breaking of the tyranny of the thoroughly corrupt government (the Revolution of Dignity) has led to a pre-planned terrorist operation, which prepared the springboard for a large-scale military invasion on the territory of Ukraine. Under these circumstances, a great demand from society to the current government was the introduction of an independent judiciary that will be able to provide affordable and effective judicial protection of individual rights. As a reaction, a constitutional judicial reform was carried out in 2016, the results of which have brought significant changes in the justice system. However, the effectiveness of these changes is still pending.

We believe that the second determining state-building factor, after the formation of a political nation, is a fair trial. As it was rightly pointed out at the time, 'The foundations of every state and the foundation of any country rest on justice and fairness.'[59]

The fundamentals of the judiciary of Ukraine are still in the process of their formation and this is an inevitable process on the way to asserting the sovereignty of Ukraine.

Today, Ukraine's legal system is still in the process of transformation. Integrating it into the European legal space, the country has a situation in which key legal categories and institutions are characterized by a certain eclecticism and combine features of post-Soviet and pro-European legal understanding. Thus, the concept of 'court' includes: state bodies (institutions) that are part of a single judicial system of Ukraine; the composition of the court (panel of judges, sole judge), which exercises state judicial power on behalf of Ukraine; a non-governmental body exercising judicial jurisdiction recognized by the state; a state body that is not part of the unified system of the judiciary of Ukraine and exercises judicial jurisdiction; an international court whose jurisdiction is recognized in Ukraine. This approach significantly erodes the archaic postulates of the court and justice, which were laid down in 1996 in Art. 124 CU. Therefore, it is indisputable that the modernization of the legal system of Ukraine requires a renewed doctrinal vision of justice. The issues of the organization of the judiciary of Ukraine should be based on the international doctrine of judicial law, which has deep domestic and Western European historical roots.

At the same time, given that the national judiciary is still in the process of formation, the problem of weakening the foundations of Ukraine's national sovereignty as a result of integration into supranational judicial protection systems raises serious concerns.

Social, political, economic and environmental crises, both global and domestic, also have a significant impact on the democratic processes of reforming the national justice system. For Ukraine, these factors are largely related to military aggression, separatism and pandemics and point to the need for effective judicial mechanisms in such emergencies. In particular, we believe that there is an urgent need for Ukraine to revive military justice (military courts, prosecutors and investigators).

59 Citary, 'As-Samarkandi' <https://citaty.su/biografiya-i-aforizmy-as-samarkandi> accessed 22 July 2020.

Access to Justice in Eastern Europe,
Issue 2/3 (7) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.2-3

O Rozhnov 'Towards Timely Justice in Civil Matters Amid the COVID-19 Pandemic' (2020) 2-3 (7) *Access to Justice in Eastern Europe 100-114.*
10.33327/AJEE-18-3.2-3-a000028

TOWARDS TIMELY JUSTICE IN CIVIL MATTERS AMID THE COVID-19 PANDEMIC*

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Summary: – 1. Introduction. – 2. Accessibility of Justice in Civil Cases and Procedural Time Limits: General Principles. – 3. Observation of Procedural Time Limits under Quarantine Conditions: Experience of Ukrainian Legislation and National Courts. – 4. Concluding Remarks.

This article is devoted to the analysis of procedural time limits transformation under pandemic conditions implemented in the legislation of Ukraine during the coronavirus pandemic of 2020, as well as the practice of their application in national courts. It is stated that inaccuracy and incompleteness in resolving important issues related to the extension and renewal of procedural time for the administration of justice under the quarantine

* *Received: 16.06.2020. Revised: 08.07.2020. Approved: 14.08.2020*

creates obstacles to the implementation of the main tasks of civil proceedings. Inaccuracy in the regulation by procedural legislation of certain procedural terms, the possibility of their renewal and extension can significantly affect the movement of all civil proceedings as well as significantly impede the achievement of its goals.

Keywords: procedural time, civil justice, access to justice, pandemic challenges, a fair and timely trial, COVID-19, civil litigation.

1. INTRODUCTION

Access to justice consists in the inadmissibility of the state to establish any obstacles to justice. In order to exercise the right to justice, the person concerned carries out procedural actions, the ultimate purpose of which are the timely consideration and resolution of civil cases. Thus, access to a specific procedural action and the timely administration of justice consider as the interrelated components of the concept of 'access to justice'.[1]

It should be noted that interpreting the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – Convention) the European Court of Human Rights (hereinafter – ECtHR) stated in its judgments that the right of access to justice is not absolute and may be limited: the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals' (Case of *Golder v. The United Kingdom*,[2] Case of *Ashingdane v. the United Kingdom*).[3]

The ECtHR allows the introduction of time limits, while it disallows the retrospective application of procedural law, which reduces the time to appeal against court (*Melnyk v. Ukraine*).[4] As it was stated by ECtHR, in every case, the court should verify whether the reasons for renewal of a time-limit for appeal could justify the interference with the principle of res judicata (*Ponomaryov v. Ukraine*[5]).

The timeliness of civil proceedings is one of the most important elements of access to justice and one of the most pressing issues.[6] In the face of modern challenges,

1 See the Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 08 July 2020; OM Ovcharenko, *Dostupnist pravosuddia ta garantii ioho realizatsii [Access to justice and guarantees of its implementation] (Pravo 2008)* <http://library.nlu.edu.ua/POLN_TEXT/KNIGI/MonoOvcharenko.pdf> accessed 08 July 2020; NY Sakara, *The problem of access to justice in civil matters [Problema dostupnosti pravosuddia u tsyvilnykh spravah]* (Pravo 2010).

2 *Golder v. the United Kingdom* (App no 4451/70) ECHR 21 February 1975 <http://hudoc.echr.coe.int/eng?i=001-57496> accessed 08 July 2020.

3 *Ashingdane v. the United Kingdom* (App no 8225/78) ECHR 28 May 1985 par. 34-35 <http://hudoc.echr.coe.int/eng?i=001-57425> accessed 22 June 2020.

4 *Melnyk v. Ukraine* (App no 23436/03) ECHR 28 March 2006 note 49, § 30. < http://hudoc.echr.coe.int/eng?i=001-72888> accessed 08 July 2020.

5 *Ponomaryov v. Ukraine* (App no 3236/03) ECHR 3 April 2008 para 41 <http://hudoc.echr.coe.int/fre?i=001-85683> accessed 08 July 2020.

6 Sakara (n 1).

pandemics in particular, ways to ensure the reasonable timing of proceedings should receive considerable attention. The long duration of a trial may result in the trial being nullified, as the protection of rights, freedoms or interests will either lose relevance to the person applying to the court or the case will no longer be enforceable, as a result of the destruction of the subject matter of the dispute or a change in the external circumstances of the decision; either way, the actual protection of rights will not be exercised. In this regard, amendments to the legislation of Ukraine aimed at providing additional social and economic guarantees in connection with the spread of coronavirus disease (COVID-19) by extending the procedural time limits should be considered effective and sufficient to avoid violations of the Convention.[7]

The issues of granting a retroactive effect to regulations in connection with the amendments to procedural codes are worth particular attention. Thus, the Venice Commission notes that the retroactive effect of law is contrary to the principle of legal certainty, at least in criminal law (Art. 7 of the Convention), as the subjects of law must know the consequences of their behavior; but this also applies to civil and administrative law, to the extent that it negatively affects the rights and legitimate interests of an individual.[8]

On 11 March 2020, the World Health Organization announced that the epidemic of the COVID-19 virus, which was first identified in December 2019 in Wuhan, China, had reached a pandemic level. The coronavirus has affected all aspects of life and the legal system is no exception.[9]

The current viral pandemic poses real and obvious challenges to the effective and fair functioning of the courts. Remote access to justice has become a necessity and it is the responsibility of all involved to ensure that such hearings are properly provided in order to grant access to justice.[10]

On 10 June, the European Commission on the Efficiency of Justice (CEPEJ) during a special correspondence plenary meeting approved the Declaration 'Lessons Learned and Challenges Faced by the Judiciary during and after the COVID-19 Pandemic'.[11] This Declaration states that the current crisis in the judiciary requires an immediate and urgent response. At the same time, any measures that must be taken to overcome the crisis and its consequences must be in strict compliance with the principles of the rule of law and must respect and protect human rights. Any implemented measures must have a fixed end date, and a judicial review must take place within a specified time.

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7 *Khlebik v. Ukraine* (App no 2945/16) ECHR 25 July 2017 <https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-175656%22]}> accessed 08 July 2020.

8 Venice Commission, *Report on the Rule of Law adopted by the at its 86th plenary session* (Venice, 25–26 March 2011) CDL-AD 003rev <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e> accessed 08 July 2020.

9 World Health Organization Regional Office for Europe, 'WHO announces COVID-19 outbreak a pandemic' (Statement by Dr Hans Henri P Kluge, WHO Regional Director for Europe) <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic> accessed 08 July 2020.

10 J Hayden, 'Remote Access to the Court of Protection Guidance', 31 March 2020 <https://www.judiciary.uk/wp-content/uploads/2020/04/20200331-Court-of-Protection-Remote-Hearings.pdf> accessed 08 July 2020.

11 CEPEJ, 'Lessons Learnt and Challenges Faced by the Judiciary during and after the COVID-19 Pandemic' (10 June 2020) CEPEJ 8rev) <https://rm.coe.int/declaration-en/16809ea1e2> accessed 08 July 2020.

Nevertheless, across the world civil justice faces the unpredictable issues of preserving timely procedures[12], without exception of Ukraine.

Quarantine has been implemented in Ukraine since 12 March 2020.[13] Like other state bodies, after the introduction of quarantine, the courts began to reorganize their work. On 2 April 2020, the Law of Ukraine № 540-IX 'On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)' of 30 March 2020 (hereinafter – Law № 540-IX) came into force.[14] At the same time, Law № 540-IX regulated the relations concerning the holding of a court session by videoconference outside the court premises and the extension of the procedural time for the period of the quarantine.

According to sub-clause 3 of Clause 12 of Section XII of the 'Final Provisions' of the said Law № 540-IX, to prevent the spread of coronavirus disease (COVID-19) during the quarantine established by the Cabinet of Ministers of Ukraine procedural time is extended for the length of the current quarantine.

The term of quarantine is established by the Resolution of the Cabinet of Ministers of Ukraine of 11 March 2020 №211,[15] - throughout Ukraine starting from 12 March up to 3 April. The quarantine established by this Resolution was extended several times throughout the territory of Ukraine and according to the latest changes introduced by the Resolution of the Cabinet of Ministers №500 of 17 June 2020,[16] the quarantine has now been extended until 31 July 2020.

On 18 June 2020, the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Procedural Time During the Quarantine Established by the Cabinet of Ministers of Ukraine to Prevent the Spread of Coronavirus Disease (COVID-19)' (hereinafter referred to as *Law № 731-IX*) entered into force[17], according to which the grounds and procedure for renewal and extension of procedural time have been changed In particular, a new version of paragraph 3 of Section XII 'Final Provisions' of the Civil Procedure Code of Ukraine (hereinafter – CPC of Ukraine) was proposed, according to which during the quarantine, the court may renew the

12 Hermes Zaneti Jr, 'COVID-19: Brazilian Perspective' in Bart Krans and others, *Civil Justice and COVID-19* (2020) 5 Septentrio Reports 8-10 <https://septentrio.uit.no/index.php/SapReps/issue/view/465/entire> accessed 08 July 2020; Catherine Piché, 'The Canadian Justice System's Response to COVID-19' in Bart Krans and others, *Civil Justice and COVID-19* (2020) 5 Septentrio Reports 11-12 <https://septentrio.uit.no/index.php/SapReps/issue/view/465/entire> accessed 08 July 2020.

13 The Resolution of the Cabinet of Ministers of Ukraine of 11 March 2020 № 211 'On prevention of the spread of coronavirus COVID-19 on the territory of Ukraine' <https://zakon.rada.gov.ua/laws/show/211-2020-%D0%BF#Text> accessed 08 July 2020.

14 The Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)' [2020] Vidomosti of the Verkhovna Rada 18/123 < https://zakon.rada.gov.ua/laws/show/540-IX#Text> accessed 08 July 2020.

15 Resolution (n 13).

16 The Resolution of the Cabinet of Ministers of Ukraine of 17 June 2020 № 500 'On Amendments to Certain Acts of the Cabinet of Ministers of Ukraine' <https://zakon.rada.gov.ua/laws/show/500-2020-%D0%BF#Text> accessed 08 July 2020.

17 The Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Procedural Time of Quarantine Established by the Cabinet of Ministers of Ukraine for the Prevention of the Spread of Coronavirus Disease (COVID-19)' <https://zakon.rada.gov.ua/laws/show/731-IX#Text> accessed 08 July 2020.

procedural time established by the provisions of this Code, and if it recognizes the reasons for their default as valid and due to the restrictions imposed in connection with the quarantine. The applicant in this case should be the participants and persons who did not participate in the case, if the court has decided on their rights, interests and (or) obligations (provided they have the right to perform the relevant procedural actions under this Code). The court may renew the relevant time both before and after its expiration. Upon the application by a person, the court shall extend the procedural time established by the court, if the impossibility to perform the relevant procedural action within the specified time is due to the restrictions imposed by the quarantine. In addition, the procedure for extending procedural time which has previously been automatically extended has been established.

Thus, in accordance with the final and transitional provisions of the Law № 731-IX,18 procedural time, which was extended in accordance with Law № 540-IX of 30 March 2020, expires 20 days after the entry into force of this Law. During this 20-day period the parties to the case and persons who did not participate in the case have the right to extend the procedural time on the grounds established by this Law, if the court has decided on their rights, interests and (or) responsibilities (provided they have the right to take appropriate procedural actions under these codes).

To this end, this article attempts to analyze the procedural measures of immediate response, which were introduced in Ukraine during the quarantine, in order to ensure access to justice - a basic principle of the rule of law.19 Based on the above, the purpose of this article is to study the approach to the transformation of procedural time under conditions of a pandemic, implemented in the legislation of Ukraine during the quarantine of 2020, as well as the practice of its application in national courts. The conclusions offer some lessons to improve this approach, provided that the person's right to a fair trial is ensured.

2. ACCESSIBILITY OF JUSTICE IN CIVIL CASES AND PROCEDURAL TIME LIMITS: GENERAL PRINCIPLES

Procedural time in accordance with Art. 120 of the CPC of Ukraine is primarily a period of time determined by law or the court to perform procedural actions by the parties and other participants in the proceedings.

According to Art. 121 of the CPC, the court must set reasonable time limits for procedural actions. A time limit is reasonable if, taking into account the circumstances of the case, it provides for sufficient time to accomplish a procedural action and corresponds to the task of civil proceedings. The specified norm establishes the requirement for the court which will set a reasonable timeframe for the commission of the procedural action. In assessing the reasonableness of procedural time limits, the court setting the time limit must take into account: first, the sufficiency of the period of time determined by

18 Law (n 17).

19 United nations and the Rule of Law, 'Access to Justice' <https://www.un.org/ruleoflaw/ru/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> accessed 08 July 2020.

it to commit a procedural action, taking into account the circumstances of the case, secondly, the procedural time established by the court must correspond to the task of civil proceedings (Part 2 of Art. 121 of the CPC).

The court's determination of the sufficiency of the time for the performance of a specific procedural action must be carried out in each case individually, taking into account the circumstances of the case.[20] Moreover, procedural law defines additional criteria for the reasonableness of procedural time set by the court.

Thus, according to Part 7 of Art. 178 of the CPC, the revocation is filed within the period established by the court, which may not be less than fifteen days from the date of service of the decision, to initiate proceedings. The court must set a time limit for filing a notice that will allow the defendant to prepare it and the relevant evidence and the other participants in the case to receive a notice no later than the first preparatory hearing in the case. If the defendant does not provide a revocation within the period established by the court without good reason, the court decides the case on merits.

As stated in Part 4 of Art. 179 of the CPC, the response to the revocation shall be filed within the period prescribed by the court. The court should set a time limit for filing a response to the revocation, which will provide sufficient time for the plaintiffs to prepare their arguments and the relevant evidence, for the other participants in the case – to receive a response to the revocation in advance before the trial on merits, and for the defendant – to provide objections to the parties before the trial.

According to Part 4 of Art. 180 the CPC states that objection is filed within the period prescribed by the court. The court must set a time limit for filing an objection that will allow other participants in the case to receive an objection in advance of the hearing of the case on merits. Part 4 of Art. 181 of the CPC specifies that explanations of a third party are submitted within the period prescribed by the court. The court must set a time limit that will allow the third party to prepare its arguments and relevant evidence and provide explanations to the claim or revocation, and other parties to the case – to respond to such explanations in advance of the consideration of the case on the merits.

The reasonableness of procedural time limit is inextricably linked to their duration, which is a certain value of the time interval between two points in time (the beginning of the procedural time and the end of the procedural time). The duration of procedural time is determined using the methods of calculation established by law (Art. 122 of the CPC of Ukraine) and the rules on the beginning and end of procedural time (Art.s 123, 124 of the CPC of Ukraine) and their renewal and extension (Art. 127 of the CPC of Ukraine). In addition, to characterize the procedural time, it is necessary to highlight such concepts as the beginning of the procedural time limit.

The beginning of the procedural time limit is the relevant calendar date or the occurrence of the event since which it begins. A separate property of the procedural time limit is its uniformity. This means that both the legislator and the court setting the duration of

20 See more in: VV Komarov (ed) and others, *Kurs tsuvilnoho protsesu [Course of civil procedure]* (Pravo 2011); MY Shtefan, *Tsuvilne protsesualne pravo Ukrainy [Civil procedural law of Ukraine]* (Publishing house 'In Jure' 2005).

specific procedural time can apply only one value of the calculation, which is provided for in Art. 122 of the CPC.

In this regard, it should be noted that courts do not always adhere to this feature of procedural time limit. The most common violations of this feature of the time limit set by the court include the setting of a time limit to eliminate the shortcomings of the statement of claim (appeal or cassation appeal). Thus, the Cassation Civil Court of the Supreme Court (hereinafter – the CCC of the Supreme Court) in its decision determines the time by the following method of calculation: until 23 March 2018, but not exceeding ten days from the date of delivery of the relevant resolution.[21]

In another decision, the CCC of the Supreme Court set the time as follows: one month to fullfil the requirements of the resolution, but not later than ten days after the end of quarantine established by the Cabinet of Ministers of Ukraine to prevent the spread of coronavirus disease (COVID-19).[22] Even more interesting is the example of extending the previously established time limit by defining the time limit in the following way: until 10 August 2020, but not exceeding ten days from the date of service of this decision and the end of quarantine established by the Cabinet of Ministers of Ukraine to prevent the spread of coronavirus disease (COVID-19).[23]

In all of the above examples, the court sets a time limit for eliminating the shortcomings of the cassation appeal by means of two values for the calculation of procedural time. Thus, in the first case, the court uses an indication both by an event that must inevitably occur and in days, in the second case – in months and days, and in the third case the procedural time limit is set by the court using an indication of an event that must inevitably occur and in days with not quite appropriate wording of the automatic extension of time by the court in accordance with Law № 540-IX. The consequence of violation by courts of such a feature of the procedural time limit as uniformity is uncertainty for the parties to the case, which of the above dimensions of calculation of time limit is mandatory for them, as well as the inconsistency of the time set by the court with the reasonableness of procedural time.

The Plenum of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases in the decision of 17 October 2014 № 11 'On Some Issues of Compliance With Reasonable Time Limits for Civil, Criminal Cases and Cases of Administrative Offenses'[24] drew attention to the fact that the time limits set by the court (for example, the time for eliminating the shortcomings of the statement of claim or appeal), must comply with the principle of reasonableness. In particular, noting that when determining (at its own discretion) the duration of these time limits, the court must take into account the principles of dispositivnes and adversarialism, time limits set by law to consider the case when determining the time

21 Case 279/2481/16-ц (Supreme Court of Ukraine, 26 February 2018) <http://www.reyestr.court.gov.ua/Review/72561130> accessed 08 July 2020.

22 Court decision < http:// www. reyestr. court. gov. ua. /Review/ 90021561> accessed 08 July 2020.

23 Court decision < http:// www. reyestr. court. gov. ua. /Review/ 90021550> accessed 08 July 2020.

24 The Resolution of the Plenum of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases of 17 October 2014 № 11 'On some issues of compliance with reasonable time limits for consideration by courts of civil, criminal cases and cases of administrative offenses' < https://zakon.rada.gov.ua/laws/show/v0011740-14#Text> accessed 08 July 2020.

limit of specific proceedings, complexity of the case, number of participants, possible difficulties in claiming and examination of evidence, etc. The period that is objectively necessary for the performance of procedural actions, preventing violations of Art. 6 when making procedural decisions and consideration and resolution of the case in order to ensure timely (without undue delay) judicial protection is considered particularly reasonable.[25] In addition, to prevent violations of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the establishment by the court of procedural burdens, in the form of time limits, must be clear and predictable from the point of view of the party to the proceedings, i.e. to comply with the principle of legal certainty.[26]

3. OBSERVATION OF PROCEDURAL TIME LIMITS UNDER QUARANTINE CONDITIONS: EXPERIENCE OF UKRAINIAN LEGISLATION AND NATIONAL COURTS

Law № 540-IX and Law № 731-IX have made some changes to the traditional understanding of the renewal and extension of procedural time limits.

For a long time, in scientific literature[27] and case law the renewal of the procedural time established by law was allowed in accordance with Art. 127 of the CPC, provided that the court finds the reasons for its omission valid, with the exception when the impossibility of such renewal was established by the CPC. The extension of procedural time limit established by the court was allowed by the application of the party filed before the expiration of this time, or by court's initiative. However, the scientific literature actively discusses the issue of improving the procedure for renewal and extension of procedural time limits, in particular, by improving the current civil procedural legislation.[28] For example, attention is drawn to the groundlessness of the conclusion on the distinction between the concepts of 'renewal of procedural time limit' and 'extension of procedural time limit' in connection with the division of time limits into statutory and court-appointed.[29]

The introduction of the amendments to the Procedural Codes had, indeed, a worthy purpose for the period of the established restrictions related to quarantine, to protect the interests of the participants in court proceedings, by automatically extending the basic procedural and some official time limits.

But this approach to quarantine-related restrictions has almost halted legal proceedings, which, in turn, has deprived most people whose rights have been violated of justice in a timely manner. Thus, in the methodological recommendations the CCC of the Supreme Court notes that, due to the fact that the commission of procedural actions and making court decisions by the legislator is made dependent on the commission of appropriate actions by the parties, it may lead to the fact that in some cases the court will not be

25 Resolution (n 24).

26 Kravchenko v. Ukraine (App No 46673/06) ECHR 30 June 2016 <https://zakon.rada.gov.ua/laws/show/974_d47#Text> accessed 08 July 2020.

27 See more in Komarov (n 20), Shtefan (n 20).

28 Komarov (n 20).

29 OM Borshchevska, 'Stroky u hospodarskomu sudochynstvi' ['Time limits in commercial litigation'] (Candidate of Law thesis, NAS of Ukraine, Institute of Economic and Legal Research 2016).

able to consider cases, resolve another procedural issue or make a court decision without violating the rights of a party to the case. That is, until the end of the quarantine, the courts may not consider cases in which the 'obligated' party has not taken the procedural action expected of it or has not exercised the procedural rights granted to it.[30]

In addition, in our opinion, it is impossible to protect the interests of the parties during the quarantine period only by automatically extending the procedural time. As noted, the extension of procedural time belongs to the institution of procedural time and is closely related to such a feature of procedural time as its duration. The essence of the extension of procedural time is to increase the duration of the previously established time, and such an increase may be accomplished by either setting a new time limit or by increasing the previously established time limit.

The CCC of the Supreme Court provided the courts with methodological information on controversial issues of the application of the legislation on extension of procedural time limits during quarantine,[31] noting, in particular, that these legislative changes came into force upon publication of Law № 540-IX,[32] i.e. on 2 April 2 2020. However, given the content of Art. 3 of the CPC of Ukraine and the fact that the proposed changes do not establish new responsibilities, do not cancel or restrict the rights of litigants, do not restrict their use, they have a retroactive effect, i.e. they apply to legal relations connected to the implementation of proceedings in all cases, i.e. those that are already pending in the courts of all instances and those that will be opened in the future. In this case, the date of the beginning of quarantine throughout Ukraine does not matter if the civil procedural legal relationship continues.

Procedural actions of the court and participants in the trial should be carried out only within the relevant stages of the proceedings, in sequence and within a certain time, including procedural time limits for litigants and court time limits established by law for the court (official time limits). Law № 540-IX stipulates that the procedural time limits in the cases determined by it are not suspended and not renewed, but are automatically extended.

Despite the fact that the text of Law № 540-IX refers to the extension of procedural time limits, i.e. the time limits set for the parties to the proceedings for taking procedural actions, the extension also applies to some official time limits, such as time limits for court making decisions, time limits for the court considering applications and petitions and the time limit of consideration of the case under simplified procedure.

However, in contrast to the procedural time limits, the extension of which is absolute, the service time limits are extended only if the commission of a procedural action by a judge (court) depends on the commission or non-commission of certain procedural actions by the parties. In other words, the amendments do not relieve the judge (court) from the obligation to perform procedural actions and make appropriate procedural

30 Supreme Court, 'Methodical information on controversial issues of application of the legislation on extension of procedural times during quarantine' (22 April 2020) <https://supreme.court.gov.ua/supreme/pres-centr/news/928802)> accessed 08 July 2020.

31 Supreme Court (n 30).

32 The Law (n 17).

decisions within the time limits expressly provided by the CPC of Ukraine, if the parties have properly performed their duties and exercised their rights.

At the same time, taking into account that according to the general rule, the CPC of Ukraine does not impose the dependence of procedural actions by a judge (court) or the adoption of a relevant court decision on commencement of procedural actions by the parties, in this case, according to the logic of legislative changes, the beginning of official time limit has to be calculated from the moment of committing appropriate procedural actions by the parties to the case.

In order to respect the rights of the parties to the case, it is considered appropriate in each court decision to inform (explain, as a party to the process may often not know) the parties about the extension of procedural time limits and to outline a certain approximate time, for example, to indicate: 'within ten days from the moment of receiving a copy of the court decision, but not later than at the end of the quarantine period.' However, it should be borne in mind that the commission of procedural actions after this period will still be considered lawful in the context of the above law.

Therefore, the time limit established in the court decision cannot be less than the duration of the quarantine. If the procedural time limit began before 12 March 2020, its duration will be equal to: the number of days of the time limit specified by law, which had passed before 12 March 2020 + the quarantine period + the number of days remaining from the period established by law.

The following may serve as an example. The time for appealing a court decision is 30 days. 15 days had passed before the start of quarantine from the 30-day period specified by law. The total time for appeal, taking into account the provisions of Law 540-IX will be: 15 + quarantine period + 15. If the procedural time limit began during the quarantine, its duration will be: the number of days before the end of quarantine + time limit established by law. That is, for the period of quarantine the calculation of procedural times is stopped.

Another example illustrates the beginning of the procedural time, which began during the quarantine. The time limit for the appeal began on 10 April 2020, thus, taking into account the effect of Law 540-IX, the time limit defined by law for the appeal should be calculated from the next day after the end of the quarantine, i.e. 30 days. This also applies to the calculation of the one-year procedural time limit for an appeal against a court decision (part two of Art. 358 of the CPC of Ukraine). If the party to the case has the right to perform a procedural action during the quarantine, the procedural time begins on the day following the end of the quarantine in the full extent established by law (or court).

The first part of Art. 273 of the CPC of Ukraine provides that the court decision enters into force after the expiration of the period for filing an appeal by all participants, provided that the appeal was not filed. In this regard, since in accordance with Art. 354 of the CPC of Ukraine the time for an appeal is extended until the end of the quarantine period, all court decisions of the courts of first instance, which were made during the quarantine, will take effect only after its expiration, i.e. when the time for appeal expires. This also applies to court orders and court decisions in absentia.

However, since Art.s 384 and 419 of the CPC of Ukraine stipulate that a decision of a court of appeal or cassation takes legal effect from the date of its adoption, the above Law № 540-IX does not affect the legal force of court decisions of appellate courts.

As the times for review and appeal of court decisions are extended until the end of quarantine by Law № 540-IX, submission of applications and complaints without compliance with the time limits provided by the CPC of Ukraine until the end of quarantine will not be considered as grounds for leaving such applications and complaints without action, as, according to the above mentioned law, they are submitted in a timely manner. Accordingly, individuals should not apply for the renewal of a missed time limit.

However, this does not apply to situations where the procedural time limit was missed before the quarantine was announced. That is, if the procedural time limit had expired by 12 March 2020, the effect of Law 540-IX does not change it. However, the reference to the fact that the person missed the time limit due to the quarantine, can be considered as a valid reason.

According to Law № 540-IX, the time for which the procedural time limits have been extended is determined by the duration of the quarantine, i.e. by the moment when the Cabinet of Ministers of Ukraine adopts an official decision on its termination. Accordingly, in the operative part of the court decision, which sets the time limit for procedural actions, in addition to specifying the procedural time limit, it is advisable to use the legislative wording, namely 'until the end of the quarantine period'.

The analysis of the methodological information on the application of the provisions of Law № 540-IX shows that in the Supreme Court it was difficult to find a clear formula for extending the procedural time limits. Thus, the Supreme Court points out that Law № 540-IX stipulates that procedural time limits in certain cases are neither suspended, nor renewed, but automatically extended, the time established in the court decision may not be less than the duration of quarantine, i.e. the calculation of procedural time limit is suspended for the quarantine period.

Indeed, according to the general rules of the CPC, it is possible to extend the procedural time limit, which has already begun, but not yet ended. The extension of procedural time limits is associated with the establishment of additional time or an increase in the period of time for the performance of procedural actions. Accordingly, in contrast to the renewal of procedural time, when deciding on the extension of the time limit, there is no obligation to simultaneously apply for the extension of time limit and perform a procedural action whose deadline is to be extended. When extending the procedural time limit, the procedural action may be committed at any time from the beginning of the initially established time to the expiration of the additional or new time.

In this sense, the Supreme Court notes that time limits are not stopped. The consequence of the suspension of the procedural time limit is the suspension of the flow of the procedural time limits, and, accordingly, from the moment of suspension and until the day of resuming the procedural time, the right to perform a procedural action is lost. At the same time, in our opinion, the conclusion of the Supreme Court that the calculation of procedural time limit is suspended is inappropriate. In the context of Art. 122 of the CPC, the calculation of procedural time limit should be considered as units of measurement of the duration of the time defined by law.

Thus, the time limits established by law or court are calculated in years, months, days, or can be determined by an indication of an event that must inevitably occur (Art. 122 of the CPC). Such an understanding by the Supreme Court of the extension of procedural time limits does not correspond either to the notion of extension of time limit nor to the suspension of the calculation of procedural time, which has not at all been used in the legal literature and practice before.

In addition, the understanding of the extension of the procedural time limit is also negatively affected by the new practice of the Supreme Court to apply certain provisions of procedural law. Thus, the Commercial Court of Cassation of the Supreme Court notes that the analysis of these rules gives grounds to conclude that failure to eliminate the above shortcomings of the appeal within the period specified in the decision of the Court of Appeal on leaving the appeal without action, has the effect of returning the appeal.

Part 2 of Art. 174 of the Commercial Procedural Code of Ukraine sets a time limit for eliminating the shortcomings of an application/complaint which cannot be extended by the court. Therefore, the ten-day time granted by the Court of Appeal to the defendant by the court ruling of 26 February 2018 to eliminate the deficiencies of the appeal cannot be extended, which accordingly makes it impossible to satisfy the defendant's application to extend the time to eliminate the deficiencies of the appeal.

Having come to the right conclusion on this, the Court of Appeal declines the arguments of the plaintiff on deprivation of his/her access to justice due to non-extension by the appellate court of the time for elimination of shortcomings.

Moreover, in regards to the applicant's allegation that the Court of Appeal had deprived him of access to justice, the court considers it necessary to add the following. Art. 129 of the Constitution of Ukraine establishes the basic principles of judicial proceedings, which, in particular, are the provision of appeals and cassation appeals against court decisions, except in cases established by law.

However, the right to a court, one aspect of which is the right of access to a court, is not absolute, it may be subject to restrictions in its content, especially in regards to the conditions for the admissibility of an appeal against a decision. However, such restrictions may not confine the exercise of this right in such a way or to such an extent that the very essence of the right is violated[33].

These restrictions must pursue a legitimate aim and there must be a reasonable degree of proportionality between the means employed and the objectives pursued. The rules governing the time limits for filing complaints are, of course, intended to ensure the proper administration of justice and the principle of legal certainty. Their application must comply with the principle of legal certainty and not prevent the parties from using available means; concerned parties should expect that these rules will be applied

33 *See Ponomaryov v. Ukraine* (App no 3236/03) ECHR 3 April 2008 para 41 <http://hudoc.echr.coe.int/fre?i=001-85683> accessed 08 July 2020: "The Court acknowledges that it is primarily within the domestic courts' discretion to decide on the renewal of the time-limit for an appeal, but such discretion is not unlimited. The courts shall be required to indicate the reasons' and *Aleksandr Shevchenko v. Ukraine* (App no 8371/02) ECHR April 2007 para 27 <http://hudoc.echr.coe.int/eng?i=001-80286> accessed 08 July 2020.

(judgment of the European Court of Human Rights of 18 November 2010 in the case of *Mushta vs Ukraine*[34]). The return of the appeal against the decision of the court of first instance does not deprive the appellant of the right to re-appeal.[35]

The automatic extension of the procedural time limits provided by Law № 540-IX has led to the postponement of the consideration of the majority of civil cases and the postponement of the decision entry into force for an indefinite period. But in our view, even in the midst of the pandemic, the courts must perform basic functions and ensure justice. Such automatic extension of procedural time created conditions for abuse of procedural rights and has led to the impossibility to obtain judicial protection, including the stage of the decision entry into force.

Law 731-IX is aimed at overcoming the negative situation that has arisen in the field of justice in civil cases related to the automatic extension of procedural time limits. Thus, in accordance with the provisions of this Law, the court on the application of the parties and persons who did not participate in the case, if the court decided on their rights, interests and (or) responsibilities (if they have the right to take appropriate procedural actions provided for by this Code), renews the procedural time established by the norms of this Code, if it recognizes the reasons for their missing the deadline as valid and due to the restrictions imposed caused by quarantine. The court may renew the relevant time limit both before and after its expiration. Upon the application of a person, the court shall extend the procedural time limit established by the court, if the impossibility to perform the relevant procedural action within the specified time is due to the restrictions engendered by the quarantine.

It should be noted that the legislature again departs from the understanding of renewal and extension of procedural time limits, which is enshrined in the CPC. Thus, according to Art. 127 of the CPC, the court on the application of the party to the case renews the missed procedural time limit established by law, if it finds the reasons for missing the deadline valid, except when the CPC establishes the impossibility of such renewal.

The procedural time established by the court may be extended by the court upon the application of the party to the case, submitted before the expiration of this time, or on the initiative of the court. Unless otherwise provided by law, the application for renewal of the procedural time established by law shall be considered by the court, where the procedural action in respect to the time limit was missed, is to be performed and the application for extension of the procedural time established by the court shall be considered by the court, which established the time without notifying of all of the participants of the case.

Simultaneously with the submission of the application for renewal of the procedural time, a procedural action (submitted application, complaint, documents, etc.) in respect to the deadline missed must be performed. Missing the time limit set by law or court for a party to the case to present evidence, other materials or take certain actions does not release such a party from the obligation to take the appropriate procedural action. The court shall issue a ruling on the renewal or extension of the procedural time. The court

34 *Mushta v. Ukraine* (App no 8863/06) ECHR 18 November 2010 < http://hudoc.echr.coe.int/eng?i=001-101769> accessed 08 July 2020.

35 Court decision < http:// www. reyestr. court. gov. ua./Review/74456005> accessed 08 July 2020.

shall issue a ruling on the refusal to renew or extend the procedural time, which shall be sent to the person who filed the relevant application no later than the next day from the day of its ruling. The decision to refuse to renew or extend the procedural time may be appealed in the manner prescribed by this CPC.

Thus, the CPC associates the renewal of the procedural time with the missing of the time limit established by law and the consequences provided for in Art. 126 of the CPC. According to Art. 126 of the CPC, the right to perform a procedural action is lost after the expiration of the timeframe established by law or the court. Documents submitted after the expiration of the procedural time limit remain without consideration, except as provided by this CPC. In this regard, as noted earlier, the CPC requires that at the same time as filing an application for renewal of the procedural time, a procedural action must be taken (submitting of application, complaint, documents, etc.) in respect to the deadline was missed. In addition, the only ground for renewing the procedural time limits in accordance with the CPC is the court's recognition of the seriousness of the reasons for its being missed.

Unlike the renewal, the procedural time limits set by the court are subject to extension. It is related to the duration of the time limit, which has not yet passed. Continuation is possible both at the request of the party to the case and on the initiative of the court.

In this regard, it is not clear why Law 731-IX deviates from the general provisions of the CPC regarding the renewal and extension of procedural time limits. For example, in accordance with Law 731-IX, the court may renew the relevant period both before and after its expiration. The main idea of the Law 731-IX is the refusal of automatic extension of procedural time limits. According to Law 731-IX, the grounds for renewal and extension of procedural time limits are the recognition of the reason for their being missed by the court as valid and due to the restrictions imposed by the quarantine.

According to Law 731-IX, the extended procedural time limits expire 20 days after the entry into force of this Law. During this 20-day period, the parties to the case and persons who did not participate in the case, if the court has decided on their rights, interests and (or) responsibilities (if they have the right to take appropriate procedural actions under these codes), have the right to extend the procedural time limits on the grounds established by this Law.

According to Law № 540-IX, the amount of time for which the procedural time limits are automatically extended is determined by the time of quarantine expiration, i.e. the moment when the Cabinet of Ministers of Ukraine makes a formal decision on its termination. According to the Law, for time limits that have already been automatically extended, where in each court decision an explanation was issued to extend the procedural time limits and where a certain approximate time is outlined, it is established that the specified time expires 20 days after the entry into force of this Law. In addition, the court at the request of the party to the case and the person who did not participate in the case, if the court has decided on their rights, interests and (or) responsibilities (if they have the right to take appropriate procedural actions under these CPC), filed within the same 20-day period, extends the procedural time limit established by law or the court for the period of quarantine. That is, these provisions of the Law set new time limits for the commission of procedural actions by the parties to the case, in connection with which, in our opinion, there are doubts about the compliance of these provisions

with Part 4 of Art. 3 of the CPC, according to which the law establishes new obligations, cancels or narrows the rights belonging to participants in court proceedings or restricts their use, has no retroactive effect.

It is worth noting that the ECtHR made its conclusion in similar circumstances. Thus, in *Peretyaka and Sheremetyev vs Ukraine,* it is a notable fact that the appellate courts had considered the applicants' cases particularly in civil proceedings, which was important in these circumstances[36]. In addition, their decisions clearly stated that a cassation appeal should be lodged with the Supreme Court within two months, i.e. within the time allowed for appealing by the new rules of civil procedure.

Thus, the appellate courts unequivocally directed the applicants to pursue their cases in civil proceedings (see paragraphs 7, 12 and 22 above). Even if the operative part of the judgment could not be considered binding for the court of the next instance, the appellate courts' assertion that the applicants had two months to appeal, was the only thing they could rely on, in particular in view of the fact that the relevant events took place immediately after significant changes in procedural law. In view of the above, the Court concludes that the Supreme Administrative Court's decision to apply a period of one month to each case, which led to the applicants' failure to consider the merits of the cassation appeals, was disproportionate to the purpose of the procedural restriction in question.

4. CONCLUDING REMARKS

The COVID-19 pandemic is a health care crisis with serious human and social consequences, with challenges for the courts and the judiciary in Member States. It has created the conditions to reflect on the possibilities of applying innovative measures in the judiciary.[37]

In the context of domestic realities, we note that the gaps in the procedural legislation and other technical and legal shortcomings of the rules and institutions of civil procedural law significantly affect the access to justice. Inaccuracy and incompleteness in resolving issues important for the administration of justice in quarantine conditions related to the extension and renewal of procedural time limits creates obstacles for the implementation of the main tasks of civil proceedings. Inaccuracy in the regulation of procedural legislation of certain procedural time limits, the possibility of their renewal and extension can significantly affect the movement of all civil proceedings and, to a great extent, impede the achievement of its goals.

In this regard, in our opinion, the improvement of procedural norms of the CPC of Ukraine in the part of procedural time limits during the quarantine established by the Cabinet of Ministers of Ukraine for the prevention of coronavirus disease (COVID-19), which aims to prevent the negative effects of missing deadlines and incurring procedural consequences, has led to a lowering of certain standards and a violation of legal guarantees.

36 *Peretyaka and Sheremetyev v. Ukraine* (App nos. 17160/06 and 35548/06) ECHR 21 December 2010 <http://hudoc.echr.coe.int/eng?i=001-102447> accessed 08 July 2020.

37 CEPEJ, 'Lessons Learnt and Challenges Faced by the Judiciary during and after the COVID-19 Pandemic' (10 June 2020) CEPEJ 8rev) <https://rm.coe.int/declaration-en/16809ea1e2> accessed 08 July 2020.

Access to Justice in Eastern Europe,
Issue 2/3 (7) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.2-3

O Kaplina, S Sharenko 'Access to Justice in Ukrainian Criminal Proceedings During the COVID-19 Outbreak' (2020) 2/3 (7)
Access to Justice in Eastern Europe 115-133.
10.33327/AJEE-18-3.2-3-a000029

ACCESS TO JUSTICE IN UKRAINIAN CRIMINAL PROCEEDINGS DURING THE COVID-19 OUTBREAK*

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* *Received: 13.07.2020. Revised: 03.08.2020. Approved: 14.08.2020*

Right to be Heard in Court. - 3.3. Observance of Guarantees of the Victim's Rights in the Conditions of a Pandemic. - 3.4. Reasonable Time Limits for Consideration of Criminal Cases in a Pandemic. - 3.5. Peculiarities of Judicial Control Proceedings in a Pandemic. - 4. Conclusions.

This article examines relevant issues of criminal proceedings in the context of the COVID-19 pandemic in Ukraine. In the wake of the COVID-19 pandemic, many governments have focused their efforts on protecting democratic values and ensuring not only the rights and legitimate interests of their people, but also their lives and health. At the same time, the pandemic has affected not only the economies of countries, but also their democratic development and fundamental rights, which have always been a priority of any democratic society. Courts and law enforcement authorities have faced challenges that have been and still are adequately addressed in order to ensure that the rights and legitimate interests of those seeking judicial protection are respected.

Each state independently assessed the degree of risks and the extent of permissible restrictions on the rights and freedoms of persons involved in the proceedings, so the present study analyses the different approaches that have been applied. At the same time, documents of the Council of Europe for the Efficiency of Justice (CEPEJ) have gained high importance, because they, among others, have developed tools for Council of Europe member states to address the problems of ensuring access to justice in the pandemic. The generalization and widespread discussion of such experiences is important, because it will be useful for states to further improve existing legislation, taking into account best practices.

Based on a study of changes introduced in the Ukrainian legislation to prevent the spread of the coronavirus disease, conclusions are proposed about the nature and extent of the restrictions, as well as the principles on which they should be based and the guarantees to be provided. Recommendations that will contribute to improving the regulation of access to justice in criminal matters in a pandemic are also proposed.

Key words: justice in the context of the COVID-19 pandemic; access to justice in the context of the COVID-19 pandemic; judicial control over the protection of rights, freedoms and legitimate interests of persons in criminal proceedings; the investigating judge; reasonable terms of criminal proceedings; publicity and openness of court proceedings; trial by videoconference.

1. INTRODUCTION

The coronavirus epidemic has had a devastating effect on humanity, regardless of geography, economic status, maturity of society or any other components. The pandemic has become a serious test for the legal systems of almost all states and civilizations. At the beginning, it was impossible to predict the full range of consequences this brought, but realizing those now, it is worth drawing conclusions for the future.

Ensuring human health during the coronavirus pandemic has become one of the top topics worldwide. The most problematic issues were the provision of adequate medical care, the development of treatment protocols and the creation of a vaccine

against a disease that has become a threat to humanity. Representatives of the medical professions were at the forefront of the fight against this dangerous disease. Obviously, we should pay tribute to medical providers, which were the first to defend humanity.

At the same time, the coronavirus pandemic has affected the democratic development of countries, the rule of law and the protection of human rights. Courts and law enforcement systems have faced significant challenges, which need to be adequately addressed to ensure that the rights and legitimate interests of those in need of judicial protection are respected.

This article addresses the challenges facing the society of democracies in respect to the fundamental rights of access to justice in criminal matters, as guaranteed by the Universal Declaration of Human Rights[1] and the European Convention (Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter - Convention),[2] as well as ways to overcome them as illustrated by the example of Ukraine.

Restrictive measures in Ukraine were introduced by the Resolution of the Cabinet of Ministers of Ukraine of 11 March 2020 № 211 'On Prevention of the Spread of Acute Respiratory Disease COVID-19 Caused by Coronavirus SARS-CoV-2'.[3]

The first version of this resolution provided, among others, for a ban on holding mass events with more than 200 participants, in addition to the measures necessary to ensure the work of public authorities and local governments. In addition, the Resolution has been repeatedly amended and supplemented, taking into account the epidemiological situation in the country.

However, in accordance with the Constitution,[4] it is the laws of Ukraine that determine the judicial system, judicial proceedings, the status of judges; the principles of forensic examination; the organization and activity of the prosecutor's office, notary, pre-trial investigation bodies, bodies and institutions of execution of punishments; the order of court decisions execution; the principles of the organization of the bar (paragraph 14 of Art. 92).

Thus, despite the introduction of quarantine measures, the procedural order of criminal proceedings was not changed and the courts had to overcome gaps in legislation by balancing between the provisions of the Resolution of the Cabinet of Ministers of Ukraine and the requirements of criminal procedure legislation.

Only on 30 March 2020, the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in

1 United Nations, *Universal Declaration of Human Rights* (10 December 1948). <https://www.un.org/en/universal-declaration-human-rights/> accessed 03 August 2020.

2 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 03 August 2020.

3 The Resolution of the Cabinet of Ministers of Ukraine № 211 of 11 March 2020 'On Prevention of the Spread of Acute Respiratory Disease COVID-19 Caused by Coronavirus SARS-CoV-2' Official Gazette of Ukraine 23/296 Art 896.

4 Constitution of Ukraine: Law of Ukraine of 28 June 1996 № 27-IX. <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 03 August 2020.

Connection with the Spread of Coronavirus Disease (COVID-19)'[5] was adopted (with subsequent amendments on 24 June 2020) (hereinafter - Law № 540-IX).

By this Law of Ukraine, the legislator established certain restrictions concerning the attendance in the courtroom during the trial and also tried to regulate certain features of judicial control over the observance of the rights, freedoms and interests of persons in criminal proceedings.

Amendments to the legislation on the procedural time limits in commercial, civil and administrative proceedings during quarantine were introduced by the Law of Ukraine only on 18 June 2020.[6] However, the legislator ignored the criminal procedure legislation. Thus, judges and investigating judges had to overcome the problems and the lack of criminal procedural legislation in the absence of proper regulation.

It is clear that during a pandemic, the introduction of certain restrictions is a necessary measure to preserve the health of the population, but at the same time, emergency measures must be based on the principles of rule of law, legality, legal certainty and proportionality.

2. THE RIGHT TO A FAIR TRIAL UNDER A PANDEMIC CONDITION: ARE THERE REASONS TO DEROGATE FROM THE FUNDAMENTAL PROVISION OF THE EUROPEAN CONVENTION?

The governments of different states have responded differently to the challenges facing their justice systems, but they have acted similarly in the means they have chosen to prevent the spread of the disease and ensure access to justice for citizens.

Regional human rights systems have also responded quickly to the challenges of the times. In particular, the Council of Europe for the Efficiency of Justice (CEPEJ) has adopted the CEPEJ Declaration 'Lessons Learned and Challenges Faced by The Judiciary During and After the COVID-19 Pandemic'. The declaration contains principles that CEPEJ would like to remind the member states of the Council of Europe to uphold.[7] In turn, on 7 April 2020 the Council of Europe adopted a toolkit for member states 'Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis'.[8]

It would be appropriate to draw attention to one point, which was emphasized in the Toolkit for the member states of the Council of Europe: 'Effective enjoyment of all

5 The Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)' [2020] Vidomosti of the Verkhovna Rada 18/123 < https://zakon.rada.gov.ua/laws/show/540-IX#Text> accessed 03 August 2020.

6 The Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Procedural Terms during Quarantine Established by the Cabinet of Ministers of Ukraine for the Prevention of the Spread of Coronavirus Disease (COVID-19)' Official Gazette [2020] 58/1835 Art 13.

7 CEPEJ, 'Lessons Learnt and Challenges Faced by the Judiciary during and after the COVID-19 Pandemic' (10 June 2020) CEPEJ 8rev <https://rm.coe.int/declaration-en/16809ea1e2> accessed 03 August 2020.

8 Council of Europe, 'Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states' (7 April 2020) <https://www.coe.int/en/web/congress/covid-19-toolkits> accessed 03 August 2020.

these rights and freedoms guaranteed by Art.s 8, 9, 10 and 11 of the Convention is a benchmark of modern democratic societies. Restrictions on them are only permissible, if they are established by law and proportionate to the legitimate aim pursued, including the protection of health. It is for the authorities to ensure that any such restriction, whether or not it is based on a temporary derogation, is clearly established by law, in compliance with relevant constitutional guarantees and proportionate to the aim it pursues' (para 3.3).[9]

According to Art. 15 of the Convention,[10] a member state may take measures derogating from its obligations under this Convention, in the event of war or other public danger threatening the life of the nation. Since the beginning of the pandemic declared by the World Health Organization nine states, declaring a state of emergency on their territory, have exercised this right. These include Albania, Armenia, Georgia, Estonia, Latvia, Moldova, Romania, San Marino and Serbia.[11]

In particular, Estonia, having declared a state of emergency in the country on 12 March 2020, on March 20 made a statement to the Council of Europe on the derogation from obligations in accordance with Art. 15 of the Convention.[12] The Estonian Government stated that the State had departed from its obligations under Art. 5, 6, 8 and 11 of the Convention, Art. 1, 2 of the First Protocol, Art. 2 of the Fourth Protocol to the Convention.

The Annex to the Note verbale JJ9017C of the Permanent Representation Estonia to the Council of Europe states that in case of prosecutors, the judge can require that they attend the hearing through a video bridge (clause 15 Appendix 3); where possible, the litigation is handled in writing. Written proceedings have to be carried out through the information system of courts and by means of a digital court file application (clause 9 Appendix 3); the courts prefer the public e-File and email when choosing the method of service of procedural documents (clause 18 Appendix 3). During emergency situation, the hearings that are absolutely necessary for the performance of unforeseen or urgent service duties will be held by technical means of communication. The Annex to this paragraph provides a list of urgent cases, including taking into custody or deciding whether it should be continued (section 130, clause 262 4, section 275, section 3951, section 429, section 447 of the Code of Criminal Procedure).

On 21 March 2020, the President of Georgia declared a state of emergency, and on 23 March 2020, Georgia notified the Council of Europe of the derogation from obligations in accordance with Art. 15 of the Convention. Among the articles identified by the President, were Art. 5, 8, 11 of the Convention, Art. 1, 2 of the First Protocol and Art. 2 of the Fourth Protocol.

9 Council of Europe (n 8).

10 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5 <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 03 August 2020.

11 Council of Europe, 'Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic' <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354> accessed 03 August 2020.

12 Council of Europe (n 2).

The following measures have been introduced in criminal proceedings: court sessions under the Criminal Procedural legislation of Georgia may be held remotely using electronic means. In such cases, the parties to the case have no right to deny the conduct of remote sessions while requesting direct participation in it.[13]

On 16 March 2020 the President of Romania declared a state of emergency on the territory of the state and issued Decree № 195[14] which establishes emergency measures aimed at combating the spread of coronavirus on the territory of the state. The Decree warned that these measures could lead to restrictions of certain constitutional rights and freedoms of a human and a citizen, as reported by the Romanian Representation in the Council of Europe on 17 March 2020. The Romanian authorities did not name specific articles of the Convention requirements which can be indented.

According to the Decree of the President of Romania № 195, court hearings pending before the courts, taking into account the previous ones, are automatically suspended during the state of emergency. Only the following cases are subject to consideration:

'1) cases where preventive or protective measures for victims and witnesses have been taken or proposed, those regarding the provisional application of safety measures having a medical nature, those involving minors as victims; 2) acts and measures of criminal prosecution whose delay would endanger the collection of evidence or the apprehending of the suspect or of the defendant, as well as those regarding the early hearing; 3) cases whose emergency is justified by the purpose of establishing the national state of emergency, other urgent cases determined by the prosecutor supervising or carrying out the criminal prosecution etc.'[15]

In 10 days after the termination of the state of emergency, the judge or the court will take measures to set time limits for the judicial procedure and to carry out the procedural acts.

In addition, the Decree of the President of Romania touched upon other important provisions, in particular, for criminal cases, the agreement to circulate procedural documents through electronic mail is presumed and the judicial bodies shall request via phone, as needed, on an emergency basis, the electronic addresses to communicate those respective documents (para 4 Art. 43). The time limits to communicate decisions and to submit and solve complaints other than those mentioned in paragraph 1 are interrupted, whereas new time limits of similar duration will run following the termination of the state of emergency. The terms for lodging appeals in criminal cases, with the exception of those tried under the present Decree, are interrupted, whereas a new time limit of similar duration will run from the date of terminating the state of emergency. The cases tried based on the present Decree are an exception (para 5 Art. 43). The right to be heard of persons deprived of their liberty shall be ensured via videoconference at the detention place or in spaces which are appropriate from the health point of view,

13 Note Verbale of the Permanent Representation of Georgia in the Council of Europe with Annex No JJ9018C of 23 March 2020 <https://rm.coe.int/16809cff20> accessed 03 August 2020.

14 The President of Romania Decree 'On the establishment of the state of emergency in the territory of Romania' of 16 March 2020 Official Gazette of Romania, Part I, No 212 <https://rm.coe.int/16809e375d> accessed 03 August 2020.

15 Decree (n 14).

without being necessary to obtain the agreement of person deprived of liberty (para 6 Art. 43). The organization of public auction for the realization of assets preserved during criminal proceedings is suspended by law (para 7 Art. 43). During the state of emergency, in cases where no criminal investigations are performed or the criminal procedure is being suspended in accordance with the current Decree, the prescription of criminal liability is suspended (para 8 Art. 43).[16]

Ukraine has not declared derogation from the Convention, and therefore, the anti-epidemiological measures introduced in criminal proceedings should be based on the inadmissibility of restrictions on fundamental human rights guaranteed by the Convention.

The vast majority of the changes introduced by the Ukrainian legislature were established by law, pursued a legitimate aim, were proportionate and necessary in a democratic society. At the same time, the analysis of the main challenges that have arisen in criminal proceedings in a pandemic show that some of the decisions taken need to be improved.

3. MAIN CHALLENGES OF CRIMINAL JUDICIARY UNDER CONDITIONS OF A COVID-19 PANDEMIC IN UKRAINE AND WAYS TO SOLVE THEM

During the introduction of quarantine measures, the main problems facing domestic courts were the problems of ensuring the implementation of the requirements of Art. 6 of the Convention and the relevant provisions of criminal procedural law, which are implemented in national law, while taking into account international legal standards for the administration of justice and respect for human rights that exist in the world.

In particular, the right to a fair trial contains the following components: the access to justice; the consideration of the case by a court established by law; the independence and impartiality of the court; a fair trial; the publicity of the trial; legal certainty; the execution of the final court decision; reasonable terms.

The fairness of the trial, in accordance with the Convention, determines the right to be present at the hearing; the right to effective participation in court proceedings; the equality of procedural opportunities of the parties; the adversarialism of the parties; the admissibility of only legally obtained evidence; the immediacy of the study of evidence; the freedom from self-accusation.

3.1. Publicity under Conditions of Quarantine

The first real problem faced by domestic courts was the impossibility of ensuring the transparency of criminal proceedings.

According to Art. 27 of the CPC 'Publicity and Openness of Court Proceedings and Full Recording of Court Hearings and Procedural Actions by Technical Means,[17] criminal

16 Note Verbale of the Permanent Representation of Romania in the Council of Europe with Annex No JJ9014C of 18 March 2020 <https://rm.coe.int/16809cee30> accessed 03 August 2020.

17 Criminal Procedure Code of Ukraine: Law of Ukraine of 13 April 2012 № 817-IX <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 03 August 2020.

proceedings in courts of all instances are carried out openly. The normative basis of this principle is the provision of paragraph 6 of Part 2 of Art. 129 of the Constitution of Ukraine,[18] Art. 11 of the Law of Ukraine 'On the Judiciary and the Status of Judges',[19] international legal acts, in particular, Art. 10 of the Universal Declaration of Human Rights,[20] Part 1 of Art. 6 of the Convention on Human Rights, part 1 of Art. 14 of the International Covenant on Civil and Political Rights.[21]

The essence of this principle in criminal proceedings is that it is:

1) a guarantee of the transparency of the judiciary, which significantly contributes to the formation of public trust;

2) a means of public control over the administration of justice;

3) a means of exercising educational influence on persons who were present in the courtroom, as well as on the members of society as a whole, promoting the development of legal culture and legal awareness of citizens;

4) one of the conditions of a fair trial.

Law № 540-IX[22] amended the CPC of Ukraine, which gave the judge and the investigating judge the right to decide to restrict access of persons, who are not participants in the trial to the court session if participation in the court session will endanger the life or health of a person. This is valid during the quarantine established by the Cabinet of Ministers of Ukraine in accordance with the Law of Ukraine 'On Protection of the Population from Infectious Diseases', We would like to draw attention to the fact that the legislator did not limit the validity of the principle of 'publicity and openness of court proceedings' to such innovations,

but only proposed certain restrictions related to discretion, timeliness, selectivity and purposefulness.

In particular, it is about the following powers:

1) make a decision to restrict the access of persons to a court hearing, which is at the discretion of the judge and/or the investigating judge;

2) a judge and/or an investigating judge may only restrict the access of persons to the courtroom, but not completely prohibit it;

3) the introduced restrictions may only be applied for the period of quarantine established by the Cabinet of Ministers of Ukraine;

18 Constitution (n 4).

19 The Law of Ukraine 'On the Judiciary and Status of Judges' [2016] Vidomosti of the Verkhovna Rada 31/545 <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 03 August 2020.

20 United Nations, *Universal Declaration of Human Rights* (10 December 1948).

21 United Nations, *International Covenant on Civil and Political Rights* (16 December 1966) <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 03 August 2020.

22 The Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)' [2020] Vidomosti of the Verkhovna Rada 18/123 < https://zakon.rada.gov.ua/laws/show/540-IX#Text> accessed 03 August 2020.

4) restriction of access applies only to persons who are not participants in the proceedings;

5) restrictions on access to a court hearing may be introduced only in the event of a threat to the life or health of a person (Law № 540-IX).

As can be concluded from this, the purpose of this decision of the court or investigating judge is multivariate. It can be considered in broad and narrow meanings. In particular, in the narrow sense, it restricts the access of persons who are not participants in the trial to the hearing, and in the broad sense, it ensures the life and health of the participants in the trial and prevents the spread of coronavirus disease in Ukraine (COVID-19).

The legal grounds for the decision to restrict the access of persons to the trial are the decision of the investigating judge, which must be legal and reasonable. The factual grounds for such a decision are the possibility of a threat to life or health. So, the legislator thus created an evaluative concept, which is interpreted differently by practitioners, but the investigating judge or the judge must properly justify the decision to restrict access to the trial.

It is very difficult to decide whether a threat to a person's life or health is created during a court hearing, as there is legal uncertainty regarding the person referred to in the amendments to Art. 27 of the CPC. In our opinion, this article should be interpreted broadly and access of persons to the court hearing should be restricted, if there is a threat to the life and health of all present in the courtroom, namely the investigating judge, other court members, participants in the proceedings, which are defined in paragraph 26 of Art. 3 of the CPC.[23]

Also, when interpreting this provision, it should be assumed that the main task of the court decision in restricting access to the courtroom should be *preventing* harmful consequences that may occur due to the presence of persons who are not participants in the proceedings.

In addition, the difficulty of interpreting this evaluation concept is that often when deciding on the prevention of harmful effects, one of the conditions for their use is the presence of real danger. But to establish the presence of real danger in a pandemic is very difficult as the 'enemy' is invisible.

Of course, there is a real danger for litigants when a temperature screening, which was mandatory in accordance with anti-epidemic measures, identifies a person or persons who have a fever. However, it is known that fever can accompany a number of other diseases. Therefore, the judge who must decide to restrict the access of persons to the trial must proceed from the following reasoning.

In itself, the introduction of quarantine measures in the state indicates the prevalence of the disease to an indefinite number of people, and many of the patients may be so-

23 In particular, participants in the proceedings: the parties to the criminal proceedings, the victim, their representative and legal representative, civil plaintiff, their representative and legal representative, civil defendant and their representative, a representative of the legal entity under trial, a representative of the probation body, a third party, in respect of whose property the issue of arrest is resolved, as well as other persons at the request or complaint of which in cases provided by the CPC, court proceedings are conducted.

called 'asymptomatic carriers', which is a specificity of the COVID-19 disease. In our opinion, only the existence of patients with a dangerous disease in a certain area, which determined the introduction of large-scale quarantine measures, indicates a threat to the health and life of the court, the investigating judge and persons involved in the proceedings.

The problem under consideration will not be solved by the requirement to provide a certificate of the absence of the virus in the body, PCR tests for COVID-19, because the disease spreads very quickly, and the incubation period lasts up to two weeks.

The protection of the life and health of citizens of the country is a legitimate aim, which stipulates the right of a judge and an investigating judge to restrict the presence in the courtroom of persons who are not its participants.

Therefore, in our opinion, the grounds for deciding to restrict the access to the trial of persons who are not participants in the trial may be:

1) introduction by law of quarantine measures in the state (on a certain territory, locality, in a certain place);

2) a threat to life and health, which objectively exists during the spread of the disease that caused the introduction of quarantine measures on the territory of the state;

3) the opinion of the investigating judge, the court of probable judgment, that there is a threat to life and health of the court and the participants in the proceedings, which arises on the basis of internal conviction, formed on the basis of the general situation in the state (in a certain territory, area, place);

4) the possibility of adverse effects is due to objective circumstances, the danger of the disease and the specificity of its spread;

5) danger can jeopardize not only the health but also the life of persons involved in criminal proceedings.

Taking into account the experience of other states,[24] in our opinion, in order to comply both with the requirements of the Convention on publicity of court proceedings and Ukrainian legislation regarding the implementation of the principle of publicity of court proceedings, it is advisable to cover the most 'high-profile' lawsuits in the media; providing online broadcasts of court hearings; audio broadcast of court hearings, etc.

24 See more about Great Britain's experience in: 'Coronavirus Act 2020' (Chapter 7) <https://www.legislation.gov.uk/ukpga/2020/7/pdfs/ukpga_20200007_en.pdf> accessed 03 August 2020, 'Supporting the justice system from home' <https://www.judiciary.uk/announcements/supporting-the-justice-system-from-home/> accessed 03 August 2020, and 'Courts and tribunals data on audio and video technology use during coronavirus outbreak' (14 April 2020) <https://www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak> accessed 03 August 2020. See also: 'COVID-19 Global: Arbitration and court impacts' (1 May 2020) <https://www.clydeco.com/en/insights/2020/05/COVID-19-impact-on-courts-and-arbitration> accessed 03 August 2020; on consideration by the US Supreme Court by videoconference with open public access to the broadcast, see 'Virus Pushes a Staid Supreme Court Into Revolutionary Changes' The New York Times, 3 May 2020 <https://www.nytimes.com/2020/05/03/us/politics/supreme-court-coronavirus.html> accessed 03 August 2020.

Such measures will promote the implementation of the principle of publicity of court proceedings and respect the rights of persons arising from the legal content of this principle.

3.2. Access to Videoconferencing as a Guarantee of the Right to be Heard in Court

The termination, in accordance with the Resolution of the Cabinet of Ministers № 211,[25] of regular and irregular carriage of passengers by road in suburban, intercity, intraregional and interregional communication (except for passenger cars), rail transport, international air traffic have led to significant complications or have made the participation in the hearing of their case in court for parties impossible.

The State Judicial Administration of Ukraine, taking into account international experience, pursuant to Law № 540-IX and the Law of Ukraine 'On the Judiciary and Status of Judges', issued an order approving the Procedure for working with videoconferencing during court, administrative, civil and economic proceedings with the participation of the parties outside the court building.[26]

However, as you can see, this act was aimed at normalizing the procedure for videoconferencing during court hearings in administrative, civil and commercial proceedings, but at the same time ignored the criminal process.

Probably, such a situation has developed due to the fact that the procedure of videoconferencing during court proceedings is provided by the CPC of Ukraine in Art. 336 and was had been widely used even before the introduction of anti-epidemiological measures.

At the same time, the Verkhovna Rada of Ukraine adopted the Law amending the CPC of Ukraine on the peculiarities of judicial control over the observance of rights, freedoms and interests of persons in criminal proceedings and consideration of certain issues during court proceedings for the period of quarantine established by the Cabinet of Ministers with the aim of prevention of the spread of coronavirus disease (COVID-19).[27]

This Law, in particular, stipulates that consideration of issues related to the powers of an investigating judge or court (except for consideration of a request to choose a measure of restraint in the form of detention) can be conducted by videoconference with prior notification of the parties to the criminal proceedings. This can be done by the decision of an investigating judge or court, taken on their own initiative or at the request of a party to the criminal proceedings. The investigating judge or court have no right to decide to hold

25 The Resolution of the Cabinet of Ministers № 211 [2020] Official Gazette of Ukraine 23/296 Art 896.

26 Order of the State Judicial Administration of Ukraine of 8 April 2020 № 169 'On approval of the Procedure for working with technical means of videoconferencing during a court hearing in administrative, civil and commercial proceedings with the participation of the parties outside the court' < https://drive.google.com/file/d/1PdQ6oIR-C5HnIJYSYox95PwXdLvk9ojC/view> accessed 03 August 2020.

27 The Law of Ukraine 'On Amendments to Paragraph 20-5 of Section XI 'Transitional Provisions' of the Criminal Procedure Code of Ukraine on the peculiarities of judicial control over the rights, freedoms and interests of persons in criminal proceedings and consideration of certain issues during court proceedings for the period of quarantine The Cabinet of Ministers of Ukraine in order to prevent the spread of coronavirus disease (COVID-19)' [2020] Bulletin of the Verkhovna Rada of Ukraine 19 Art 129.

a court hearing to consider the request for the extension of detention in a videoconference, in which the suspect (accused) is outside the courtroom, if he objects to this.

Conducting a court hearing by videoconference, including during court proceedings, shall be done in compliance with the rules provided for in Part 3-9 of Art. 336 of the CPC of Ukraine (paragraph 20-5 of Section XI 'Transitional Provisions' of the CPC of Ukraine).

The legislator has established that only a request for a measure of restraint in the form of detention cannot be considered by videoconference. This approach is quite justified given that detention significantly restricts the constitutional human right to liberty and security of person guaranteed by Art. 29 of the Constitution of Ukraine, Art. 5 of the Convention.

While not absolute, this right may be subject to restrictions, but its application must respect the guarantees that the interference with human rights is lawful. At the same time, the possibility of holding a court hearing to consider the request for extension of detention in a videoconference, in which the suspect (accused) is outside the courtroom, depends on his consent.

In our opinion, in conditions when Ukraine did not use the right provided by Art. 15 of the Convention, according to which a State may decide to derogate from its obligations under the Convention, the provision on the possibility of videoconferencing to extend a detention may lead to a formal approach, essentially a quasi-automatic extension of the detention period.

In its judgments (*Shishkov vs Bulgaria,*[28] *Tase vs Romania*[29]) the ECHR stated that the justification for any period of detention, whatever it may be, must be convincingly provided by the State and that a quasi-automatic extension of such a period runs counter to the guarantees established in paragraph 3 of Art. 5 of the Convention.

Of course, it can be argued that under current criminal procedural law, a suspect or accused must consent to a request for continued detention by videoconference. However, there is a question of voluntariness of such consent. This approach appears to be discriminatory compared to the procedure that exists for the choice of a measure of restraint, when the consideration of this issue by the investigating judge by videoconference is inadmissible.

In addition, case law shows that judges do not always check the voluntariness of consent, which should be mandatory.[30] Forcing a suspect or accused person to an offer of a trial by videoconference can significantly affect the rights of those subject to pre-trial detention.

3.3. Observance of Guarantees of the Victim's Rights in the Conditions of a Pandemic

Attention should also be paid to the observance of the procedural rights of a victim. If we refer to the international standards of the victim's participation in court proceedings

28 *Shishkov v. Bulgaria* (App no 38822/97) ECHR 9 January 2003 <http://hudoc.echr.coe.int/eng?i=001-60879> accessed 03 August 2020.

29 *Tase v. Romania* (App no 29761/02) ECHR 10 June 2008 <http://hudoc.echr.coe.int/eng?i=001-86861> accessed 03 August 2020.

30 Case № 212/8969/18 (Zhovtnevy District Court of the city of Kryvyi Rih, Dnipropetrovsk Oblast 4 August 2020). < http://reyestr.court.gov.ua/Review/90746091 > accessed 03 August 2020.

regarding the choice or change of a measure of restraint for a suspect or accused, we can conclude that international acts are based on the need to take into account the victim's opinion on the choice of a measure of restraint.

The Declaration of Fundamental Principles of Justice for Victims of Crime and Abuse of Power enshrines the obligation of States to promote that judicial and administrative procedures are more responsive to the needs of victims of crime. This is done by ensuring that their views are expressed and considered at certain stages of the trial in cases where their personal interests are involved, without prejudice to the accused and in accordance with the national criminal justice system.[31]

The ECtHR in its decision in the case of *Batsanina vs. Russia* stated that the victim's participation in the proceedings was based on the fact that the principles of equality and adversarial proceedings required a 'fair balance between the parties' and that each of them should be given a reasonable opportunity to present their case in conditions that do not put him or her in a less favorable position compared to his or her opponent.[32] The participation of the victim in court proceedings is a necessary condition for ensuring the balance of interests of the parties and ensuring the right of a person to judicial protection of their own interests.

The analysis of Art. 193 of the CPC allows us to conclude that the victim is not a participant in the proceedings at the stage of pre-trial investigation during the decision of the investigating judge to apply for a measure of restraint or change it, which seems to limit his rights and legitimate interests. Scholars of law have repeatedly stressed that the victim should be given the right to participate in the consideration of a request for a measure of restraint in order to strengthen his/her role as an independent participant in criminal proceedings.[33]

Therefore, we believe that in the situation under consideration, the possibility of victim's direct participation or participation by videoconference (with his/her consent) in the hearing should be regulated by law.

3.4. Reasonable Time Limits for Consideration of Criminal Cases in a Pandemic

The reasonableness of time limits as one of the components of the right to a fair trial is enshrined in Part 3 of Art. 5, part 1 of Art. 6 of the Convention, Part 3 of Art. 9, Part 2.c Art 14 of the International Covenant on Civil and Political Rights (hereinafter - ICCPR or Covenant) and, in particular, stipulates that justice should not be administered with a delay that could compromise its effectiveness and credibility.

31 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [1985] Resolution 40/34 Gen Assembly <https://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx> accessed 03 August 2020.

32 *Batsanina v Russia* (App no 8927/02) ECHR 26 May 26 2009 in: Precedents of the European Court of Human Rights in Russia (2009) No 9 p 356–363.

33 See: SV Davydenko, 'Features of the procedural position of the victim in the application of precautionary measures' (2015) 3 Law and society 194–201; VO Sichko, 'Obrannia, skasuvannia abo zamina zapobizhnoho zahodu u sudovomu provadzhenni' ['Choice, cancellation or change of a measure of restraint in court proceedings'] (Candidate of Law thesis, Yaroslav Mudryi National University of Law 2019) 104-107.

It was in the CPC of 2012 where for the first time at the normative level, the reasonableness of time limits was enshrined as a general principle of criminal proceedings, which corresponds to its task under Art. 2. The reasonableness of time limits is to ensure a speedy investigation and trial, so that anyone who commits a criminal offense is prosecuted to the extent of their guilt, no innocent person has been charged or convicted, no person has been subjected to unreasonable procedural coercion and proper legal procedure was applied to each participant in the criminal proceedings.

Given the practice of the ECHR and the provisions of parts 1, 4 of Art. 28 of the CPC, a reasonable time limit should be understood as the shortest period of consideration and resolution of criminal proceedings, procedural action or adoption of a procedural decision, which is sufficient to provide timely (without undue delay) judicial protection of violated rights, freedoms and interests and the tasks of criminal proceedings in general.[34]

One of the most important advantages of judicial activity, of course, is the availability of justice, its quality and efficiency which correlate with each other and complement each other. Modern law enforcement practice allows us to state that the efficiency of judicial proceedings is not covered exclusively by the organizational sphere. It should provide such a degree of access to justice that would promote the realization of one of the fundamental human rights, which is inextricably linked to the right to a fair trial, namely, participation in the trial without unjustified delay.

In paragraph 1 of Art. 6 of the Convention this right is formulated as the right to participate in a trial 'within a reasonable time'. A similar provision is formulated in paragraph 3 of Art. 14 of the ICCPR. As both the Covenant and the Convention apply concepts such as 'promptly, 'within a reasonable time', 'without undue delay', etc., the ECHR explains in sufficient detail the differences between them. The first concept is used in Art. 5 of the Convention and applies to detainees and arrested before being charged, who must be 'promptly' brought before a judge or other official exercising judicial power.

The notion of 'reasonable time', as well as 'without undue delay', refers to the length of the criminal proceedings and applies to the time that elapses from the moment the charge is brought until the end of the criminal proceedings.

The interpretation of the 'reasonable time' category depends on whether or not the accused is under arrest, as the arrested person has the right to have his or her case considered as a matter of priority and for the trial to proceed without delay. Therefore, the 'reasonable time' referred to in relation to the arrested person should be shorter than the 'reasonable time' referred to in relation to all accused (and not only the accused, if civil proceedings are also taken into account). In a number of decisions, the ECHR has formulated a legal position according to which a long delay in a trial can be acceptable, justified, due, for example, due to the complexity of the case, but this cannot justify a long detention.[35]

34 OV Kaplina, OG S Shylo (eds), *Kryminalnyi process [Criminal proceedings]* (a textbook) (Pravo 2018).

35 *Trigiani v Italy,* ECHR 19 February 1991 < http://www.echr.coe.int> accessed 03 August 2020; *Manzoni v Italy* (App no 19218/91) ECHR 1 July 1997 <http://www.echr.coe.int> accessed 03 August 2020; *Calogero Diana v Italy* (App no 15211/89) ECHR 21 October 1996 <http://www.echr.coe.int> accessed 03 August 2020; *Manieri v Italy (App 12053/86)* ECHR <http://www.echr.coe.int> accessed 03 August 2020; *Kalashnikov v Russia* (App no 47095/99) ECHR 15 July 2002 <https: //zakon.rada.gov.ua/laws/show/980_057#Text> accessed 03 August 2020.

Determining in each case the presence of a violation of paragraph 1 of Art. 6 of the Convention or paragraph 3.c of Art. 14 of the Covenant, the ECHR considers the circumstances of the case, paying particular attention to its complexity, the actions of the parties and the authorities. Since the obligations under international treaties are assumed by states, only the delays caused by the latter can justify the conclusion that the requirements for a 'reasonable time' have not been met. The state should be able to guarantee a 'reasonable time' even in the event of disruption of public institutions in the country, for example, during a temporary political crisis or a coronavirus epidemic.

3.5. Peculiarities of Judicial Control Proceedings in a Pandemic

In this context, the problems of law enforcement practice that have arisen in connection with the introduction of amendments to the CPC of Ukraine have become especially relevant. It goes about the above-mentioned Law of Ukraine[36] 'On Amendments to Paragraph 20-5 of Section XI 'Transitional Provisions' of the CPC of Ukraine on the peculiarities of judicial control over the rights, freedoms and interests of persons in criminal proceedings and consideration of certain issues during quarantine proceedings, established by the Cabinet of Ministers of Ukraine in order to prevent the spread of coronavirus disease (COVID-19)' of 13 April 2020 № 558-IX, which proposed a new version of paragraph 20-5 of chapter XI 'Transitional Provisions' of the CPC and standardized features of judicial control over the observance of the rights, freedoms and interests of persons in criminal proceedings and consideration of certain issues during court proceedings.

It should be noted that in the opinion of a Ukrainian legislator no special features of the procedure for the consideration of applications for permission to conduct covert investigative actions, as well as complaints about decisions, actions or inaction of the investigator or prosecutor during pre-trial investigation are required for the period of quarantine.

The first feature of the judicial control proceedings concerns the reduction of the time limit for considering a petition of a local court to transfer a petition to be considered by an investigating judge to another court within the jurisdiction of one appellate court or to another court within the jurisdiction of different appellate courts. This applies to cases, when a judge in the relevant court cannot be appointed (except for the Supreme Anti-Corruption Court). Such a request must be considered immediately, but not later than 24 hours from the date of its filing, by the chairman of the relevant appellate court (chairman of the Supreme Court of Cassation in case of transfer between courts within the jurisdiction of different appellate courts).[37]

In this case, it is considered that the date of receipt of such materials in court should be not the date of their transfer to the relevant chairman of the court, but the date and

36 The Law of Ukraine 'On Amendments to Paragraph 20-5 of Section XI 'Transitional Provisions' of the Criminal Procedure Code of Ukraine on the peculiarities of judicial control over the rights, freedoms and interests of persons in criminal proceedings and consideration of certain issues during court proceedings for the period of quarantine The Cabinet of Ministers of Ukraine in order to prevent the spread of coronavirus disease (COVID-19)' [2020] Bulletin of the Verkhovna Rada of Ukraine 19 Art 129.

37 Note that Part 3 of Art. 34 of the CPC of Ukraine, which provides for the general procedure for consideration of the relevant application, sets a five-day period.

time of submission of the document specified in the registration mark (court stamp) affixed in accordance with paragraph 9.[38] It is obligatory to indicate the time of receipt of the submission due to the shortened period (not more than 24 hours) for resolving the issue of changing the jurisdiction.

The second feature of the judicial control proceedings is related to the impossibility for a judge (panel of judges) to consider a request for election or extension of a preventive measure in the form of detention, except for a petition submitted to the High Anti-Corruption Court.

In this case, it may be (1) transferred for consideration to another judge, determined in the manner prescribed by Part 3 of Art. 35 of the CPC, or (2) considered by the presiding judge, or in his absence - by another judge of the panel of judges, if the case is considered collectively, or (3) transferred to another court within the jurisdiction of one court of appeal or to a court within the jurisdiction of various courts of appeal in the manner prescribed by para. 6 pp. 20-5. The established multivariate solution to the situation that may arise indicates that this rule is not mandatory and provides discretionary powers to the court.

The question of transfer on the basis of para 5, point 20.5, of a request to choose or extend a measure of restraint in the form of detention for consideration to another court shall be decided by the chairman of the relevant appellate court (chairman of the Supreme Court of Cassation in case of transfer between courts within the jurisdiction of different appellate courts). The decision is made upon submission by a local court (court of appellate instance) immediately, but not later than 24 hours from the date of receipt of such submission, on which the relevant decision is made. Jurisdictional disputes between courts are not allowed in this case.

Analyzing the criminal procedural mechanisms mentioned above, we can state that they, in general, will promote the observance of reasonable time limits of criminal proceedings. They will also prevent situations when courts will not have control over the observance of the rights, freedoms and interests of persons in a criminal proceeding in a timely and a fair manner. The same applies to certain urgent issues consideration during pre-trial and court proceedings properly and within the statutory period.

At the same time, there are questions about the approach of the legislator, who, while formulating the normative structure, resorts to the use of evaluative concepts, in particular, 'in case of the impossibility to appoint an investigating judge in the relevant court', 'in case of the impossibility to consider a request for election or extension of a preventive measure in the form of detention… it may be transferred'. Thus, courts are given wide discretion regarding the interpretation of the above provisions, because it is not established exactly which cases are in question. This, in turn, may lead to a violation

38 T Slutska, 'Zminy do KPK na period dii karantynu: analiz Zakonu, opublikovanoho 22 kvitnia 2020 roku' ['Amendments to the CPC for the period of quarantine: analysis of the Law published on 22 April 2020'] <https://protocol.ua/ru/zmini_do_kpk_na_period_dii_karantinu_analiz_zakonu_opublikovanogo_22_kvitnya_2020_roku/> accessed 03 August 2020.
See also Instructions on record keeping in local and appellate courts, approved by the order of the State Judicial Administration of Ukraine of 20 August 2019 № 814 and item 2.12. Instructions on record keeping of the Supreme Court, approved by the order of the Chief of Staff of the Supreme Court of 31 January 2020 № 11.

of the rights, freedoms and interests of the defense, as well as of the provisions of Art. 6 of the Convention.

In addition, legal clarity is not provided by the provisions of para 10, point 20.5, chapter XI of the CPC of Ukraine, which stipulate that during the pre-trial investigation and during the trial, a request for extension of detention shall be submitted no later than ten days before the expiration of the previous detention order. The increase in the application period from 5 to 10 days is explained by the need to ensure compliance with the detention period specified in the previous decision, as due to quarantine measures, timely court hearings may be difficult. At the same time, the problem of non-compliance with the 10-week time limit by the prosecution remains unresolved. It is believed that the only legal consequence of such a violation should be the release of a person from custody. In fairness, we note that the provisions of Chapter 18 'Precautions, Detention' the problem is raised, while unfortunately, it is not resolved. This should be considered as a significant gap in current procedural law, as it causes a violation of the right of the protection of suspects, the accused and the defense counsel. Incidentally, we should recall that the right to have the time and opportunities necessary to prepare their defense is provided for in paragraph 3.b of Art. 6 of the Convention

It is noteworthy that under the conditions of the quarantine, the defense 'received' an additional argument in the motivation of the request to change the pre-trial detention measure to a milder one, namely the threat of COVID-19 in the pre-trial detention centre.

As an example, the panel of judges of the Horodyshche District Court of Cherkasy Oblast considered the claim of their accused defense counsel to change the measure of restraint in the form of detention to a milder measure of restraint due to the fact that, among other things, '...the accused under conditions of isolation was not provided with a mask or gloves; there is a risk of disease; and evidence that the mother is elderly, disabled, in need of care, which is necessary at this time, when the state declared a coronavirus pandemic, and who is at risk…'. However, in the court's view, these arguments were not sufficient to satisfy the request, and the detention period was extended.[39]

The case law of the ECHR provides some guidance on understanding the possibility and appropriateness of releasing persons from custody due to the risk of infection. Jeremy McBride in his article 'An Analysis of COVID-19 Responses and ECHR Requirements' notes:

'The conditional release of persons from prison – as is envisaged in the derogations of Georgia and Latvia – could protect those released from the risk of being infected. However, this should not occur without assessing the consequent risk to members of the public that this might pose as the infliction of physical violence by a released person could be in breach of the duty of care to the victim, entailing a violation of Art.s 2 and 3 (see, e.g., *Maiorano and Others v. Italy,* no. 28634/06, 15 December 2009 and *Opuz v. Turkey*, no. 33401/02, 9 June 2009). The Latvian derogation also seems to envisage the possible prolongation of prisoners' sentences. Any such prolongation would, given the

39 Case № 704/16/16-k (Horodyshche District Court of Cherkasy Region, 30 March 2020) <http://reyestr.court.gov.ua/Review/88555565> accessed 03 August 2020.

likely absence of a causal connection with the original sentence, not be justified under Art. 5(1) (a). Furthermore, in the absence of a being a measure required to prevent the spread of infectious diseases – such as where the prisoner concerned has become infected with COVID-19 - and thus a justifiable ground for deprivation of liberty pursuant to Art. 5(1)(d), reliance on the derogation would undoubtedly be necessary to prevent any violation of the Convention. However, in such circumstances, it is hard to see delayed release really being strictly required by the exigencies of the situation.'[40]

Analysis of paragraph 7 item 20-5 chapter XI of the CPC of Ukraine shows that the practical implementation of its normative content may lead to a violation of the deadlines established by the general provisions of the CPC for the consideration of certain issues within the competence of the investigating judge or court. Thus, there is a provision, according to which the consideration of issues under the powers of an investigating judge or court (except for consideration of a request to choose a measure of restraint in the form of detention) by its decision, taken on its own initiative or at the request of a party to criminal proceedings, can be conducted by videoconferencing, of which the parties of the criminal proceedings are notified in the manner prescribed by law. However, this provision does not take into account, that, in accordance with Part 8 of Art. 135 of the CPC, a person must receive a summons or be notified by other means no later than 3 days before the day when he is obliged to arrive on summons.

At the same time, according to the criminal procedure legislation of Ukraine, the petition of the investigator or prosecutor to impose a fine on the person, temporary restriction on the use of a special right, removal of a person from office, seizure of property, precautionary measure should be considered by the investigating judge not later than three days from the date of its receipt in court during the pre-trial investigation. The timeframe for the request for seizure of property is even less - not later than two days.

Such conflict, in any case, may lead to a violation of the rights and legitimate interests of the participants in the criminal proceedings and will not help to ensure compliance with reasonable time limits.

4. CONCLUSIONS

It is obvious that during a pandemic the introduction of certain restrictions is a necessary measure to preserve the health and life of the population, but at the same time, emergency measures must be based on the principles of rule of law, legality, legal certainty and proportionality, and be sufficient in case of danger, as well as be accompanied by a number of guarantees against the arbitrariness of the authorities.

Ukraine has not declared a derogation from the Convention, therefore, the anti-epidemiological measures introduced in criminal proceedings should be based on the inadmissibility of restrictions on fundamental human rights guaranteed by the Convention. The vast majority of the changes introduced by the Ukrainian legislature

40 Jeremy McBride, 'An Analysis of COVID-19 Responses and ECHR Requirements' ECHR BLOG < http://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html > accessed 03 August 2020.

were established by law, pursued a legitimate aim, were proportionate and necessary in a democratic society.

Changes aimed at restricting the access of persons who are not participants in the trial to a court hearing during quarantine do not violate the fundamental rights of persons and are not aimed at terminating the principle of publicity of criminal proceedings. Due to the current situation, the legislator proposed only certain restrictions containing a set of guarantees against the abuse of rights, which are related to the discretion of the court decision, timeliness, selectivity and clear purpose.

The evaluative concept 'the threat to the life or health of a person' determines the purpose of the introduced restrictions related to the publicity of criminal proceedings. When interpreting this concept, the reasoning should be based on the fact that the protection of life and health is a legitimate goal. It determines the possibility of restrictions due to the fact that the investigating judge may assume, that there is a threat to the life and health of the court and the participants in the proceedings, which arise from internal conviction on the base of the general situation in the territory, area or place.

Given the importance of restricting the constitutional human right to liberty and security of person, the authors believe that the amendments to the CPC of Ukraine should be subject to revisions, according to which the extension of detention may take place by videoconference, as such an approach without a system of guarantees of voluntary consent of the suspect or accused is capable of leading to a quasi-automatic continuation of this most severe precautionary measure.

Also, despite the general positive direction of the amendments to the CPC of Ukraine for the period of quarantine established by the Cabinet of Ministers of Ukraine to prevent the spread of coronavirus (COVID-19), at present there is a need to talk about creating an effective mechanism for judicial control over rights, freedoms and legitimate interests of persons in criminal proceedings, as well as the creation of a system of guarantees of reasonable terms of criminal proceedings in a pandemic.

ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Access to Justice in Eastern Europe,
Issue 2/3 (7) 2020
http://ajee-journal.com
10.33327/AJEE-18-3.2-3

I Kondratova, T Korotenko 'Towards Modern Challenges in Financing the Judiciary: Between Independence and Autonomy' *(2020) 2/3 (7) Access to Justice in Eastern Europe 134-147.*
10.33327/AJEE-18-3.2-3-a000030

TOWARDS MODERN CHALLENGES IN FINANCING THE JUDICIARY: BETWEEN INDEPENDENCE AND AUTONOMY*

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Summary: 1. Introduction – 2. Legitimacy of Reducing a Judge's Reward Under Conditions of Quarantine. – 3. Financial Independence of the Judiciary or Judges Only? – 4. Concluding Remarks.

An independent judiciary is the guarantor of a democratic state governed by the rule of law, which we strive to build in Ukraine. This independence is ensured, among other things, by a

* *Received: 10.06.2020. Revised: 28.07.2020. Approved: 18.08.2020*

stable and sufficient funding of the national courts, which has become a significant challenge. The resolution of such issues has been sought in recent decades, but the problem of court financing has become especially acute in the context of the economic crisis and the coronavirus pandemic, which occurred in 2020. This has led to somewhat hopeless feelings about the chosen way of forming the policy of Ukrainian courts financing and its implementation.

Our study attempts to analyze certain aspects of the existing mechanism of financing the judiciary in Ukraine, in particular, through the prism of financial support for judges and assistant judges during the coronavirus pandemic. The functions which they perform can be attributed to the main ones during the administration of justice. The authors propose the analysis of the case on the protection of the right of assistant judges to a decent salary, which lasted for years in all courts of the state. In connection with the coronavirus pandemic in Ukraine, a law was passed reducing the salaries of judges, which is also analyzed in the article.

The search for a new, more modern approach to resolving the issue of a stable financial independence of the judiciary will help to solve urgent problems and ensure a real rule of law in Ukraine. In particular, our proposed approach to the formation of financial autonomy of the judiciary in Ukraine is suggested in this study.

Key words: *judiciary, access to justice during pandemic, COVID Justice, financing of the judiciary, independence of the judiciary, financial autonomy of the courts.*

1. INTRODUCTION

The independence of the judiciary is one of the main principles of its formation and functioning; it is what allows the court to act objectively and impartially in the consideration and resolution of cases. Ensuring the independence of the judiciary is the goal that is sought to be achieved in a modern democratic state governed by the rule of law. The struggle for funding is eternal, but modern challenges set even greater tasks to legislators and the judiciary, namely how to ensure the financial independence of the judiciary in a total crisis and pandemic that depletes the country's economy.

In our study we have analyzed several aspects of the financing of courts in Ukraine, through the example of which it is possible to clearly illustrate the inefficient model of the existing mechanism of financing the judiciary.

The crisis of the judiciary financing in Ukraine has been exacerbated by the coronavirus pandemic, which has been used as an excuse for reducing judges' salaries through legislative changes. Can this ensure the equality of rights between different branches of state power? Can judges feel financially independent in such conditions? This issue has become the subject of the analysis in this article.

The financing of the judiciary is viewed mainly through the prism of determining the salaries of judges, while they are definitely not the only element in the judiciary that provides justice.

There are 1,632 assistant judges in Ukraine,[1] who provide an integral part of the court's activities. At the same time, their financial dependence has not yet been the subject of attention by either legislators or scholars. The example of a case to protect the right to a decent wage, which has lasted for years in all courts of the state, shows that the existing approach is ineffective and needs to be radically changed.

The introduction of a new, more current and adaptive approach to resolving the issue of the stable financial independence of the judiciary would solve urgent problems and ensure the real rule of law in Ukraine, as is proposed in the conclusions.

2. LEGITIMACY OF REDUCING A JUDGE'S REWARD UNDER CONDITIONS OF QUARANTINE

> What fairness is there in a system under which the plaintiff in the case (a governmental agency) pronounces the applicable policy, prosecutes the case, and then decides the case to which it is itself a party?
>
> Stanley N Ohlbaum, 'Toward an Independent Judiciary' (1977)

The concept of the independence of the judiciary is multi-layered, but decisive. The court cannot remain in the hands of the legislative or executive branches of power, as this disrupts the balance of power in the state, as well as the general concept of a democratic state governed by the rule of law. 'No liberty, if the power of judging be not separated from legislative and executive powers. [2]

There have been repeated warnings around the world to ensure the financial independence of the courts. However, even within one judicial system, there is no uniform approach to the financing of different types of courts. In France, for example, the Constitutional Court and administrative courts are financed autonomously as opposed to ordinary courts, which do not have a direct link with the Ministry of Justice and the Ministry of Finance.[3] But the shortcomings of the influence of the legislative and the executive branches on the work of the courts are innumerable, in particular, the ones aptly described by S. N. Ohlbaum have been chosen by us as an epigraph to this part of the study[4].

The first aspect of this impact concerns the reduction of judges' remuneration in the context of quarantine imposed to prevent the coronavirus pandemic in Ukraine.

1 V Kolishnyi, 'Suddi mozhut zalyshytysja bez pracivnykiv aparatu ta ohoronciv, a kompjutery, mebli ta marky prydbavatymut vlasnym koshtom' ['Judges may be left without staff and security guards, and computers, furniture and stamps will be purchased at their own expense'] (2019) 37/1439 Zakon i biznes <https://zib.com.ua/ua/139293-suddi_mozhut_zalishitisya_bez_pracivnikiv_aparatu_ta_ohoronc.html> accessed 17 July 2020.

2 Ronald M George, 'Challenges Facing an Independent Judiciary' (2005) 80 NYU L Rev 1345 P. 1346-1347.

3 Caroline Expert-Foulquier, 'The Financial Independence of the Judiciary in France' (2020) 11 IJCA 1.

4 Stanley N Ohlbaum, 'Toward an Independent Judiciary' (1977) 16 Judges J 29.

The adopted Law of Ukraine № 294-IX 'On the State Budget of Ukraine for 2020' of 14 November 2019,5 the Law of Ukraine № 553-IX 'On Amendments to the Law of Ukraine "On the State Budget of Ukraine for 2020"' of 13 April 20206 and other laws provide for a significant reduction in judicial fees which are established by the Constitution of Ukraine (hereinafter – CU), in particular, part one of Art. 126.[7]

Art. 8 of the CU[8] stipulates that the principle of the rule of law is recognized and in force in Ukraine. The CU has the highest legal force. Laws and other normative legal acts are adopted on the basis of the CU and must comply with it.

Part 2 of Art. 52 of the Law of Ukraine 'On the Judiciary and the Status of Judges'[9] stipulates that judges in Ukraine have a single status regardless of the place of the court in the judiciary or the administrative position that the judge holds in court.

The material support of judges, in particular, judicial remuneration, is an integral part of their status, as well as a guarantee of the implementation of the principle of independence of the judiciary. Thus, the actual and legal delegation by the Parliament of powers, the exercise of which has a decisive influence on the issue of material support of judges, to the executive body is unconstitutional. This legal position is based on the fact that despite the fact that the level of judges' remuneration has been reduced by law, the probable restoration of its state-guaranteed level is legally dependent on the actions of the Cabinet of Ministers of Ukraine.[10]

Based on the analysis of the provisions of Law № 553-IX, the size of the material security reduction does not depend on the actual amount of wages received by representatives of the budget sphere before the introduction of such a restriction. However, in this context, attention should be paid to a certain disproportion of this reduction in relation to judges and other representatives of the budget sphere, as this may be evidence of an encroachment on the independence of judges.[11]

Judges experience the most significant reduction in the level of material support in connection with the adoption of Law № 553-IX, while the level of material support of representatives of the legislative and supreme executive bodies does not change significantly and most employees of budgetary institutions and public authorities do not experience negative consequences in matters of material security in connection with the adoption of Law № 553-IX.[12]

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5 The Law of Ukraine 'On the state budget for 2020' [2020] Vidomosti Verkhovnoi Rady 5/31 <https://zakon.rada.gov.ua/laws/show/294-20#Text> accessed 27 July 2020.

6 The Law of Ukraine 'On Amendments to the Law of Ukraine "On the State Budget of Ukraine for 2020"' [2020] Vidomosti Verkhovnoi Rady 19/126 < https://zakon.rada.gov.ua/laws/show/553-20#Text> accessed 27 July 2020.

7 The Constitution of Ukraine [1996] Vidomosti Verkhovnoi Rady 30/141 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> accessed 27 July 2020.

8 Constitution (n 7).

9 The Law of Ukraine 'On the Judiciary and Status of Judges' [2016] Vidomosti of the Verkhovna Rada 31/545 <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 22 July 2020.

10 Resolution of the Plenum of the Supreme Court №7 of 29 May 2020 http://www.ccu.gov.ua/sites/default/files/4_230_2020.pdf accessed 27 July 2020.

11 Resolution (n 10).

12 Resolution (n 10).

Monitoring the salaries of employees in various fields gives grounds to conclude that Law № 294-IX provides for a disproportionate reduction of judges' remuneration in relation to the material support of other employees of budgetary institutions, which in turn, violates the principle of judicial independence. This conclusion applies both to the quantitative ratio of judges who have been restricted compared to other civil servants and to the proportionality of the restriction: most civil servants' material security is reduced from 5% to 30% and in some cases up to 50%, while all judges suffer a reduction from 50 to 85% .[13]

In this case, in accordance with established international standards for ensuring the status of judges, which are formulated in the conclusions of the Venice Commission and the practice of constitutional courts of other states, remuneration for judges may be reduced, but with a certain set of conditions: 1) it is caused by an emergency; 2) reduction of this level applies to all public sector employees; 3) reduction of the level of judges' remuneration is carried out last (in case of budgetary difficulties, judges' remuneration should be especially protected). That is, the reduction in the level of remuneration cannot be disproportionate and discriminatory.[14]

Throughout the quarantine period, the courts of Ukraine have not stopped performing their jobs.[15] Judicial authorities have been and are considering cases, including those related to violations of quarantine rules, sanitary, hygienic and anti-epidemic rules and regulations provided by the Law of Ukraine 'On Protection of the Population from Infectious Diseases'[16] and other acts of the current legislation, as well as cases of urgent nature, criminal proceedings, complaints and petitions, which are referred to investigating judges.[17]

At the same time, the organization of the work of courts in today's conditions is burdened by the lack of sufficient logistics and necessary funding, as the courts have not received the required number of personal protective equipment against infectious diseases.[18] In the vast majority of cases, these supplies for preventing the spread of infectious diseases for judges and court employees are purchased at their own expense.[19]

Thus, as a result of the legislative changes, the remuneration of all judges, regardless of instance, was significantly reduced, which led to a decrease in the achieved level of guarantees of judges' independence and, consequently, to another violation by

13 Resolution (n 10).

14 Resolution (n 10).

15 Rada Suddiv Ukrainy, 'Rada suddiv Ukrai'ny zvernulasja do kerivnyctva derzhavy utrymatys' vid rishen' shhodo obmezhennja suddivs'koi' vynagorody' ['The Council of Judges of Ukraine appealed to the state leadership to refrain from decisions on limiting judges' remuneration'] 2 April 2020 <http://rsu.gov.ua/ua/news/rada-suddiv-ukraini-zvernulasa-do-kerivnictva-derzavi-utrimatis-vid-risen-so-peredbacaut-obmezenna-suddivskoi-vinagorodi> accessed 27 July 2020.

16 The Law of Ukraine 'On protection of the population from infectious diseases' [2000] Vidomosti of the Verkhovna Rada 29/228 <https://zakon.rada.gov.ua/laws/main/1645-14#Text> accessed 22 July 2020.

17 Appeal of the Council of Judges (n 15).

18 Appeal of the Council of Judges (n 15).

19 During the preparation of this article for publication, there was an unprecedented disconnection of courts from the Internet (see N Mamchenko, 'V sudah problemy z internetom cherez borgy DSA pered Ukrtelekomom' ['Courts have significant problems with the Internet due to debts before Ukrtelecom'] <https://sud.ua/ru/news/publication/174407-niyakogo-vidklyuchennya-ne-vidbudetsya-yak-u-dsa-lishili-sudi-bez-internetu> accessed 27 July 2020) , while the Commercial Court of Kyiv considers the claim of the public joint-stock company 'Ukrtelecom' to the State enterprise 'Information judicial systems' for recovery of UAH 7,262,712.91. In fact, it is a question of means which is owed for the corresponding services the State judicial administration of Ukraine.

the legislator of Art. 126 of the Constitution and disregard of legal positions of the Constitutional Court of Ukraine.[20]

In particular, the Decision of the Constitutional Court of Ukraine of 4 December 2018 № 11-r/2018[21] clearly states that the reduction of the salary of a judge by the legislature leads to a reduction in the amount of judicial remuneration, which, in turn, endangers the guarantee of judicial independence in the form of material support and is a prerequisite for influencing both the judge and the judiciary as a whole.

In its decision of 3 June 2013 № 3-rp/2013, the Constitutional Court of Ukraine[22] stated that any reduction in the level of guarantees for the independence of judges contradicts the constitutional requirement of strict provision of independent justice and the right of every human and citizens to the protection of their human rights and freedoms, because it limits the possibilities of exercising this constitutional right.

In the Decision of 11 March 2020 № 4-r/2020, the Constitutional Court of Ukraine[23] stated that the legislator cannot arbitrarily set or change the amount of a judge's remuneration, using his powers as an instrument of influencing the judiciary.

This indicates that Law № 294-IX in terms of reducing judges' remuneration once again reflects the actions of the legislative branch to reduce the level of judicial guarantees and guarantees of judicial independence in general, and therefore contradicts part one of Art. 126 of the Constitution of Ukraine. The Constitution of Ukraine prohibits discrimination because citizens have equal constitutional rights and freedoms and are equal before the law (Art. 24).[24]

In addition, Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that the enjoyment of the rights and freedoms recognized in this Convention must be ensured without discrimination on any grounds, such as sex, race, color, language, religion, political or other beliefs, national or social origin, belonging to national minorities, property status, birth or other grounds. According to Art. 23 of the Universal Declaration of Human Rights [25], everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

In accordance with paragraph 2 of Part 1 of Art. 1 of the Law of Ukraine 'On Principles of Preventing and Combating Discrimination in Ukraine'26 (hereinafter – the Law

20 Resolution (n 10).

21 Case №11-r/2018 (the Constitutional Court of Ukraine, 4 December 2018) <https://zakon.rada.gov.ua/laws/show/v011p710-18#Text> accessed 27 July 2020.

22 Case №3-rp/2013 (the Constitutional Court of Ukraine, 3 June 2013) <https://zakon.rada.gov.ua/laws/show/v003p710-13#Text> accessed 27 July 2020.

23 Case № 4-r/2020 (the Constitutional Court of Ukraine, 11 March 2020) <https://zakon.rada.gov.ua/laws/show/v004p710-20#Text> accessed 27 July 2020.

24 Resolution (n 10).

25 United Nations, *Universal Declaration of Human Rights* (10 December 1948) <https://www.un.org/en/universal-declaration-human-rights/> accessed 22 July 2020.

26 The Law of Ukraine 'On the principles of preventing and combating discrimination in Ukraine' [2013] Vidomosti Verkhovnoi Rady 32/412 < https://zakon.rada.gov.ua/laws/show/5207-17> accessed 27 July 2020.

on Discrimination), discrimination is a situation in which a person and/or group of persons on the grounds of race, color, political, religious and other beliefs, sex, age, disability, ethnic and social origin, nationality, marital and property status, place of residence, linguistic or other characteristics that were, are and may be valid or presumed, is restricted in the recognition, exercise or realization of rights and freedoms in any form established by this Law, except in cases when such a restriction has a legitimate, objectively justified purpose, the ways to achieve which are appropriate and necessary.

Art. 4 of the Law on Discrimination applies to relations between legal entities of public and private law, whose location is registered in the territory of Ukraine, as well as individuals residing in the territory of Ukraine. This Law applies, in particular, to the following areas of public relations: justice; labour relations, including the application of the principle of reasonable accommodation by the employer.

Given the above, we conclude that the reduction of judges' remuneration in the conditions of quarantine imposed on the territory of Ukraine is a manifestation of discrimination in the field of labour.

In this regard, the Plenum of the Supreme Court by its resolution №7 of 29.05.2020[27] appealed to the Constitutional Court of Ukraine with a constitutional petition to verify the constitutionality of laws and regulations, which reduced the judge's remuneration during quarantine. The epigraph we have chosen for this article is useful for further research about the question of the fairness of our justice system and the democratic rule of law that we are building.

3. FINANCIAL INDEPENDENCE OF THE JUDICIARY OR JUDGES ONLY?

The primary duty of the judiciary to uphold the rule of law is well understood, therefore, the precondition for the ability to do it, namely the independence of each judge, is mandatory.[28] But the principle of judicial independence, of course, applies to all judges in the state, not just to judges of higher courts or judges who hear criminal cases.[29] In Canada, this principle also applies to judicial justices of the peace. In our opinion, this example makes it possible to extend this principle to court assistants, who perform an important function, so guarantees of their independence, including the financial, ensure the proper administration of justice.

Pursuant to part one of Art. 157 of the Law of Ukraine 'On the Judiciary and the Status of Judges',30 each judge has an assistant (assistants), the status and conditions of whom are determined by this Law and the Regulation on the Assistants of Judges, approved

27 Resolution (n 10).

28 Jack Beatson, 'Judicial Independence and Accountability: Pressures and Opportunities' (2008) 17 Nottingham LJ 1.

29 Fabien Gelinas and Jonathan Brosseau, 'Judicial Justices of the Peace and Judicial Independence in Canada' (2016) 20 Rev Const Stud 213.

30 Law (n 9).

by the Council of Judges of Ukraine[31] (hereinafter – Regulation). The legal status and the conditions of activity of assistant judges are determined by the Law of Ukraine 'On the Judiciary and the Status of Judges'[32] and Art. 92 of the Law of Ukraine 'On Civil Service',[33] regulations on remuneration of patronage services and this Provision.

The positions of assistant judges belong to the positions of patronage service, which are not covered by the Law of Ukraine 'On Civil Service,'[34] except for Art. 92.

The assistant of a judge is an employee of the patronage service in the court, which ensures the execution of the judge's powers to administer justice.[35]

In addition, Art. 66 of the CPC of Ukraine[36] defines the procedural status of an assistant of a judge and his/her responsibilities, in particular, the assistant of a judge provides the preparation and organizational support of the trial. The assistant of a judge: 1) participates in the registration of court cases, prepares draft requests letters and other materials related to the consideration of a particular case, executive documents on behalf of the judge; 2) draws up copies of court decisions to be sent to the parties to the case and other participants in the case in accordance with the requirements of procedural law, controls the timeliness of sending copies of court decisions; 3) executes other instructions of the judge related to the organization of court proceedings.

The decision of the Council of Judges of Ukraine №21 of 18 May 2018 approved *the Regulation on the Assistants of Judges*,37 which determines the uniform principles and conditions of activity and the legal status of a person holding the position of assistant judge.

Section III of the above regulation defines the Tasks, Rights and Duties of the Assistant of a Judge. An assistant of a judge has the right to enjoy the rights and freedoms guaranteed to the citizens of Ukraine by the Constitution and laws of Ukraine:

- to receive documents and information necessary to perform their duties of court administration at the place of work;
- to use information databases, telecommunication networks of the relevant court in the prescribed manner;
- to make proposals to the judge on the organization of their work;
- to participate in conferences, seminars, round tables, forums, other scientific and practical events in agreement with the judge, and to undergo internships in the relevant departments of government agencies;
- to take part in meetings, staff meetings and other similar events of the relevant court;

31 Regulation on the Assistants of Judges [2018] <https://zakon.rada.gov.ua/rada/show/vr021414-18#Text> accessed 27 July 2020.

32 Law (n 9).

33 The Law of Ukraine 'On Civil Service' [2016] Vidomosti Verkhovnoi Rady 4/43 <https://zakon.rada.gov.ua/laws/show/889-19> accessed 27 July 2020.

34 Law (n 33).

35 Regulation (n 31).

36 Civil Procedure Code of Ukraine of 18 March 2004 № 1618-IV (with changes and additions) <https://zakon.rada.gov.ua/laws/show/1618-15> accessed 27 July 2020.

37 Regulation (n 31).

- to improve their professional level in the system of training and advanced training of court staff;
- respect for personal dignity, fair and respectful attitude towards themselves by managers, employees and citizens;
- for remuneration in accordance with current legislation;
- for social and legal protection in accordance with their status.

The assistant of a judge plays an important role in the administration of justice, in particular, he/she selects the acts of law and case law that are necessary for the consideration of a particular case; participates in the preliminary preparation of court cases for consideration, in the registration of court cases, prepares draft court decisions, inquiries, letters, other materials related to the consideration of a particular case on behalf of the judge; makes copies of court decisions for sending to the parties in the case and other participants in the case in accordance with the requirements of procedural law, controls the timeliness of sending copies of court decisions; monitors the timely conduct of expert institutions appointed in cases of expert research, the timely implementation of internal affairs decisions of the judge on coercive cause, and in case of non-compliance with such decisions - prepares drafts of relevant reminders, etc.; prepares draft court orders on the execution by courts of other states of certain procedural actions on the service of court documents in civil, commercial, administrative, criminal cases, on the extradition of offenders to the territory of Ukraine; promotes the execution of orders of foreign courts in accordance with the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, other international legal agreements of Ukraine on legal assistance, ratified by the Verkhovna Rada (Parliament) of Ukraine; carries out other instructions of the judge concerning the organization of consideration of court cases.

The issue of drafting court decisions and many other functions of judicial assistants on behalf of a judge is quite controversial from the point of view of both the Recommendations[38] and the practice of national courts in Ukraine.[39]

It is worth noting that for a long time assistants of judges did not have any procedural status and performed a lot of the above functions without proper regulation. At the same time, it is difficult to deny the provisions set out in the Recommendations that the role of assistant of a judge derives from the role of judge and assistants of judges must support rather than replace judges in the performance of their functions.

According to the Regulations, an assistant of a judge may, on behalf of a judge, exercise the powers of the secretary of the court session in his/her absence in case of impossibility to replace him/her with another secretary; coordinate the work of the secretary of the court session and provide him/her with methodological and practical assistance, including ensuring the recording of the trial by technical means; control the receipt and attachment of relevant materials to court proceedings; check the timeliness of drawing

38 Council of Europe, 'Opinion No. 22 on the role of judicial assistants' 2019 (6) CCJE <https://zib.com.ua/files/Opinion-22CCJE-Uk.pdf> accessed 27 July 2020.

39 O Dovidna, 'KRES poradyla trymaty pomichnykiv podali vid rishen ta chastishe yih zvilnjaty' ['The CCJE advised to keep assistants away from decisions and to dismiss them more often'] 2019 50 (1452) Zakon i biznes <https://zib.com.ua/ua/140533-pomichnikiv_suddiv_slid_trimati_podali_vid_rishen_ta_chastis.html> accessed 27 July 2020.

up the minutes of court hearings in cases pending before a judge; exercise control over the timely delivery to the court office and/or court archives of court cases considered under the chairmanship of the judge by the court session secretary; carry out the preparation and registration of statistical data; carry out the generalization of judicial practice, generalize about quantity and the state of consideration by the judge of judicial cases of all categories; carry out the analysis of the cancelled and changed decisions of the judge after a review of cases by courts of appellate and cassation instances; sign non-procedural documents of informational and organizational nature; carry out other instructions of the judge concerning the organization of consideration of court cases.

Moreover, the assistant of a judge is obliged to timely and efficiently perform the instructions given to him/her; to adhere to the terms for preparation of documents and execution of orders; to constantly improve their professional level and qualification; to take care of court property; not to allow violations of human and civil rights and freedoms in the performance of their official duties.

Given the above, taking into consideration the importance of the tasks assigned to the assistant of a judge, the role of the assistant of a judge in the administration of justice should not be underestimated.

At the same time, official salary of an assistant of a judge of a local general court in 2020 is UAH 9,921 (321 euros at the official exchange rate of the National Bank of Ukraine, hereinafter – OER NBU [40]), which is established by the Resolution of the Cabinet of Ministers of Ukraine of 24 December 2019 № 1112 'On Terms of Remuneration of Employees of State Bodies Not Covered by the Law of Ukraine "On Civil Service"'.[41]

In our opinion, the specified salary of an assistant of a judge is disproportionate to the salary of a local court judge.

The amount of a judge's remuneration is determined by Art. 135 of the Law of Ukraine of 2 June 2016 'On the Judiciary and the Status of Judges',[42] according to which the basic amount of a judge's salary is as follows[43]:

1) For judges of a local court – 30 SMABP;
2) Judges of the Court of Appeal, the High Specialized Court – 50 SMABP;
3) The salary of judges of the Supreme Court is 55 SMABP. This item is declared unconstitutional according to the Decision of the Constitutional Court of Ukraine №4-r/2020 of 11 March 2020,[44] and therefore the basic salary of a judge of the Supreme Court is 75 SMABP.

40 National Bank of Ukraine, 'Official Exchange Rates' <https://bank.gov.ua/ua/markets/exchangerates> accessed 19 July 2020.

41 The Resolution of the Cabinet of Ministers of Ukraine 121112 of 24 December 2019 'On the conditions of remuneration of employees of state bodies, which are not covered by the Law of Ukraine "On Civil Service"' <https://zakon.rada.gov.ua/laws/show/1112-2019-%D0%BF#Text> accessed 27 July 2020.

42 Law (n 9).

43 The amount of each subsistence minimums for able-bodied persons is set for 1 January of the calendar year, hereinafter – SMABP.

44 Case №4-r/2020 (Constitutional Court of Ukraine, 11 March 2020) <https://zakon.rada.gov.ua/laws/show/v004p710-20#Text> accessed 22 July 2020.

Thus, the absolute salary of a judge of the court of first instance in 2020 is UAH 63,060 (2017 euros at the OER NBU.)[45]

In accordance with Part 1 of Art. 144 of the Law of Ukraine 'On the Judiciary and the Status of Judges', as of 1 January 2015,[46] the sizes of salaries of court staff, the State Judicial Administration of Ukraine staff, the High Qualifications Commission of Judges of Ukraine staff, the National School of Judges of Ukraine staff, their level of social protection is established by law and may not be less than the relevant categories of civil servants of the legislative and the executive powers. Thus, the size of the official salary of the employee of the court staff (this position belongs to the sixth category of positions of civil servants) is established at the rate of 30 percent of the official salary of the judge of local court. Salaries of court staff, whose positions are assigned to each subsequent category of position of civil servants, are set at a factor of 1.3 in proportion to the salaries of court staff whose positions are assigned to the previous category of civil servants.

The first part of Art. 144 is supplemented by the second paragraph in accordance with the Law № 1697-VII of 14 October 2014 [47]. These provisions of the law entered into force on 26 October 2014.

In this case, it should be noted that in accordance with Part 3 of Art. 129 of the Law of Ukraine 'On the Judiciary and the Status of Judges', as amended on 1 January 2015, the salary of a judge of a local court is set at 10 minimum wages specified by law.

Thus, the amount of the minimum wage set in 2014 was UAH 1,218.00 (equals to 39 euros at the OER NBU), respectively, the size of the salary of a local court judge was UAH 12,180.00 (389 euros at the OER NBU), and accordingly, the amount of the official salary of a court employee classified in the 6th category of a civil servant should be UAH 3,654.00. (116 euros at the OER NBU), and the salary of a court employee classified in the 5th category of civil servant positions should be UAH 4,750.20 (152 euros at the OER NBU it is).

At the same time, as of 12 February 2015, the salary of an assistant of judge, a civil servant of the 5th category, was only UAH 1,218.00 (39 euros at the OER NBU).

Disagreeing with the amount of salary and the illegality of actions of the Cabinet of Ministers of Ukraine, an assistant of a judge filed a lawsuit to the District Administrative Court of Kyiv, where he asked to recognize as illegal the inaction of the Cabinet of Ministers of Ukraine concerning bringing resolution № 268 of 9 March 2006 'On Structure and Conditions of Remuneration of Staff of Executive Authorities, Prosecution Office Bodies, Courts and Other Bodies' in compliance with Part 1 of Art. 144 of the Law of Ukraine 'On the Judiciary and the Status of Judges', as amended on 1 January 2015, and in compliance with Part 1 of Art. 147 of the Law of Ukraine 'On the Judiciary and the Status of Judges', as amended on 28 March 2015. He also asked to oblige the Cabinet of Ministers of Ukraine to bring the resolution in line with the

45 National Bank of Ukraine, 'Official Exchange Rates' <https://bank.gov.ua/ua/markets/exchangerates> accessed 19 July 2020.

46 Law (n 9).

47 The Law of Ukraine 'On the Prosecution Office' [2015] Vidomosti Verkhovnoi Rady 2-3/12 <https://zakon.rada.gov.ua/laws/show/1697-18/ed20141014#Text> accessed 27 July 2020.

Law of Ukraine 'On the Judiciary and the Status of Judges', to oblige recalculation and payment of the salary.

The claims were substantiated by the fact that the Cabinet of Ministers had committed unlawful inaction in failing to comply with the Law of Ukraine 'On the Judiciary and the Status of Judges'.

By the decision of the District Administrative Court of Kyiv of 31 July 2015 and the decision of the Kyiv Administrative Court of Appeal of 24 September 2015, the claim was partially satisfied. The courts found the inaction of the Cabinet of Ministers of Ukraine regarding the failure to bring the resolution in line with the Law illegal and it was obliged to bring the resolution in line with the law, while the rest of the claims were denied.

The previous court decisions in the case were revoked, and the case was sent for a new trial to the District Administrative Court of Kyiv according to the decision of the Supreme Administrative Court of Ukraine of 16 November 2016 № K/800/43643/15, № K/800/43720/15,.

The claims were partially satisfied, namely, the court decided to recognize the illegality of inaction of the Cabinet of Ministers of Ukraine concerning untimely bringing the resolution in line with the Law of Ukraine 'On Judiciary and Status of Judges' according to the decision of the District Administrative Court of Kyiv of 16 January 2018.

The refusal was motivated by the fact that the Government of Ukraine did not make appropriate changes to the Resolution №268, which regulates the remuneration of employees of courts and other bodies, in order to bring it in line with the legislature. Accordingly, at the time of the disputed legal relationship there was no mechanism for implementing the provisions of the Law of Ukraine 'On the Judiciary and the Status of Judges'.

By the decision of the Kyiv Administrative Court of Appeal of 24 April 2018, the said decision of the District Administrative Court of Kyiv of 16 January 2018 was left unchanged.

Only in 2020 the Supreme Court considered the cassation appeals of the parties and ruled that the decision of the District Administrative Court of Kyiv of 16 January 2018 and the decision of the Kyiv Administrative Court of Appeal of 24 April 2018 in case №826/4982/15 should remain unchanged.

The Supreme Court agreed with the conclusions of the courts of previous instances that from 26 October 2014 to 9 September 2015 the Cabinet of Ministers of Ukraine did not amend Resolution № 268 on wage conditions, including salaries of court staff. The Laws of Ukraine 'On State Budget of Ukraine for 2014' and 'On the State Budget of Ukraine for 2015' did not provide for expenditures for the implementation of the provisions of the second paragraph of the first part of Art. 144 of Law № 2453-VI and part one of Art. 147 of the same Law as amended on 28 March 2015. State Court Administration, as the main administrator of budget funds, had no legal grounds for recalculation and payment of salaries to court staff outside the state budget expenditures for such employees in amounts other than those established by the Cabinet of Ministers of Ukraine.

The salary of an assistant of a judge of a local general court in 2019 was UAH 8,320 (266 euros at the OER NBU), however, the salary of a local court judge in 2019 was UAH 60,031 (1920 euros at the OER NBU).

The salary of an assistant judge of a local general court in 2018 was UAH 7,900 (253 euros at the OER NBU), while the salary of a local court judge in 2018 was UAH 44050 (1409 euros at the OER NBU).

Compared to 2018, in 2019 the expenditures for the payment of judges' fees increased by almost UAH 2,369.9 million (75.8 million euros at the OER NBU), or by 90 percent. The increase in expenses for the payment of judges' remuneration is due to an increase in the amount of:

- subsistence level for able-bodied persons from UAH 1,762 to UAH 1,921 (used as a calculated value for determining judges' salaries);
- salaries of judges who have passed the qualification assessment up to 25 SMABP in local courts and up to 40 SMABP in appellate courts (against 20 and 30 respectively the previous year[48]);
- salaries of judges who did not pass the qualification assessment, up to 15 SMABP in local courts and up to 16.5 SMABP in appellate courts (against 10 and 11 last year).[49]

In this regard, the planned expenditures for the payment of salaries of court staff, with a constant number of a staff decreased compared to last year by 1612.7 million UAH (51.6 million euros at the OER NBU), or by 30.2%.

The average monthly salary in 2018 of court staff was UAH 18,542 (593 euros at the OER NBU) while the planned labour costs provide for the average monthly salary of court staff in 2019 at the rate of UAH 13,100 (419 euros at the OER NBU).[50]

Such a disproportion between a judge's remuneration and the assistant of judge's salary has been observed for many years, as exemplified by the case we have analyzed. This indicates the lack of a single approach to determining the financing of salaries of all employees of the judiciary and therefore – lack of a single concept of financial independence of the judiciary in the state.

4. CONCLUDING REMARKS

Both examples, analyzed in parts two and three of our study, show that the funding of the judiciary in Ukraine is inadequate. There is no stability, especially concerning permanent and sufficient financial security of judges, as well as a decent salary for work performed. The amount of remuneration does not correspond to those functions that are performed by court staff to promote the proper administration of justice.

48 Law (n 9) para 24 of Section XII.

49 Decision of the Constitutional Court of Ukraine of 04 December 2018 № 11-p/2018 in case № 1-7/2018 (4065/15) on the constitutional petition of the Supreme Court of Ukraine on compliance of the Constitution of Ukraine (constitutionality) with the provisions of parts three and ten of Art 133 of the Law of Ukraine of 7 July 2010 № 2453-VI 'On the Judiciary and the Status of Judges' as amended by the Law of Ukraine of 12 February, 2015 № 192-VIII); a significant increase in the number of judges who passed the qualification assessment.

50 Clarification of the State Judicial Administration of Ukraine on the procedure of forming the wage fund for 2019 <http://rsu.gov.ua/ua/news/derzavna-sudova-administracia-ukraini-rozasnila-poradok-formuvanna-fondu-oplati-praci-na-2019-rik> accessed 27 July 2020.

The example of the reduction of judges' remuneration in the conditions of quarantine imposed on the territory of Ukraine is a clear example of the inadequate guarantees of financial independence of the judiciary in Ukraine. This manifested itself in an unusual situation, which was almost unpredictable, but is likely to happen again in the future. It is an example of the instability and inherent dependence of judicial funding, which influences an access to justice in this state greatly.

At the same time, there has been an imbalance in determining the judge's remuneration and the judge assistant's salary for years, which indicates the existence of a well-established disproportionate approach to the financing of the judiciary. This we may title a consequence of a view, outside judiciary itself.

The different types of financing of the judiciary described by Caroline Expert-Foulquier can be used in Ukraine, in particular, it is about 'a system, that establishes financial autonomy, i.e. the possibility for a court to decide on the resources allocated to its jurisdiction and the courts it administers, and the guarantee of a certain level of resources provided. Participation in financial decision-making is indeed possible.' 'Financial independence can be found in a system where the resources are determined and adopted by the Council for the Judiciary or a court itself.'51

It is extremely difficult to ensure the balance of powers in the state, but in our opinion, it is possible to keep them from directly influencing each other by introducing the financial autonomy of the judiciary, which will allow it to manage the budget allocated for its operation independently. Within this budget, funds may be distributed as required by the judiciary itself, in particular, to ensure a balance between the salaries of court staff.

51 Caroline Expert-Foulquier, 'The Financial Independence of the Judiciary in France' (2020) 11 IJCA 1.

ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Access to Justice in Eastern Europe,
Issue 2/3 (7) 2020
http://ajee-journal.com
10.33327/AJEE-18-3.2-3

E Silvestri 'Italy and COVID-19: Notes on the Impact of the Pandemic on the Administration of Justice' *(2020) 2/3 (7) Access to Justice in Eastern Europe 148-155.*
10.33327/AJEE-18-3.2-3-n000031

ITALY AND COVID-19: NOTES ON THE IMPACT OF THE PANDEMIC ON THE ADMINISTRATION OF JUSTICE*

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The COVID-19 pandemic has forced governments around the world to adopt special measures to limit the spread of the contagion. In the field of the administration of justice, social distancing and other health safety measures have brought about alternatives to the normal management of judicial business. This essay presents an overview of the solutions devised by the Italian authorities to handle civil disputes in the time of COVID-19.

* *Received: 10.08.2020. Revised: 24.08.2020. Approved: 26.08.2020*

Key words: COVID-19, remote hearing, online adjudication, written briefs, online mediation.

1. INTRODUCTION

The year 2020 will be remembered as a true annus horribilis. No one anticipated a global pandemic of Biblical proportions and its serious consequences for our societies, not to mention for the world economy. According to the International Monetary Fund, we are facing an unprecedented global recession which in its severity can be compared only to the Great Depression of the 1930s.[1]

In this alarming situation, it is almost unavoidable to turn – as a sort of consolation – to literary accounts of pandemics that afflicted humanity in the past, in order to see whether the modern world is faring better in dealing with a similar danger. Let us consider what Thucydides wrote about the Plague of Athens of 430 B.C.:

> It is said, indeed, to have broken out before in many places, both in Lemnos and elsewhere, though no pestilence of such extent nor any scourge so destructive of human lives is on record anywhere. For neither were physicians able to cope with the disease, since they at first had to treat it without knowing its nature, the mortality among them being greatest, because they were most exposed to it, nor did any other human art avail. And the supplications made at sanctuaries, or appeals to oracles and the like, were all futile, and at last men desisted from them, overcome by the calamity.[2]

Could we find words better than these to describe what has happened as COVID-19 has spread across the globe hitting country after country, while the scientific medical community confesses that no effective cure is currently available? Thucydides tells us the Athenians were not successful in dealing with the plague nor in mitigating its effects on their society.

For ourselves, we all continue to live under the many different measures adopted by our national governments in their efforts to mitigate the effects of COVID-19. Italy opted for a strict lockdown that initially centered on limited areas, but later was extended to the entire country. As a consequence, freedom of movement was severely restricted and non-essential economic activities were shut down from early March to early May. The lockdown applied to the judicial business of Italian courts, too, which necessitated the adoption of special measures for the management of pending cases.

This essay presents an overview of the special measures taken with principal reference to civil and commercial cases, mindful though that looming in the background is the

1 According to the document titled *World Economic Outlook Update, June 2020: A Crisis Like No Other, An Uncertain Recovery* (available at <https://www.imf.org/en/Publications/WEO> accessed 24 August 2020), the growth of the global economy in 2020 is projected at –4.9 percent. The same source emphasizes that, 'The COVID-19 pandemic has had a more negative impact on activity in the first half of 2020 than anticipated', also maintaining that, 'The adverse impact on low-income households is particularly acute, imperiling the significant progress made in reducing extreme poverty in the world since the 1990s.'

2 Thucydides, *History of the Peloponnesian War*, Book 2 (translation by Charles Forster Smith for the Loeb Classical Library edition, William Heinemann and Harvard University Press 1919, rev edn 1928) 341.

risk of another lockdown, since as of mid-August Italy has seen a worrying surge in the contagion that could further delay the return to the normal activity of the judicial system.

2. JUDICIAL PROCEEDINGS IN THE TIME OF COVID-19

As a consequence of the rapid and uncontrolled spread of COVID-19, since February 2020 the Italian Government has adopted a series of statutory instruments aimed at enforcing the recommendations issued by the World Health Organization with a view to containing the tragic effects of the pandemic. The statutory instruments address a variety of subjects, which detracts from their clarity and brings about countless problems in their interpretation. This may be due to the pressure imposed by the escalation of the pandemic for quick action to be taken, likely making it difficult to pay close attention to the subtleties of legislative drafting. Be that as it may, it is worth outlining a number of the rules specifically affecting the administration of justice, whether civil, criminal or administrative.[3]

One of the first and most comprehensive statutory instruments enacted by the Government contained a number of provisions concerning civil justice. This instrument laid down different rules for two different timeframes. The first ran from 9 March through 15 April. During this timeframe, all hearings were postponed *ex officio* to a date later than 15 April. All deadlines provided for by the laws in force regarding the performance of any activities concerning adjudication were suspended. If a deadline was set to begin to run during the suspension period, the deadline would instead begin to run only at the end of the suspension period. Similarly, all deadlines concerning out-of-court mediation and assisted negotiation (when they are mandatory and supposed to take place within specific deadlines) were suspended.

A few exceptions to these rules were contemplated. They concerned urgent matters such as alimony and child support cases, as well as the adoption of interim measures for the protection of fundamental rights, just to mention a few examples specifically listed. There was also a general clause according to which suspension did not apply to proceedings in which delay could cause 'serious harm' to the parties to the case, according to an evaluation of the circumstances of the dispute at hand made by the judge who was presiding over the court before which the case was pending.

The second timeframe was scheduled to run from 16 April through 30 June. During this period other steps could be taken: in particular, the heads of the judicial offices were granted the power to implement the measures that appeared necessary with a view to guaranteeing that all the health safety requirements laid down by the Ministry of Health were complied with. For instance, access to the courthouses could be limited, and new guidelines for the management of proceedings were supposed to be announced.

3 References to the extraordinary measures adopted by the Italian Government in the field of the administration of justice are mainly in Italian, which makes it unhelpful to cite them in an essay intended for an international audience. Among the very few reports written in English, see Massimiliano Blasone, 'Law Must Go On. The Reaction of Italian Civil Justice to the COVID-19 Epidemiological Crisis' [23 April 2020] <https://www.coe.int/en/web/cepej/compilation-comments#Italy> accessed 24 August 2020.

As far as virtual hearings were concerned, from the reading of the statutory instrument it seemed that they could be authorized only after 10 April, that is to say, during the second timeframe. In reality, virtual hearings were scheduled even earlier, at least for urgent matters and when interim measures were requested. According to the relevant rules, virtual hearings could take place only provided that the equality of arms of the parties was guaranteed and insofar as the personal presence of the parties themselves was not required. The technical provisions issued by the Ministry of Justice provided that the programs to be used for virtual hearings were either Skype for Business or Microsoft Teams, keeping in mind that both programs had to employ infrastructures and areas of data centers that were restricted to the Ministry of Justice.

Later in the spring, new rules were laid down, providing that all deadlines concerning civil, criminal and administrative procedures were extended to 11 May. The entering into force of a few statutes governing bankruptcy and insolvency procedures was postponed to 1 September, 2021.

As far as hearings in civil cases were concerned, if the case fell within the list of matters that were deemed urgent and could not be delayed, the hearing could take place via remote connection, provided that the attendance of only the attorneys for the parties was required (meaning that the personal attendance of the parties themselves could be dispensed with). In any other case (and always provided that the attendance of only the attorneys for the parties was required), the hearing would be substituted with an online exchange of written briefs whose contents had to be limited to the petitions and the conclusions of law advanced by the parties. The order would be issued by the judge in charge of the case later on, meaning outside the hearing.

The High Council for the Judiciary prepared several protocols that courts and local bar councils could sign laying down the rules applicable to hearings conducted via remote connection and to hearings substituted with an online exchange of written briefs. More protocols were drafted by judges presiding over courts of first instance for the management of cases. The basic idea was that, at least in times of crisis and mandatory social distancing, adjudication would have to rely more and more on written briefs and motions exchanged via the Web, since orality was expected to be confined to the appearance of lawyers and judges thanks to the two versions of application software that was authorized for conducting hearings via remote connection. Of course, a more extensive use of the rules governing online civil cases presupposes that lawyers, bailiffs, court clerks and judges can master these very rules, which is not always the case. Furthermore, the state of cabling throughout the country and, in particular, the fiber optic wiring, is not optimal in a number of areas, most of all in the southern regions of the country. When the emergency is finally over, it will be necessary to reconsider the whole national policy in the field of IT innovation for the strengthening of the technological devices designed to allow online adjudication and mediation, smart working, teleworking, distance education and the like, so as to be ready should a situation similar to the one we face today with the COVID-19 pandemic occur in the future.

Later on still, new rules were adopted with a view to relaxing the stringent limits imposed by the lockdown. Italian courthouses officially reopened on 12 May. This so-

called 'Phase 2' in the administration of justice did not begin in a successful way, and the day after its start the Italian press emphasized how the chaotic situation caused by the overlapping of rules often inconsistent, if not contradictory was exposing the tragic frailty and backwardness of the Italian justice system.

All deadlines had been suspended until 12 May. On 12 May, a new window of time started. According to the new rules, judicial activities could resume and continue to be carried out until July 31. It is important to underline that for the whole month of July deadlines and any proceedings not considered urgent were stayed. This is not one of the new rules enacted for the pandemic emergency, rather it is a rule that has been in force for decades. In practice, the normal operation of the judicial machinery is put on hold for the summer month of August and is supposed to resume on 1 September. This holds true most of all for new cases, the ones in which the first hearing (which, according to Italian civil procedure, is the first contact between the parties and the judge in charge of the dispute) has not been scheduled yet. In practice, if you had commenced a case on May 18, the first hearing would be scheduled and expected to take place only after September 1, with the specific date unknown, at least for the time being.

For cases already pending, the new rules entrusted the judge presiding over the court with the power to adopt all the organizational measures necessary for the management of the court's caseload, in concert with the measures other authorities are responsible for, with regard to maintaining the necessary public health guidelines inside the courthouse. Among the organizational measures adopted, the most important ones have been the mandatory protocols devised by the presiding judge and the local bar associations. And these very protocols have been the major source of inefficiency and confusion. The Italian lawyers' professional association counted no fewer than 200 different protocols adopted for the management of different types of disputes, according to both the subject matter and the court in charge.

Browsing through these protocols, one understands that essentially the development of pending cases takes place in two forms, that is – remote hearings and the so-called 'paper hearing', which is a fiction, since there is only an exchange of written briefs and motions submitted through the technologies available under what Italians call PCT (*processo civile telematico*, in other words 'online adjudication').

As mentioned above, remote hearings can take place via two platforms authorized by the Ministry of Justice: Skype for Business and Microsoft Teams. The incomprehensible rule is that the judge must be physically present in his or her office, while the parties and their lawyers may be elsewhere.

3. REMOTE HEARINGS: THE WAY FORWARD?

The pandemic has caused the closing of courthouses virtually around the world. The traditional, 'physical' court hearing has given way to a variety of alternatives with mixed results, as one can learn from visiting an interesting website named 'Remote Courts Worldwide', managed by Professor Richard Susskind.[4]

4 The site is available at <https://remotecourts.org/> accessed 2 August 2020. The site is constantly updated with information added from countries across the globe.

As far as Italy is concerned, many specific rules concerning the development of remote hearings have been enacted, and one could describe extensively the details concerning the structure of the briefs and motions of the so-called 'paper hearings'. This kind of analysis, though, would be useful only for Italian legal professionals, who – in fact – can rely on quite a number of essays, commentaries, posts on social media and blogs devoted to the subject.[5]

Two points are worth emphasizing. First, the negative attitude of many 'insiders' (whether scholars, attorneys or judges) towards the virtualization of justice, which is considered acceptable in an emergency, but repugnant if intended to become the new normal. Second, remote hearings seem to give rise to a number of issues. To start with, there are many technical challenges owing to the fact that different areas of Italy have different levels of access to IT. But the real challenge has to do with the principles of open justice and public access to the courts, both enshrined in the Italian Constitution. The limitations these principles suffer are due to the emergency situation that Italy, like many other countries, is experiencing, but many are afraid that what is presented as a temporary restriction in the individual enjoyment of fundamental liberties and rights may become a permanent feature of our society.

In reality, what one may consider the most serious shortcoming in the public debate in the time of COVID-19, is the virtually exclusive concern given to what is happening right now, without much thought at all given to the future. And the future does not look bright. In the months to come, the courts will almost certainly face a flood of new cases, and no one seems to be paying serious attention to that. As a matter of fact, one can hardly find a single sentence written hinting at the problem or alluding to possible strategies to cope with the approaching high volume of new lawsuits. In this regard, this author's opinion is that legislators should devise new procedures devoted to the disposition of COVID-19-related civil and commercial disputes. I suppose that changes in substantive law could help reduce the number of incoming cases, at least in some matters. So far, one of the first statutory instruments enacted at the outset of the pandemic provided that if compliance with the measures imposed as mandatory in order to contain the pandemic made the duly performance of contract obligations impossible or delayed, the defaulting party could appeal to *force majeure* and be exonerated from any responsibility. In spite of that, one may argue that the issue whether *force majeure* clauses, as well as hardship clauses, become operational in the context of epidemics or pandemics is quite controversial, most of all if the clause generically refers to events or circumstances beyond the parties' reasonable control. This means that determining whether the wording of the clause covers issues arising from the COVID-19 pandemic is a question of interpretation and is strictly fact-specific. And this could be the source of numerous new disputes, something that Italian courts, already overburdened, could not manage.

5 A recent, comprehensive study of the available alternatives to traditional hearings is offered in Antonio Didone e Francesco De Santis (a cura di), *Il processo civile solidale. Dopo la pandemia* (Wolters Kluwer Italia 2020).

4. IS ADR A VIABLE SOLUTION?

The only saving grace to be found in the debate on how to face the crisis of formal justice due to the restrictions imposed by the pandemic is a renewed interest in mediation and collaborative law. As far as mediation is concerned, if all the parties agree, then it can be held online with remote meetings. This author feels compelled to point out that she is in favor of a more extensive use of mediation strictly as a tool to reduce the caseload of the courts, since she does not nurture any illusory belief in the cathartic power of transformative or humanistic mediation. In other words, mediation appears to be a practical tool suitable for use in dealing with the elevated number of COVID-19-related disputes.

Specifically, as far as online mediation is concerned, 'digital immigrants' such as this author (as opposed to the 'digital native')[6] are inclined to view online mediation with a good measure of skepticism. The rules allowing online mediation only with the parties' consent, not only in the emergency period (meaning until July 31) but even afterwards, do not say anything about the commercial digital platforms that can be used (in light of the fact that not many mediation centers have established their own platforms). It is reasonable to consider that the same platforms authorized for remote court hearings (Skype for Business and Microsoft Teams) could work for mediation, too. Of course, one may raise a few concerns regarding online mediation. First of all, it is important to demonstrate the parties' affirmative agreement to the use of this particular type of mediation and all its implications. It is also imperative to ensure that the technology used allows all participants to feel secure about the confidentiality of the information they disclose. From a practical standpoint, it is advisable that a breakout room, separate from the general virtual meeting room, is set up and used for caucus proceedings. Finally, for online mediation, there are a number of technical problems to consider, such as the signature of the agreement reached, a signature which can only be digital, with all the problems connected with the different kinds of what we generically call digital signature.

This past June, mandatory mediation was extended to cases concerning failure to comply with contractual terms (or delay in compliance) when the conduct of the defaulting debtor was caused by the duty to abide by the rules laid down with a view to containing the spread of COVID-19. In other words, disputes arising out of breach of contract cannot be brought to court unless the parties have previously attempted to negotiate a settlement agreement through an out-of-court mediation procedure, provided that the defaulting debtor can prove that his behavior was justified by the necessary compliance with the rules issued for infection prevention and control. It is still too early to make an assessment as to the effectiveness of this new rule. Hopefully, it will turn out to be useful to cope with the anticipated torrent of COVID-19-related disputes, even though it is a

6 It is well known that there is a so-called digital divide between people who were born before personal computers and IT technologies became popular and widely used, and those who were born afterwards and can effortlessly master even the most advanced technologies: the former are called 'digital immigrants' as opposed to the latter who are known as 'digital natives': Marc Prenskye, 'Digital Natives, Digital Immigrants' [2001] <https://www.marcprensky.com/writing/Prensky%20-%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf> accessed 24 August 2020.

rule of thumb that mediation can be made mandatory, but this does not mean that the parties will commit themselves to finding common ground so as to put an end to their dispute with a mutually acceptable settlement.[7]

5. CONCLUSION

The future is a *terra incognita*. No one can confidently predict whether the pandemic will loosen – or tighten – its grip on our societies in the months to come. Even if the situation improves, and hopefully it will, life may not be quite the same as before, and that holds true in the field of justice too.

7 In Italy, for the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters the legislators chose to make mediation mandatory in a wide range of cases. The mandatory aspect of mediation means that adjudication cannot begin unless the parties have made an attempt at mediation before one of the mediation providers certified by the Ministry of Justice. If adjudication is begun in spite of the duty to attempt mediation, the judge in charge of the case will stay the proceeding and set a deadline for the appearance of the parties before a mediator; if the parties fail to comply, the case is rejected. Mediation becomes mandatory even when the court orders the parties of a pending adjudication to attempt mediation. On mediation in Italy, see Elisabetta Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 Netherlands-Vlaams Tijschrift voor Mediation en Conflictmanagement 29.

ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Access to Justice in Eastern Europe,
Issue 2/3 (7) 2020
http://ajee-journal.com
10.33327/AJEE-18-3.2-3

V Vėbraitė 'Impact of the COVID-19 pandemic on court proceedings in Lithuania' *(2020) 2/3 (7)*
Access to Justice in Eastern Europe 156-159.
10.33327/AJEE-18-3.2-3-n000032

IMPACT OF THE COVID-19 PANDEMIC ON COURT PROCEEDINGS IN LITHUANIA*

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Summary: 1. Introduction. – 2. Court Proceedings during Lockdown. – 3. Conclusion. Lessons to be Learned.

The pandemic of coronavirus COVID-19 has impacted almost all areas of life through out the word. Justice system in Lithuania was no exception. The effects of the pandemic have been felt till now (the article was finished at the end of August), even if the lockdown was ended on the 16th of June and until now country remains under the conditions of an emergency situation. This article will describe the most important effects of the pandemic to the court proceedings in Lithuania and what lessons could be learned from this situation.

Key words: COVID-19, civil justice, 'hybrid' hearing, court proceedings, online justice.

* *Received: 20.08.2020. Revised: 24.08.2020. Approved: 26.08.2020*

1. INTRODUCTION

Quarantine was introduced in Lithuania on the 16th of March, 2020.[1] Art. 3.2.1. of the resolution stated that 'State and municipal institutions and bodies and state and municipal enterprises organize their work and provide customer services remotely, except where the functions (tasks) concerned must be performed at the workplace. The performance of urgent and immediate functions (tasks) shall be ensured'. Such regulation meant that most court cases in civil, criminal, or administrative matters had to be adjourned or heard remotely.

It must be mentioned that the courts in Lithuania have not been quite modernized until the pandemic, especially courts, which hear civil cases. Already in year 2004 a unified information system of Lithuanian courts LITEKO was launched. This system is being modernized all the time. From 1 March 2013, Art. 175 (2) of the Code of Civil Procedure[2] came into force and legitimized the use of information and communication technologies (videoconferences, teleconferencing, etc.) during court hearings. Still, it can be said that this option had not often been used for civil cases until the pandemic.

A similar situation could be found for administrative proceedings. It has been possible already for seven years for citizens and companies to deliver and receive documents of the administrative and administrative offenses cases, to listen to the records of the court hearings and to pay stamp-duties and fines without leaving their residences. The situation was not so developed regarding criminal cases.

2. COURT PROCEEDINGS DURING LOCKDOWN

In Lithuania there has been no special legislation for court proceedings regarding COVID-19 pandemic. It has been believed that the legal norms of codes of procedure (concerning possibilities to hear cases via technological means) is enough to apply them for quarantine conditions also. The judicial Council only introduced recommendations for how court proceedings should look like during the quarantine and later.[3]

It was recommended during the quarantine to adjourn all scheduled hearings in oral procedure, except in cases of statutory urgency (for example, issues related to arrest, removal of a child from an unsafe environment). In urgent cases oral hearings had to be organized in the manner and time prescribed, taking all precautionary measures relating to the prevention of the spread of COVID-19, while maintaining a maximum distance between the participants in the courtroom. Otherwise, if it was possible and the parties to the disputes agreed, written procedure could have been applied, or court hearings could have been organized remotely, by means of technology.

After the quarantine had been introduced, all courts strived to work through different platforms (like Zoom or Teams). In several weeks the setting up of the hard- and

1 Government resolution No. 207 (14 March 2020) <https://lrv.lt/uploads/main/documents/files/Nutarimas%20Nr_%20207%20su%20pakeitimais%2004_30_EN.pdf> accessed 10 August 2020.

2 Valstybės žinios [2002] No. 85-4126.

3 All recommendations can be found online here: <https://www.teismai.lt/lt/naujienos/teismu-sistemos-naujienos/del-teismu-darbo-organizavimo-karantino-laikotarpiu/7444> accessed 10 August 2020.

software to enable all judges to work from their homes was finished. Also, the complete staff of the courts worked from their homes during the lockdown.

The statistics of the national courts administration show that during lockdown 32 pct fewer new cases were received in the first instance cases than in the year 2019 in that period. Also, courts of appeal instance received 40 pct fewer of appeals in comparison with the year 2019.[4]

Almost all cases, which could have been heard in written procedure, have been finished in time (especially in appeal and cassation instances). Most of the cases, which had to be heard orally, because it was not possible to use written procedure, have been adjourned to the months of summer or autumn. More than 1100 court hearings have been organized through videoconferencing in three months. Most of these cases were civil, especially commercial matters. Some cases, where witnesses had to be heard in person, were adjourned as the court and the participants of the proceedings did not think it was possible to hear witnesses safely through electronic means.

Some mediation procedures have also been organized online and some of them were successful. It can be mentioned that at the beginning of 2020 mandatory mediation was launched in Lithuania as a prerequisite to contentious family legal actions in court. Enforcement procedure and communication between bailiffs and courts have been conducted electronically for several years already.

The situation was much more problematic with criminal cases. Most of them have been adjourned and are being heard during summer or later in autumn. Amendments to the Code of Criminal Procedure have been presented to allow the use of technological means more broadly for criminal cases also. Until the amendments came into force it had only been possible to hear witnesses or expert witnesses via videoconferences in criminal cases.

3. CONCLUSION. LESSONS TO BE LEARNED

As pandemic is still ongoing and nobody knows what the situation will be later this year, still some cases are being heard online in Lithuania and some mediations are also done online. Also, it can be agreed that some new types of cases could reach courts in near future[5]. There are already several claims in Lithuania regarding the declaration of quarantine and the damages it caused to private businesses; also, several plaintiffs have already sued hospitals because they have gotten infected with the virus at the hospitals.

The ongoing pandemic taught us that it is possible to have court hearings virtually, only proper equipment is needed. Also, judges, other staff in courts, lawyers,

4 More statistics on activities on courts during quarantine can be found online here: ‚Lietuvos teismai karantino laikotarpiu – bylų nagrinėjimas persikėlė į elektroninę erdvę, organizuota daugiau nei tūkstantis nuotolinių posėdžių' (7 July 2020) <https://www.teismai.lt/lt/lietuvos-teismai-karantino-laikotarpiu-bylu-nagrinejimas-persikele-i-elektronine-erdve-organizuota-daugiau-nei-tukstantis-nuotoliniu-posedziu/7764> accessed 10 August 2020.

5 Opinion of Consultative Council of Judges (CCJE), ‚The Functioning of Courts in the aftermath of the Covid-19 pandemic' <https://www.coe.int/en/web/ccje/-/functioning-of-courts-in-the-aftermath-of-the-COVID-19-pandemic> accessed 10 August 2020.

prosecutors, and litigants should have the knowhow to use digital tools. Investing in new forms of dispute resolution should be an important priority for the government and the court system itself.

Such a 'hybrid' way of hearing cases could shorten time limits for court proceedings and make proceedings even more approachable for the public. Perhaps nobody could have anticipated that online court hearings would become quite normal so quickly. Many practitioners and scholars thought it would take more time to get used to the concept of online hearings.

Understandably, during an online hearing all the procedural rights of the participants of the proceedings must be safeguarded. While virtual hearings can work in a justice system, we cannot consider them a 'new normal' without providing the same safeguards a defendant would have, if they appeared in person, this is especially important for criminal cases.

Access to Justice in Eastern Europe,
Issue 2/3 (7) 2020
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com
10.33327/AJEE-18-3.2-3

C Popotas, 'COVID-19 and the Courts. The case of the CJEU' (2020) 2/3(7) *Access to Justice in Eastern Europe 160-171.*
10.33327/AJEE-18-3.2-3-n000033

COVID-19 AND THE COURTS. THE CASE OF THE CJEU[*1]

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Summary: 1. Introduction. – 2. Historical background. – 3. Preparedness and the COVID-19. – *3.1. Business continuity. – 3.2. Administrative adaptations. – 3.3. Access to the premises and hygienic measures. – 3.4. Working conditions. – 3.5. Medical issues. – 3.6. Revealed cases of COVID infections. – 3.7. Protocolary activities. – 3.8. Communication. – 3.9. Safety and security. – 3.10. Interinstitutional coordination. – 3.11. Jurisdictional issues. – 3.12. Caseflow at the Court. – 3.13. Organisation of the Court Registry. – 3.14. General Court. – 3.15. General Court Registry. – 4.* Conclusions.

* *Received: 03.09.2020. Revised: 07.09.2020. Approved: 08.09.2020*

1 The note is based on the presentation, given him at the ‚Online conference "'The COVID-19 crisis – Lessons for the Courts', organized by EGPA Permanent Study Group XVIII ‚Justice and Court Administration'. See more at EPGA Study Group / K2 http://www.justizforschung.ch/index.php/homepage/egpa-study-group and EGPA Permanent Study Group XVIII ‚Justice and Court Administration' https://egpa.iias-iisa.org/PSG_XVIII_JUSTICE_AND_COURT_ADMINISTRATION.php#

The article describes the generally positive experience of Court of Justice of the European Union in managing the Covid-19 crisis. Before the outbreak of the Covid-19 crisis the Court had established an effective structure to cope with risks and issues related to pandemics. It benefited from an extensive migration to a modern computer operating system and the replacement of traditional desktop computers by portable devices capable of remotely connecting to the Court's network. Appropriate teleworking and extensive dematerialisation and simplification of standard administrative procedures took place and proved their effectiveness. The disruptive dimensions of COVID-19 pandemic forced the CJEU to accelerate transformations – not only digital but managerial and judicial processes The author analyses several phases of organising the functioning of the Court during the pandemic and comes to the conclusion that that the Court proved to be well prepared to tackle the issues raised by the COVID-19 pandemic. However, the quest of the future organisation will also have to do more with smart management and the new modes of working.

Keywords: Justice, Court Administration, COVID-19, CJEU.

1. INTRODUCTION

Just a year ago, Courts worldwide were navigating along their chosen pace in technological waters. Oscillating between the wish to be in the forefront of technology, or restrained by budgetary limitations, pandemics was a secondary issue in terms of technological planning. Since 2018 the big hype was about blockchain, the resuscitation of Artificial intelligence in law, predictive justice and the future of Courts. There has of course been the previous SARS and MERS alerts and jurisdictions had established continuity plans, untested of course under real circumstances, Courts thus remained confident that everything was accounted for and prepared adequately.

But COVID-19 has shifted Courts away from future perspectives and forced them to concentrate on the bitter realities of a crisis management situation. COVID-19 has put forth the value of proactive and good Court administration. The Court of Justice of the European Union (CJEU or the 'Court' henceforth) has luckily been preparing such an eventuality. The Court is a complex organisation with 2200 staff, two jurisdictions (the Court and the General Court), 91 Members (27 Judges, 11 Advocates General, 1 Registrar at the Court of Justice, 51 Judges and 1 Registrar at the General Court), a Multilinguism General Directorate covering translation and interpretation needs in all EU official languages and finally a relatively small administration, assisted by an in-house medical service.

Ever since the 90's when a first crisis, around Asbestos fears, upset the services of the Court and ended to a massive removal of services outside the traditional premises, the Court has maintained a crisis management plan catering for all possible threats, including terrorism and pandemics. The plan gave ground to several drills on the one hand and, as far as pandemics were concerned, more specifically following the SARS and MERS concerns, led to detailed contingency plans and urgency structures to be activated in case such a threat materialised. Specific equipment was also acquired envisaging responses to safety requirements for staff that would be handling the CJUE core business during pandemics (personal protective equipment - masks and kits to cater for in case of emergency units had to operate).

Thus the business continuity process at the Court, activated in response to the COVID-19 pandemic, largely based on the extensive teleworking arrangements put in place with effect from Monday 16 March, managed to guarantee the continuity of the judicial operations fundamental to the functioning of the European Union, entrusted to the jurisdictions.

2. HISTORICAL BACKGROUND

In a suitable timely preparation, the Court had established a structure to cope with risks and issues related to pandemics. The internal debates on previous occasions of anticipating on risks, resulted to the creation of two crucial committees, delegated with the task of supervising the activity of the Court in case of emergency: a) the Crisis unit, in the role of a strategic committee, regrouping high ranking officials and b) the crisis management committee (CMC), composed of representatives of operational services and the Registries, entrusted with the task of coordinating amongst the domains of activity of the Court in a rapid and flexible manner. Alongside these committees, operational cells within each service were expected to liaise with the coordination instances and implement the necessary measures within each service.

Even if no-one could imagine the extent of the problem and just before it became obvious that the cases of pneumonia in China represented a global threat, the Court had completed its preparedness. A happy coincidence wants that the CMC met in November and December in order to update the contingency plan with all emergency procedures in place, the business continuity plan and operational cells in all services.

More specifically, the CMC had been working throughout the previous years and as planned, on the 18th of December 2019, it established the infrastructure and operational procedures that would allow the members of the CMC to coordinate via the use of video-conferencing. All members of the committee were equipped with a laptop, capable of gaining remote access to their respective domains of activity and more importantly offering the possibility to hold virtual meetings. The committee was also given the capacity to send messages to the whole staff and Members of the institution via SMS, as well as to email both via the official addresses as well as the private ones. In January the whole setup was tested successfully.

Already, the Court, in the context of conciliation of work and family life, had established since 2004 a number of policies on working conditions that ended up contributing to a quick adaptation of the staff to the Covid-19 reality. In particular teleworking, that had been introduced long ago as a work pattern to conciliate work to family needs, which, towards the end of 2019, was adapted to cater also for occasional needs of remotely working. On a rotating basis, approximately 10% of the staff were at any moment homeworking. Several services and work profiles were allowed to practice by full or half time teleworking, and quite a number of colleagues have thus been trained to work at a distance while maintaining full productivity. Remote working was therefore nothing new for the Court.

3. PREPAREDNESS AND THE COVID-19

When the COVID-19 started taking menacing dimensions in Europe, preparedness paid back. The Court activated timely its plan and considered the necessary adaptations, one week ahead of corresponding lockdowns decided by the National authorities. This reaction made, as will be explained later, that very few cases manifested at the Court and most importantly at the time they showed the risk of contamination through social contacts was minimised.

The Court benefited at this phase from an extensive migration to a modern computer operating system and the replacement of traditional desktop computers by portable devices capable of remotely connecting to the Court's network. Appropriate teleworking was thus effective for approximately 80% of the staff. The Court was at this time three months short of equipping the totality of its staff but shortly afterwards it managed to put in place an accelerated plan that equipped the rest by the end of May.

Extensive dematerialisation and simplification of standard administrative procedures took place during the week preceding the lockdown, and judicial procedures, which were at an advanced level of computerisation, were enhanced informatically. Internal and external communication were adapted and enhanced.

This way the Court managed to maintain its normal rhythm of deciding cases and publishing judgments. The number of cases resolved for the first quarter amounted to exactly the same as in 2019. In parallel, procedural measures compensated for the incapacity to hold hearings. Written questions to the parties replaced the debates that would normally take place in courtrooms. Deliberations amongst judges were in the first period conducted through written procedures via secure email, later replaced by secure videoconferencing.

Upon realisation of the risks that the new virus presented, a gradual adaptation to the new realities was taking place, following the advice of the medical service of the Court. Already in February, colleagues returning from areas that were heavily affected, were asked to self-isolate for two weeks.

Finally, following measures taken by Luxembourg, Germany, France and Belgium restricting movement of persons and sanitary limitations due to COVID-19 and in line with policies adopted by all other institutions, the Court, on the 13th of March adopted a generalised homeworking.

Several phases of organising the functioning of the Court were observed.

First phase of COVID-19 measures: 16 March to 24th of May

The first phase that was announced on the 13th of March and put in place as from the 16th – later extended up to the 24th of May. During that first phase, staff was invited to work remotely, while accesses to the Court premises were permitted for short periods, in view of dematerialising work or dealing with issues that could not be handled at a distance.

The CMC, having the delegations to oversee the coordination amongst services, continued virtually meeting during the remote work period once every two days in

the beginning, but gradually the frequency was adapted to the everchanging realities. Several topics had to be dealt with, some of which are mentioned indicatively as follows.

3.1. Business continuity.

Remote working was preceded by a hectic preparation of such an eventuality. Fears of a generalised lockdown forced the services of the Court during the beginning of March 2020 to accelerate efforts to dematerialise the working support in administrative and judicial domains and convert paper-based workflows to electronically managed circuits.

Informatics infrastructure

The informatics department put in place an urgency plan in order to provide laptops to the members of staff that were not appropriately equipped. In parallel the network bandwidth was expanded in order to cope with the increased requests, due to both accesses to files and applications as well as for audio and videoconferencing. For the members of staff waiting for laptops to be made available, tokens or smartphones to allow remote access to webmail were given. Delivering the physical equipment, which gradually was completed by the 17th of May, required of course special sanitary arrangements to guarantee social distancing and avoid contact between persons.

1.2. Administrative adaptations.

This novel situation brought forth the need for administrative adaptations never seen before, affecting all the Court's departments.

Important modifications took place at the core administrative level, reshuffling the traditional processes. In the first-place projects aiming at digitalising archives and services that had been pending for several years, were quite quickly implemented just before closure and allowed as from then to handle cases remotely. This was certainly also due to the lucky correlation that most administrative systems were at a level of maturity that allowed file handlers to work remotely as if they were at the office e.g. accounting, human resources, salary payment applications. Still several adaptations complemented the core systems to cater for areas where workflows were not previously dematerialised.

In all cases, the brief period just before the lockdown was a very intense one. New working methods had to be invented. From the simple alternatives permitting the online request for holidays through an external link – catering thus for people that wouldn't have direct access to the Court systems - up to the level of organising in a hurry a completely new service in order to issue certificates for colleagues that were obliged to cross borders in order to come to the Court - Luxembourg being a small country, many of the Court staff reside in the neighbouring countries, Germany, France, Belgium – therefore everything had to be adapted and tested while staff was still at the premises.

Access to the premises and hygienic measures.

As from the 13th of March, entering the Court was rearranged dramatically. Beyond protective installations and personal protective means, entrance was subject to temperature checks and sanitary precautions to be taken. All visits were cancelled.

Special protocols were also put in place for the cleaning and preventive disinfecting of spaces used.

Several diffuse problems made surface though. For example, the Court had already, as I said, an important stock of protective material (masks, disinfectants, gloves). But, since replacement had to be envisaged, the possibility to acquire new equipment was confronted with the intense competition and the limited availability of certified goods. The Court managed though to get hold of supplementary material allowing the possibility to gain almost normal activity for several months.

Attendance during restrictions

The Court has opted not identify critical/essential roles. Instead it entrusted line managers with the task of authorising staff to be present when needed.

Attendance at the Court was nevertheless limited. During the first phase very weak percentage of the staff (1, 5-2%) was present daily at the premises of the Court. The presence of service providers and staff in the buildings was only authorised for the performance of specific and necessary tasks.

1.3. Working conditions.

The peculiar situation of the staff being mostly expatriates had also to be accounted for. The Court's staff was of course concerned about family at their place of origin. Equally the social assistant had to take care of concerns of people in difficulties.

As for the working conditions, one victim of the new situation was flexitime - a facility provided to approximately 1/3 of the staff in the pre-Covid period – which was suspended as unnecessary due to the remote working. Several adaptations of part time working were also registered.

1.4. Medical issues.

Another novel issue was the need for medical recommendations as the situation evolved. Beyond regularly issuing recommendations to the intention of g the CMC, the Medical service established Protocols for tracing suspected and confirmed cases as well as close contacts which were rather successfully applied. Overall a number of 11 cases were revealed up to the 20th of April – none afterwards - and this is an indicator of how the system operated successfully in order to avoid recontamination. No disruption of the Court services and operations resulted from this occurrence.

Specific medical information was provided regularly through the communication channels, and a series of videos compiled by the in-house psychologist addressed issues relative to the stress produced by teleworking and related questions.

1.5. Revealed cases of COVID infections.

The Court has established fairly early a specific protocol for handling revealed cases of COVID-19 infections amongst Members or staff. In close contact with the Luxemburgish authorities, specifically designated medical and administrative instances were monitoring the cases concerned as well as their close contacts. Eleven cases were overall detected, a relatively small percentage of the staff. All necessary

restrictions were applied and specific actions for decontaminating premises were undertaken. Data protection rules were previously adapted to be in line with the evolving situation, consequently tracking of the revealed COVID-19 cases and their contacts was established through operations conciliating respect of privacy and proper monitoring of health condition and risks.

The relatively small number of cases is an indicator of success of the surveillance policy and the timeliness of the social distancing measures.

1.6. Protocolary activities.

All protocolary activities were cancelled, the only residual activity concerned the swearing in of a newly appointed Member which was initially modified to require the smallest possible presence of people. Nevertheless, due to the evolving situation the taking of the oath of the new Advocate General took place via Skype, in the presence of the President of the Court, the First Advocate General and the Registrar.

1.7. Communication.

The Communication directorate had to reshuffle their communication strategy in order to adapt it to the current situation. Since the staff of the directorate was also asked to work remotely except upon specific request and planning, the directorate organised with the 2 registrars the modalities allowing, as far as possible, to carry out the authorization to publish delivered judgments and uploading press releases remotely and without the presence of people within the institution.

The Intranet and Internet sites were kept up to date by the Communication Desk in conjunction with the Office of the Registrar. Communication to the general public was adapted to be prepared remotely. In parallel the emergency procedures for internal communication were activated and Members and staff were constantly kept informed about ongoing and constantly changing conditions through a specific intranet page systematically updated, as well as, messages sent via SMS, official and private email.

1.8. Safety and security.

the Safety Unit was liaising with the Luxembourgish authorities and homologue services of other institutions in order to provide up to date information on adopted measures.

Cleaning and disinfecting

This operation gave rise to further adaptations of previous operations of cleaning and working in general, up to the level of adjusting facilities (door handles, lifts, photocopiers etc.).

1.9. Interinstitutional coordination.

All the EU institutions and agencies have adopted measures similar to the ones implemented by the Court. An inter-institutional network for information exchanges was set up under the aegis of CPQS, a specific Committee that is entrusted with preparing Heads of administrations decisions and to which the task of coordinating approaches amongst EU institutions was assigned.

1.10. Jurisdictional issues.

The two jurisdictions adopted immediately the required adjustments of procedures and communicated them to concerned parties via email, as well as to potential parties via the web site of the institution and social networks. Very quickly, the week following the Court's "shutdown", measures meant to optimise the usage of resources were adopted by the presidents of the two jurisdictions:

1.11. Caseflow at the Court

All hearings and pleadings were postponed to a later date; 60 cases were considered urgent and one Urgent Preliminary Request was kept in progress for which the chamber has decided to waive the hearing and to put questions to the parties for written answers. Written procedures were put in place replacing the traditional deliberations.

- Deadlines remained as precised in the guidelines concerning the management of cases
- For all cases planned to be resolved without General advocate opinions (mostly cases of chambers at three judges) for which a hearing occurred already or was not considered necessary, the drafts of the judgments were handed as usual.
- For all cases planned to be resolved following a General advocate opinion for which a hearing occurred already or was not considered necessary, the drafts of the judgments started being prepared as soon as the opinion was handed down, in the language accessible by the chamber concerned.

  (In all previous situations once the draft was handed down, deliberation of the chamber was immediately planned by written procedure, until a change of situation could allow face to face meetings.)
- For all cases for which an audience was already fixed the Court envisaged the possibility to replace the oral procedure by questions for written answers.
- For mature cases the normal route was followed by remote means, while in cases where the written procedure was still open the preparatory work was anticipated in order to facilitate future judicial considerations.
- For completed cases, sessions for grouped pronouncements of judgments were organised at specific dates respecting increased sanitary measures for judges and members of staff (e.g. interpreters) concerned.

1.12. Organisation of the Court Registry

Despite the increased digitisation of the judicial process, the Registry is still called upon to treat a relatively high number of acts of procedure which reach the Court by normal post. All relevant original documents and records, often bulky, have to remain securely at the Court and have to be digitised before they can be further processed. It was therefore necessary to establish new operative processes for the dematerialisation of documents in pending cases and, on the other hand, register, scan and treat all elements of procedure delivered to the Registry by normal post. Communication was at times difficult, in particular concerning request for

preliminary ruling transmitted by national Courts which were not registered in the e-Curia application. To cope with this burden the Registry has organised brief visits at the Court buildings to operate the digitalisation, before transmission to services. In this way, the Registry has been able to perform a follow-up of all the cases received in the Court since the beginning of confinement, whether they were submitted electronically or by post.

On top of that, in the beginning of the confinement, not all of the staff at the Registry was in possession of equipment capable of remote access to business applications. Quickly, however, the Registry proceeded to address the main issues related to the core functioning of the jurisdiction. The majority of tasks were gradually catered for online, with the exception of the ones that require physical presence in the premises of the Registry and were thus deferred at a later date.

One of the problems that had to be tackled was the need to inform all parties involved in pending cases concerning the cancellation or postponement of hearings. Since some of the parties, especially in preliminary rulings cases do not have an e-Curia account and servicing by normal post was problematic, a lot of innovative spirit was invested in order to identify the contact details of parties and serve via email.

Finally, in order to meet with deadlines, all services involved shortened the time of treatment and readied their part of the work much earlier.

1.13. General Court

At the General Court the compulsory use of the e-Curia application by the parties facilitated the remote work of the Registry. It was thus possible to access remotely all of the filings, as well as the Registry was able to serve electronically all outgoing documents and acts of procedure, with the exception of acts to be served by post in extraordinary situation of parties not having an e-Curia account, for which dispatching was feasible only by being present at the Court.

However, the obligation to conserve an authentic paper version of the file of a case forces a backward compatible procedure for printing the corresponding files.

The deliberations were initially held by audio conferencing, quickly followed by video conferencing.

1.14. General Court Registry

The entire Registry has entered into a remote working regime as from the 13th of March. Since teleworking was never implemented, the core of people equipped with laptops was the spearhead of the operation of the Registry in the beginning until total equipment allowing remote work was attained. The activity of the Registry has never stopped but has been reduced to the treatment of the more urgent cases.

Second phase: partial resumption of services, 25th of May up to the 15th of July

A partial resumption of activity occurred as from May 25, this up to the 16th of July, The work plan for this partial resumption of activity on the site of the Court had been developed by the services of the Court well before the 25 May via three task forces entrusted with,

respectively, the planning of hearings, the videoconferencing and finally security and health/ medical precautions to adopt measures in order to allow for gradual recovery of activity.

During this second phase more restrictive conditions of access to the Court's premises were introduced. Working at a distance remained the main rule. Entrance to the Court premises was allowed exclusively upon authorisation of the corresponding line manager and respecting the sanitary measures imposed. Staff having to be present at the Court had to abide by social distancing and wear masks outside individual offices.

The jurisdictions resumed hearings partially at a controlled rhythm. When to be held in situ, hearings were adapted to hygienic standards.

Distance Videoconferencing was put in place where attorneys could not be present for hearings, even if this could not be applied to complex cases (following the works of the taskforce " videoconferencing " and in the respect of the principles adopted by the committee " Rules of procedure " of the Court).

This hesitating exit from the previous almost complete halt of operations went very well, thanks to careful preparation work and to the efficient collaboration of all actors involved.

Reduced presence at the services, mainly the registries allowed to accomplish the tasks which could only be carried out in situ

Resuming the hearings obliged the services to organise in detail the new realities and involved a close coordination with all the Institution services principally concerned (directorates of interpretation, information technology, registry internal services. Precautions were taken as for the access to buildings and canalisation towards the courtroom concerned respecting social distancing, limited canteen facilities, distancing in the courtrooms and blocking of seatings, elimination of meeting with the parties prior to the hearing, even the possibility for party representatives to plead without gown if so wished.

The management of the hearings involved implementation of measures of organisation of the procedure aimed to verify the interest of the parties to attend a hearing. Indicatively, at the General Court , 69 plea hearings had been planned for the period from June 8 to July 15. After a difficult start during the week from 8 to 12 June with two hearings held out of the 14 scheduled, the return to a form of normality was noted as from the 15 June.

Third phase: judicial holidays (16th of July up to the end of August)

The administration incited actively the staff to make use of their holidays. Since presences at the Court were by definition less numerous, measures were eased, leaving upon individuals to organise their presence at the Court, respecting always social distancing and sanitary precautions. Teleworking remained of course the principle.

Fourth period from 1st of September onwards

At the end of the judicial holidays the Court had to clarify the applicable rules. In order to conciliate business continuity with the preservation of people's health, it was decided to maintain the generalised remote working. Anew, access to the Court's premises will be organised as it was during the second phase, subordinating it to the

authorisaton of line managers for as long as it is necessary for the execution of tasks requesting physical presence mostly related to hearings. Social distancing and health precautions remain compulsory.

Luxembourg has put in place a systematic possibility to undergo free COVID-19 tests for residents returning from holidays abroad. Nevertheless the Court decided to offer the possibility of tests to a limited number of persons performing essential functions requesting physical presence at the Court.

3. CONCLUSIONS.

The need to consolidate and accelerate the digital transformation

The disruptive dimensions of COVID-19 pandemic forced the CJEU to accelerate transformations – not only digital but managerial and judicial processes also. Procedural, organisational, communication, security, sanitary protection measures were adopted or adapted, to cater with the new realities. In a matter of weeks, the Court has put in place developments that would have required years of work. Important administrative decisions have been immediately adopted following the CJEU lockdown taking into consideration the capacity of the services, the priorities of the jurisdictions without losing from sight the staff needs. Delegations and replacements were organised in time. Finally, the CJEU has demonstrated the resilience it was expected to have established through years of preparation.

With the first hindsight that the passage of time allows, the management of the crisis can be viewed positively, even if the challenge is to predict when the crisis will end and what has to be kept from the forced transformation of the CJUE administration.

Given the exceptional circumstances of the COVID-19 crisis and of the business continuity mode, the administration of the Court has been effective since it remained operational and continues essential functions until relative normality is re-established.

One of the main conclusions we can draw is that COVID-19 has hindered normal everyday relations amongst persons but were partially replaced by intense communication and the use of technological tools. But on the other hand, staff became more autonomous, and even if dematerialisation was a question of individual reorganisation to begin with, convergence of practices and bringing together of experiences became an asset.

In general, the crisis seems to have strengthened the links between the services. Exchanges in within the Center of management of crisis (CMC), have allowed for these services to better understand their needs and to work very effectively together. This was proven by a Satisfaction Survey that was launched by the Staff representation Committee and demonstrated a strong support for the measures taken.

Overall, it can be said that the Court proved to be well prepared to tackle the issues raised by the COVID-19 pandemic. But most importantly what can be seen in this preparation is that in reality the Court's authorities prepared their staff to prepare the change and to embrace it. There was a generalised solidarity and investment in converting each one's tasks in the new context. If it is true that in the beginning everybody was hopeful that

the crisis would end in the summer, it became in the meanwhile obvious that plans had to be extended on a longer period.

For the services that were already on the route of computerising their records and workflows, Covid-19 has not made access to services more difficult. In terms of quality of service, in reality internal users have not noticed a substantial difference of access to applications compared to the previous situation.

But post COVID-19 everything will be different, changes will be broad, deep and lasting. The challenge for the CJEU now is of course to master the new dynamics, maintain and improve all positive changes and leapfrog to the post COVID era, redesigning and modernising processes and projecting the justice system in the digital age, in cybersecure environment, while guaranteeing access to justice for the European citizens and appropriate working conditions for its staff.

It is obvious that this pandemic is going to modify radically and profoundly the workings of the Court in the future, in particular, since the persistence of the crisis was an unprecedented challenge. What the future holds is relatively unclear. This is obviously not just going to force to amend the informatics tools. Procedural rules are going to follow the new organisational methods, simplify the approach and certainly provide for delegated acts that could adapt to the evolution of similar crises. Adaptation will be needed in all areas including communication and formal exchanges. for certain the COVID-19 crisis has shifted things also towards modernising the administration of justice at the Court. The need for simplification, flexibility, less formalism, the quest for integrated systems accessible to habilitated users without intermediaries, the use of remote conferencing/virtual hearings and the inspiration from online Courts ideas are now on the table. The crisis is alleviating resistance to change, accelerating digital transformation. And there is no way back.

But since we speak in terms of administration, the quest of the future organisation will also have to do more with smart management and the new modes of working in which all persons involved will have to be trained in the alternative modes of operation and collaboration, get familiarised with new ways of bonding within services and the new responsibilities in management reinforced.

SSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Access to Justice in Eastern Europe,
Issue 2/3 (7) 2020
http://ajee-journal.com
10.33327/AJEE-18-3.2-3

B Szolc-Nartowski 'Coronavirus and the Justice System in Poland' (2020) 2/3 (7) *Access to Justice in Eastern Europe 172-175.*
10.33327/AJEE-18-3.2-3-n000034

CORONAVIRUS AND THE JUSTICE SYSTEM IN POLAND*

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Summary: 1. Introduction. – 2. Organizational measures. – 3. Conclusion.

The justice system was unprepared for the dangers of the Coronavirus pandemic, both in Poland and everywhere in the world. However, the need for safeguarding fundamental civil rights, such as human life and health, has always been the highest priority. In this note the measures aimed to protect every during the pandemic in Poland were studied and concluding remarks to be learned were proposed.

Key words: COVID-19, civil justice, judiciary, oral hearings, procedural time-limits.

1. INTRODUCTION.

While free access to the courts is, indeed, an essential and self-contained legal construct, it is not an end in itself. In fact, being a constitutionally guaranteed procedural right, it is

* *Received: 04.09.2020. Revised: 06.09.2020. Approved: 08.09.2020*

accessory to other fundamental freedoms set out in the Polish constitution and statutory law. Restricting the right to free access to the courts strikes at the members of society and their fundamental rights, especially where scope exists for exercising this right in a COVID-safe manner. There is no doubt that solutions created under time pressure will have imperfections. Also, the maintenance of the continuity of judicial functions, while working at the same time to ensure safety to all those who spend time in court buildings (litigants, witnesses, forensic experts, attorneys, judges, and administrative staff), was definitely a daunting task.

2. ORGANIZATIONAL MEASURES

Safety procedures and organizational measures were enacted by order of the presidents of courts, by recommendations of the Ministry of Justice, and by subsequent statutory legislation.

As of 12 March 2020, presidents of courts issued orders to cancel all docketed court hearings and sessions, provide all interested parties with appropriate notifications, and to the extent possible reschedule the cancelled hearings and sessions. A number of measures were enacted to restrict the flow of information internally within the courts, for example, access to the files reading room was allowed only for urgent cases or cases in which an appealable judgment has been passed. Customer service offices were closed, followed by the closure of the court office and cash desks.

The Ministry of Justice provided the Presidents of the Appeals and Regional Courts with a list of urgent cases, instructing them to exclude these particular cases from the cancellation order. Urgent case status was decided by the values and interests at issue in the case (human life and health, freedom, protection of the most vulnerable). The presidents of courts could make further discretionary exemptions from the cancellation order for cases that needed to be examined. The Ministry of Justice requested all common courts of law in Poland to post information on the categories of urgent cases on the websites.

The legal basis for the issued instructions was the Law on the System of Common Courts and the Act on Preventing and Combating Infections and Infectious Diseases in Humans.

Although assurances were made by the presidents of courts that correspondence could be exchanged by e-mail, with the assumption that any formal defects in the pleadings could be supplemented at a later date, the courts themselves, the parties and their attorneys continued to exchange letters by post in fear of adverse procedural consequences. This meant that attorneys had to visit post offices and experience the stress of being exposed to the possibility of infection. This showed the full extent of deficiencies in the digitization process of judicial procedure. The courts soon purchased special UV-C sterilization lamps, which were used to disinfect the submitted pleadings. The presidents of courts issued orders to suspend the service of all court papers relating to means of legal recourse and procedural time-limits, with the exception of urgent and executory cases.

At the same time, it became possible to cancel hearings in urgent case where a large number of persons were summoned to appear at trial. Distancing measures were also applied by restricting admission to court buildings to persons who could show a summons, a notice to appear in court or a published judgment. Petitioners were strongly encouraged to contact the court by phone or e-mail. To meet procedural time-limits, it was recommended to deliver court letters by e-mail and have them printed in the court office. The missing signature of the petitioner or attorney could be added at a later day.

The question of the expiry of procedural time-limits was finally decided by the legislature under the Act on Special Solutions Related to the Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Associated Emergencies of 2 March, 2020. Under Article 15zzs of the Act, the running of procedural and litigation time-limits shall not start, and where it has started, it shall be suspended for the duration of the epidemiological hazard or the state of epidemic declared due to COVID. The regulation applied to court proceedings, including administrative court proceedings, executory proceedings, penal proceedings, penal tax law proceedings, and cases relating to misdemeanours, administration and administrative enforcement.

The Act also specified solutions regarding the possibility of designating an equivalent substitute court of venue in urgent cases falling within the competence of the court, whose work has been suspended, with the aim of safeguarding the right of free access to the courts, within the organizational capacity of courts. Presidents of courts were also given authority to hear each case as urgent, where failure give a hearing would endanger the life or health of a human being or animal, cause severe harm to community life or irreparable material damage, or – under a subsequent general clause – where this is required to serve the vital interests of the justice system. Provision was made to delegate judges to other courts due to concern for the vital interests of the judiciary.

It should be stressed that the staying/suspending order applied only to procedural and litigation time-limits, not to proceedings themselves. Where proceedings are in progress, both the court and the parties can effectively perform procedural acts.

14 May 2020 saw the adoption of legislation to safely 'unfreeze' courts, effective as of 16 May 2020; Article 15 zzs was repealed, a seven-day waiting period was adopted, on whose expiry the stopped time-limits would start running, while the suspended time-limits would continue running. As a consequence, the commencement of the running of stopped time-limits and the continuation of the running of suspended time-limits took effect as of 24 May 2020 under Article 15zzs of the Act.

All court proceedings open to the general public may again be held on condition that they do not excessively endanger the life or health of the participants. At the same time, Art. 15zzs[1] was added to make provision for remote hearings by technical means enabling simultaneous transmission of image and sound (video-trial). However, no regulations were enacted to set down standards with regard to video-trials. The specific issues concerned include confidential and secure data transfer, streaming, access to case records and files, identity checks, simultaneous recording of all participants.

The justice system was also given the discretion to conduct proceedings behind closed doors where this was deemed to be necessary by the court and where conducting

the legally mandatory proceeding at trial or hearing would unnecessarily endanger the participating persons, or where utilizing remote methods with the simultaneous transmission of image and sound is not feasible. The parties could raise objections within a period of seven days from the date of service of notice indicating the court's intention to hold the proceeding *in camera*.

Another solution was to allow the members of the bench to participate in the proceedings by electronic means of communication. This right was not extended to the presiding judge and the reporting judge. The above persons may avail themselves of the right only in special circumstances but never during the closing session.

These extraordinary measures in civil procedure will remain in force for a year counting from the end of the state of the state of epidemic. This solution may raise legitimate doubts: extraordinary measures should not have permanent effects and the period should be shortened.

The Act also introduces a special limitation on the principle of openness of proceedings in recognition that if the evidence proceedings have been completed, the court may close the case and pass judgment in a session behind closed doors, having received from the parties or other participants their statements in writing.

Also, presidents of courts issued further orders to limit the working hours. Access to court buildings was granted to those who had a legitimate reason to be there, i.e. summons to appear at trial, appointment to peruse case files in the reading room, or who wished to file a complaint with the head of division or president. In order to ensure the openness of court proceedings but also out of concern for safety, access to the courtroom was granted to members of the general public by permission of the presiding judge where this did not pose an excessive health risk to those present. Court offices were opened. 'Drop boxes' were posted near the buildings where submissions could be made without the need to enter the building or send letters. Tightened safety measures are in force till today.

3. CONCLUDING REMARKS.

The legislative and organizational measures applied during the Coronavirus pandemic must be compatible with the right of access to the courts. This right is a component of the principle of a state under rule of law. The Constitution of Poland defines these components as the fundamental pillars upon which the rights and freedoms of the individual rest, and which safeguard these rights and freedoms. The present health crisis has revealed the weak points of the justice system, its methods of operation being still very much rooted in the 19th century. The crisis has shown the urgency of the need for appropriate legal, organizational and infrastructural measures to digitize and streamline communication. At the same time, we have acknowledged the potential of the judicial community that has shown the initiative to take action to protect the citizens and their fundamental rights.

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Certificate of state registration of the print media KB No 23634-13474P

Typeset by Iryna Roina, Dakor.

Cover-list by Alona Hrytsyk

Printed by Publishing House VD "Dakor": Bandery Stepana str., 20A, Kyiv, 04655, Ukraine

Email: vd_dakor@ukr.net. www.dakor.kiev.ua. Tel: +38 (044) 461-85-06

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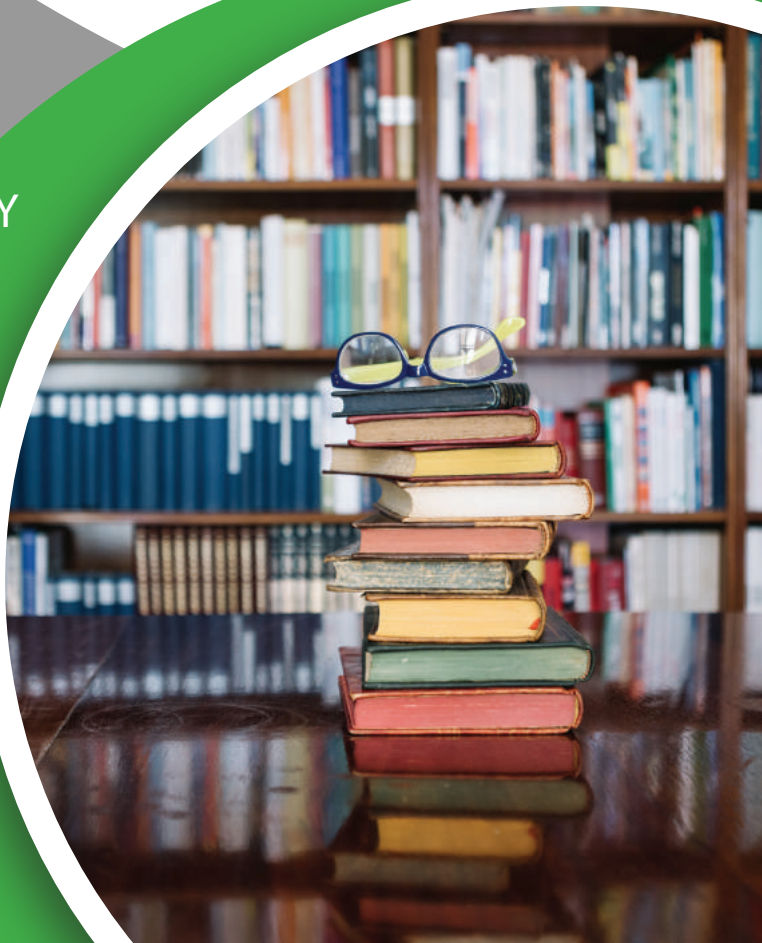

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