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## The transformation of civil justice amid COVID-19: lessons from Ukraine<sup>2</sup>

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### 1. Introduction: courts in the face of COVID-19

*A beginning is that which is not a necessary consequent of anything else but after which something else exists or happens as a natural result.*  
Aristotle, *Poetics*

The judiciary is an ancient and very conservative institution, which has faced various challenges over the centuries of its existence. It cannot be said that pandemics, wars, or other terrible circumstances have been a rarity in human history, and we cannot ensure that these things will never happen again. In view of this, the events of the beginning of the COVID-19 pandemic, as well as some of the solutions used to prevent human rights violations and the proper performing of justice in Ukraine, seem worth analysing and presenting as lessons.

During the first days of the COVID-19 pandemic in Ukraine, the executive power tried to find the most appropriate instruments to prevent the spread of the virus<sup>3</sup>. The

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<sup>3</sup> For instance, Resolution of the Cabinet of Ministers of Ukraine no. 392 of 20 May 2020 on the establishment of quarantine in order to prevent the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 in Ukraine and the stages of easing anti-epidemic measures. More details may be found at: <https://www.kmu.gov.ua/en/news/uryad-posilyuye-zahodi-bezpeki-dlya-borotbi-z-koronavirusom> (accessed on 29 November 2021).

self-organization of the judiciary of Ukraine undoubtedly played a crucial role in this period. On 17 March 2020, the Council of Judges of Ukraine approved recommendations on establishing a special mode<sup>4</sup> of operation of Ukrainian courts, which suspended all activities not related to the procedural activities of the court and ensured the activities of the judiciary (round tables, seminars, open days, etc.), allowing the personal reception of citizens by the court leadership and restricting admission to court hearings of persons who were not participants in the process<sup>5</sup>.

Within a week of the adoption of this decision, in some Ukrainian courts, orders for the administration of justice became issues in the context of the pandemic. In particular, in accordance with the order of the Shevchenkivskiy District Court of Kyiv for the entire quarantine period, the reception of citizens for the issuance of procedural and non-procedural documents was limited to one day a week<sup>6</sup>. At the same time, some courts, interpreting the decision in their own way, generally ceased allowing media representatives and the public to the courtrooms and stopped giving access to video broadcasts of court hearings. Therefore, the Council of Judges of Ukraine clarified their statements in its decision on 30 October 2020 and recommended that courts carry out exploratory work with citizens on the possibility of delaying the consideration of cases due to quarantine measures and the possibility of considering cases via videoconference<sup>7</sup>.

The next very important stage was facilitating e-justice in Ukraine. On 26 May 2021, the Law of Ukraine entered into force, which ensured the functioning of the Unified Judicial Information and Telecommunication System and amended the Code of Civil Procedure<sup>8</sup>. From that point onward, according to the new version of Part 6, 7 Art. 43 of the CPC of Ukraine, documents in electronic form must be submitted by the participants of the case to the court using the Unified Judicial Information and Telecommunication System. Also, according to Art. 248 of the CPC of Ukraine, during the full recording of the trial by technical means, as well as court hearings via videoconference, the protocol of the trial would be created by the Unified Information and Telecommunication System and confirmed with the electronic signature of the secretary of the court hearing and parties to the case. Most importantly, in accordance with Part 8 of Art. 259 of the CPC of Ukraine, court decisions would be given in paper and electronic forms using the Unified Judicial Information and Telecommunication System (hereinafter – the UJITS) and published and signed with the electronic signature of the judge (in the case of collegial consideration, with electronic signatures of all the judges who were members of the panel). It cannot be argued that all these provisions have been fully implemented,

<sup>4</sup> <http://rsu.gov.ua/ua/pro-rsu> (accessed on 29 November 2021).

<sup>5</sup> <http://rsu.gov.ua/uploads/article/risenna-rsu-no19-vid-170320-sodo-2c7e5b4a37.pdf> (accessed on 29 November 2021).

<sup>6</sup> [https://sh.ki.court.gov.ua/sud2610/pro\\_sud/shedule/?fbclid=IwAR3zypPIXEj](https://sh.ki.court.gov.ua/sud2610/pro_sud/shedule/?fbclid=IwAR3zypPIXEj) (accessed on 29 November 2021).

<sup>7</sup> <http://rsu.gov.ua/uploads/article/risenna-rsu-no-63-vid-30102020-s-1478f00d95.pdf> (accessed on 29 November 2021).

<sup>8</sup> Civil Procedure Code of Ukraine, <https://zakon.rada.gov.ua/laws/show/1618-15#Text> (accessed on 29 November 2021), hereinafter – CPC of Ukraine.

yet they are an evolutionary step towards developing a truly electronic justice system in Ukraine.

Firstly, representatives of the legal profession, namely attorneys, notaries, private executors, forensic experts, state and local governments, business entities of the state, and communal sectors of the economy register their official email addresses in this system without fail. All persons can do this voluntarily. The system also provides for the possibility of filing a power of attorney in electronic form, and the UJITS user may authorise another user to perform actions using the Electronic Court in the interests of the trustee. Three subsystems or modules namely the “Electronic Court”, the “Electronic Cabinet”, and the subsystem of videoconferencing began to function in Ukraine from 5 October 2021<sup>9</sup>.

The abovementioned modules gave customers the wider possibilities to submit applications, exchange judicial documents, to take part in hearings and videoconferences and other digital tools for administration of work in courts<sup>10</sup>, at the same time we should state that the whole system of justice, the UJITS, still does not work in Ukraine.

At the same time, we should be aware of the consequences when “something exists or happens as a natural result”. This case of COVID-19 shows us the absence of an effective system of prevention and mechanisms of actions during pandemics or other disasters. Some recommendations were only adopted later (in October)<sup>11</sup>, and these became grounds for unreasonable decisions in opposition to later ones.

## 2. The current situation: litigation amid COVID-19

*...A middle follows something else,  
and something follows from it...  
Aristotle, Poetics*

During the pandemic, the civil process as a sequence of specific actions of the court and the participants in the case became subject to additional risks because in some cases, it is necessary to hold a hearing in the presence of the parties – individuals must be in the courtroom. Access to information and evidence – the service of documents or taking evidence are carried out both in electronic and paper form – requires the personal presence of the parties in court, as do some other procedural actions. Likewise, to a lesser extent, the pandemic influenced the violation of procedural time limits associated with the per-

<sup>9</sup> The abovementioned modules gave customers the wider possibilities to submit applications, exchange judicial documents, to take part in hearings and videoconferences and other digital tools for administration of work in courts, at the same time we should state that the whole system of justice still does not work in Ukraine.

<sup>10</sup> <https://court.gov.ua/press/news/1188723/> (accessed on 29 November 2021).

<sup>11</sup> Manual *Peculiarities of the Functioning of Courts in the Context of the COVID-19 Pandemic*, developed by the OSCE Office for Democratic Institutions and Human Rights. The translation was supported by the OSCE Project Co-ordinator in Ukraine, <https://www.osce.org/files/f/documents/9/0/483854.pdf> (accessed on 29 November 2021).

formance of various procedural actions by the parties. At the same time, considering the gradual development of the electronic court system, the validity of the reason for missing the procedural period depends on the specific circumstances of the case.

### 2.1. Getting to courtroom amid COVID-19 (orality and publicity)

Ukrainian CPC prescribes a few paths for resolving civil cases. There are general proceedings for actions, simplified proceedings for small (so-called insignificant) claims, orders for payment procedures, and non-continuous proceedings. The new edition of the CPC 2017 widened the possibility of considering civil cases in written procedure for insignificant cases in which there is no need for hearings. Therefore, thanks to a happy coincidence, in Ukraine, they were able to create the appropriate conditions for avoiding a mandatory court hearing in a large number of civil cases that are considered by the courts annually<sup>12</sup>.

Of course, when it became clear that avoiding the spread of the virus was directly related to physical contact between people, it was decided to expand the possibility of videoconferencing. On 30 March 2020, the CPC of Ukraine was amended by the following rule:

“Art. 212 Participation in the court hearing by videoconference

4. During the quarantine established by the Cabinet of Ministers of Ukraine to prevent the spread of coronavirus disease (COVID-19), the parties may participate in the hearing by videoconference outside the courtroom using their own technical means. Confirmation of the person involved in the case is carried out using an electronic signature, and if the person does not have such a signature, in the manner prescribed by the Law of Ukraine «On the Unified State Demographic Register and documents confirming citizenship of Ukraine, identity or special status» or the State Judicial Administration of Ukraine”.

Consequently, a person wishing to take part in a court hearing could exercise his or her right to be heard by the court via videoconference without having to visit the courtroom.

The State Judicial Administration of Ukraine by the Order of 23 April 2020, no. 196<sup>13</sup> approved 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. Pursuant to Clause 1 of Section III of the Procedure, to participate in a court hearing by videoconference, the party to the case must pre-register

<sup>12</sup> See I. Izarova, *Reform of Civil Justice in Ukraine: A Differentiation of Action Proceedings and Review of Court Decisions*, “Teise (Law)” 2019/111, p. 234–245, <https://doi.org/10.15388/Teise.2019.111.14> (accessed on 27 November 2021); I. Izarova, R. Flejszar, V. Vebraitė, *Access to Justice in Small Claims Procedure: Comparative Study of Civil Procedure in Lithuania, Poland and Ukraine*, “International Journal of Procedural Law” 2019/9 (1), p. 97–117; Y. Baklazhenko, *Ukrainian-English Translation of Legal Terms: A Case Study of Insignificant Cases and Small Claims*, “Access to Justice in Eastern Europe” 2021/1 (9), p. 232–242, DOI: 10.33327/AJEE-18-4.1-n000055.

<sup>13</sup> [https://dsa.court.gov.ua/dsa/inshe/14/N\\_196\\_20](https://dsa.court.gov.ua/dsa/inshe/14/N_196_20) (accessed on 29 November 2021).

using his or her own electronic signature in the system and check his or her own technical means for compliance with the technical requirements for videoconferencing.

Some courts have separately ordered quarantine restrictions and special modes of operation due to the complication of the epidemiological situation and the confirmation of the diagnosis of COVID-19 by court staff to prevent the spread of that acute respiratory infection to employees and visitors of the court and ensure safe working conditions for court employees. To achieve this, they used a system to monitor the level of epidemic danger in the city – orange or red – to decide whether to suspend cases in open court hearings with the participation of participants and terminate their admission to courtrooms. It was recommended to the participants of court proceedings to participate in the court session by videoconference outside the court premises using their own technical means in the manner prescribed by Part 4 of Art. 212 CPC of Ukraine of the corresponding statement.

Encouraging people to participate in court hearings by videoconference was a good idea, but it should have been promoted via social media advertising and wide state policy strategy about safe and effective access to courts during COVID-19. At the same time, the risks of technical impossibility to participate in videoconferences outside the courtroom, interruption of communication, etc., in the CPC are borne by the party who submitted the application (according to para. 5 of Art. 212 of the CPC).

A logical question arises as to what liability has been established for violating the procedure for holding a court hearing by videoconference and whether sanctions are provided for the abuse of procedural rights by a party participating in a court hearing by videoconference. The CPC provides for a limited number of sanctions for misconduct in court, namely, warning and removal from the courtroom of a person (Art. 145) or a fine for failure to perform procedural duties, including evasion of actions imposed by the court on a party to the trial (paragraph 1 of Art. 148). So far, there is no common practice of applying such measures to persons participating in a court hearing by videoconference. Fines are applied to violators in some cases, but that is all<sup>14</sup>.

At the same time, the CPC does not provide appropriate mechanisms for renewing the terms or choosing the date and time of the court hearing by videoconference for reasons beyond the parties' control. There are often cases when the court does not have the technical capacity to hold a court hearing by videoconference because "a videoconference with another court in another civil case is scheduled for the specified date and time"<sup>15</sup>. However, the issues of execution of the person's right to be heard by the court, as well as the proper implementation of the principles of publicity and orality of the trial, were properly secured during quarantine.

<sup>14</sup> <https://reyestr.court.gov.ua/Review/98060700> (accessed on 29 November 2021). In this case, a party refused to appear in court at the request of the presiding judge during the videoconference, demanded that the presiding judge show an identity card and explain her education, stated that the video link was inappropriate because he could not see the presiding judge and her breastplate with the judge's mark, obstructed the administration of justice, did not respond to repeated remarks and warnings, and continued his behavior. The court decided on the application of a fine for this person because the application of procedural coercion is not required by procedural law.

<sup>15</sup> <https://reyestr.court.gov.ua/Review/80885966> (accessed on 29 November 2021).

## 2.2. Access to information and evidence<sup>16</sup>

Access to information about the case, case materials, and evidence in the case is an important element of the right to a fair trial, as guaranteed by the Constitution of Ukraine<sup>17</sup> and the CPC of Ukraine. At the same time, the proper exercise of these rights in the context of the pandemic was a challenge for the Ukrainian authorities in view of the following.

According to the CPC of Ukraine, the parties have the right to become acquainted with the case materials, as well as to investigate material and electronic evidence by inspection (Art. 237). In order to ensure the proper exercise of these rights by the participants of the process, the Council of Judges of Ukraine noted in its decision<sup>18</sup> that it is recommended to familiarise the participants of the trial with the materials of the court case remotely by sending scanned copies of the court case materials to the party's email address and accept applications for familiarisation through remote means of communication. Therefore, if the materials were received in paper form, the court would be obliged to scan these documents and upload them to the system<sup>19</sup>.

The Council of Judges of Ukraine<sup>20</sup> also recommended that the participants of court hearings provide the court with all the necessary documents by remote means of communication: electronically to the court email address, through a personal account in the "Electronic Court" system, by mail, or by fax<sup>21</sup>. Courts are also advised to organise online broadcasts of high-profile cases meetings to ensure the implementation of the principles of accessibility and impartiality of the administration of justice and the principle of publicity of the judicial process, and to announce and cover the course of court hearings in high-profile cases on the websites of courts and in social networks, and to ensure the online broadcast of court proceedings in a timely and detailed manner.

During the pandemic, courts had to inform visitors on 1) their information resources, relevant decisions in court about the determination of reception hours by court offices, and the archive for issuing copies of documents; 2) the prohibition of admission to court hearings and court premises of persons with signs of diseases, fever, etc.; 3) ensuring that the participants of the trial are familiar with the case materials and procedural documents remotely by sending scanned meteorological materials to the email address of procedural

<sup>16</sup> *ELI/UNIDROIT Model European Rules of Civil Procedure*, <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules> (accessed on 21 November 2021).

<sup>17</sup> Constitution of Ukraine, <https://zakon.rada.gov.ua/laws/show/254K/96-вп#Text> (accessed on 21 November 2021).

<sup>18</sup> <http://rsu.gov.ua/uploads/article/risenna-rsu-no-63-vid-30102020-s-1478f00d95.pdf> (accessed on 21 November 2021).

<sup>19</sup> Out of more than 600 local courts, only a small number are equipped with the necessary facilities for videoconferences. For instance, Obolon District Court of Kyiv, located in the capital of Ukraine, has two equipped rooms for 15 judges.

<sup>20</sup> <https://newjustice.org.ua/en/partners/council-judges-ukraine/> (accessed on 21 November 2021).

<sup>21</sup> <http://rsu.gov.ua/uploads/article/risenna-rsu-no-63-vid-30102020-s-1478f00d95.pdf> (accessed on 21 November 2021).

participants, as well as the requirement that visitors, judges, and employees of the judges' apparatus use some personal protective equipment. All activities not related to the procedural activities of the court, organised by telephone, were suspended. Disinfection measures of premises were carried out, and appropriate distance between participants (not less than 1.5 meters) was ensured.

As far as Art. 11 of the Law of Ukraine on the Judiciary and Status of Judges<sup>22</sup> is concerned, more than several thousand online broadcasts of court hearings have been made available on the YouTube channel "Judiciary of Ukraine"<sup>23</sup> to ensure openness and possibility of supporting media requests, the principles of publicity, and the openness of the administration of justice.

The courts were equipped with boxes of incoming correspondence, which were zeroed several times a day and transferred to the stationery for appropriate registration.

### 2.3. Time limits

On 30 March 2020, the CPC of Ukraine was amended by Clause 3 of Section XII "Final Provisions" of the CPC of Ukraine during the quarantine established by the Cabinet of Ministers of Ukraine to prevent the spread of COVID-19, and the procedural terms were extended for the duration of the quarantine.

Thus, these provisions state that the procedural time limits for changing the subject or grounds of the claim, increasing or decreasing the number of claims, submission of evidence, requesting evidence, and providing evidence, as well as time limits for going to court, filing a response, objections, explanations of a third party on the claim, or recalls during the quarantine are not valid. Accordingly, court decisions contain instructions to set such deadlines after expiration, in particular to set a deadline for the defendant to file a response to the statement of claim – fifteen days from the date of expiration of quarantine related to the prevention of coronavirus disease (COVID-19), or from the date of service of this decision, if it is served after the end of the quarantine related to the prevention of the spread of coronavirus disease (COVID-19)<sup>24</sup>.

Accordingly, for example, a period of thirty days is set for an appeal against a decision of a court of first instance (Art. 354 of the CPC of Ukraine). In Ukraine, there is also the model of appeal for the final decisions of the court and the interim court orders. Therefore, in some cases prescribed by law, parties may appeal court orders during the consideration of a case in the court of first instance. Regardless, the *res judicata* or so-called entering in force of the court decisions in Ukraine provides when the term for appeal expires, according to Art. 273. Thus, the finality of court decisions in Ukraine was subject to a strike.

<sup>22</sup> <https://zakon.rada.gov.ua/laws/show/1402-19#Text> (accessed on 21 November 2021).

<sup>23</sup> <https://www.youtube.com/c/CourtGovUa> (accessed on 30 November 2021).

<sup>24</sup> <https://reyestr.court.gov.ua/Review/88913294> (accessed on 29 November 2021).

At the same time, it should be noted that today, this legal norm violated the principle of reasonableness of terms of consideration of a case by the court, as the proper performance of procedural actions for which such terms are so dependent on quarantine conditions was simply not possible. In view of this, three months later, on 18 June 2020, this provision was supplemented by a rule according to which the court extended the procedural term established by the court upon the person's application, if the impossibility to perform the relevant procedural action within the specified period was due to quarantine restrictions.

Since the amendments to para. 3 of section XII "Final Provisions" of the CPC of Ukraine regarding the extension of procedural terms, courts have followed a more moderate approach to ensuring a person's right to a reasonable period of consideration of his or her case by the court. In particular, the decisions state that reference to the existence of quarantine and restrictions (self-isolation) introduced in this connection, without substantiated arguments and substantiated evidence, cannot be considered a valid reason for missing the deadline.

It should be noted that the principle of reasonable time of court proceedings enshrined in the CPC of Ukraine, as well as being an integral element of a person's right to a fair trial, could not be properly implemented during the rule of unlimited and unconditional extension of procedural terms for quarantine. At the same time, the seriousness of the reason for missing such deadlines allowed courts to correct the situation in time and provide guarantees of reasonable deadlines for the consideration of the case for all participants in the process.

### 3. Conclusions

*An end, on the contrary, is that which is inevitably or, as a rule, the natural result of something else but from which nothing else follows.*

Aristotle, *Poetics*

It should be highlighted that the issues of performing justice have attracted the attention of many scholars during COVID-19. Nevertheless, to draw useful lessons from the situation with COVID-19, I would like to paraphrase the conclusion of Aristotle: "Well constructed plots must not therefore begin and end at random but must embody the formulae we have stated". Hence, we should be ready to confront those situations that cannot be considered unpredictable anymore – there is no ground for denying the inevitability in such situations in the future. The great achievement that "not one court in Ukraine was closed during COVID-19" should be reassessed in light of the monetary expenses and costs to human safety paid for this. The necessary instructions and recommendations should be ready before these kinds of events occur and should fully cover the issues of communication with courts, safety measures of staff, possibilities of on-distance

participation, etc. That is why there is no necessity to write explicitly about COVID-19 in procedural legislation – there are many other viruses that could cause the next pandemic. A deliberate and premeditated strategy for the judiciary to respond to any pandemic, not a specific pandemic, is the best lesson we can learn from this situation with the COVID-19 pandemic<sup>25</sup>.

Secondly, the very need to limit the contact of individuals to prevent the spread of infection should be part of an overall strategy to treat people's health and create conditions for their safety as much as possible. In our opinion, direct contact between litigants and court staff are not an integral part of any of the general principles of civil justice, as long-distance communication can ensure the proper exercising of the rights of the person to be heard by the court, access to information and evidence, and other tools necessary for proper case consideration. The issues of execution of the person's right to be heard by the court, as well as the proper implementation of the principles of publicity and openness of the trial, were properly secured during quarantine with the electronic tools.

As it was noted at the beginning of this article, the conservatism of the judiciary means that decisions adopted to ensure proper functioning should be very concise, reasonable, and stable to ensure the right of a fair trial and keep justice open not temporarily but constantly.

### Abstrakt

#### ***Transformacja wymiaru sprawiedliwości w czasach pandemii COVID-19 – doświadczenia ukraińskie<sup>26</sup>***

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*Nie ulega wątpliwości, że pandemia COVID-19 wpłynęła na każdą dziedzinę naszego życia, w tym na sądownictwo. W niniejszym artykule przeanalizowano główne wyzwania związane z egzekwowaniem sprawiedliwości w czasie pandemii, koncentrując*

<sup>25</sup> See B. Krans, A. Nyland (eds.), *Civil Justice and COVID-19*, [https://septentrio.uit.no/index.php/SapReps/issue/view/465?fbclid=IwAR0HDrBxo0t\\_ag9x2rvL9TYx55Z86WHz-Bh6n2Yzy-gQHXX\\_dVXaBvBYefXU](https://septentrio.uit.no/index.php/SapReps/issue/view/465?fbclid=IwAR0HDrBxo0t_ag9x2rvL9TYx55Z86WHz-Bh6n2Yzy-gQHXX_dVXaBvBYefXU) (accessed on 29 November 2021); *ELI Principles for the COVID-19 Crisis*, European Law Institute 2020, [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Principles\\_for\\_the\\_COVID-19\\_Crisis.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf) (accessed on 29 November 2021); I. Izarova, *About Special Double Issue 2–3/2020 “Justice Under COVID-19 Pandemic”*, “Access to Justice in Eastern Europe” 2020/7 (2–3), p. 4–5.

<sup>26</sup> Artykuł powstał w ramach realizacji przez Uniwersytet Śląski grantu pt. „Impact of the COVID-19 pandemic on the justice system. Case study and suggested solutions” z programu NAWA granty interwencyjne nr BPN/GIN/ 2021/1/00006/U/00001 (numer UN-2105-001).

się na sprawach cywilnych. Metody rozwiązywania tych problemów wdrożone na Ukrainie zasługują na uwagę naukowców ze względu na ich trwałą efekt i pozytywne konsekwencje. Zmiany te przyczyniły się do przekształcenia wymiaru sprawiedliwości w sprawach cywilnych na Ukrainie i nadania mu bardziej zrównoważonego charakteru. Podsumowując, należy mieć przygotowane niezbędne instrukcje i zalecenia (także w zakresie komunikacji z sądami, środków bezpieczeństwa personelu, możliwości udziału w postępowaniach na odległość itp.) jako część przemyślanej i z góry zaplanowanej strategii wymiaru sprawiedliwości reagowania na każdą pandemię. Zaproponowano koncepcję nowej wizji jawności i ustności postępowania cywilnego w świetle nowych narzędzi komunikacji na odległość, które mogą w pełni zapewnić właściwe wykonywanie prawa do bycia wysłuchanym przez sąd oraz dostępu do informacji i dowodów.

**Słowa kluczowe:** postępowanie cywilne, pandemia COVID-19, wymiar sprawiedliwości, wideokonferencje w sądach, bieg terminów, nadużycie prawa procesowego

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