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Iryna Yuriyivna TATULYCH

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Iryna Yuriyivna TATULYCH[1]

Abstract

The article is devoted to the study of issues related to the proceedings in civil court cases during the quarantine period. The importance of ensuring continuous and secure access to justice is obvious to effectively protect violated, unrecognized or disputed rights, freedoms, or interests of individuals, the rights and interests of legal entities, the interests of the state. The article reveals the study of the issue of a person's constitutional right realization to fair judicial protection during a pandemic. Legislation and regulations that contain the main recommendations for courts to administer justice during the quarantine period underwent the analysis. It is substantiated that neither the judicial system nor the guarantees of citizens for judicial protection can be "quarantined" because the main function of the state, even in such conditions, is to ensure the implementation of the protection of the rights and freedoms of citizens. It is found out that justice should be not just a form of the judiciary, but an effective tool for protecting rights, freedoms, and interests. The court is the tool that ensures the effectiveness of judicial protection. To overcome the identified gaps, it was concluded that it is necessary to implement all components of electronic litigation, which will make an appeal to court more accessible and understandable, will completely abandon paper documentation in parallel with an electronic one, and in the future will lead to effective civil litigation and timely resolution, within a reasonable period.

Keywords:

Proceedings; justice; participate; "Electronic Court"; quarantine.

I. Introduction

For more than a year, Ukraine has been living by new, unprecedented rules with restrictions aimed at preventing the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 in Ukraine, which naturally caused changes in the daily life of each citizen and society as a whole. The justice system is no exception.

Article 55 of the Constitution of Ukraine guarantees that the rights and freedoms of man and citizen are protected by the court (Konstytutsiya Ukrainy

[1] Candidate of Law, Associate Professor, Department of Justice, Faculty of Law, Yuriy Fedkovych Chernivtsi National University, Ukraine; i.tatulych@chnu.edu.ua

vid 28.06.1996). Access to justice and its administration must be ensured in all circumstances and situations but the imposing of a national quarantine in March 2020, in our opinion, has been a difficult challenge for Ukrainian courts at all levels. At the same time, despite the all-Ukrainian quarantine, the judicial system continues to operate. Courts are obliged to administer justice even after declaring martial law or a state of emergency.

In the mechanism of protection of rights, freedoms, interests of a person, as well as interests of the state and society, the judicial form of protection is the most effective and perfect one. However, in connection with the Coronavirus disease pandemic on March 11, 2020, the Cabinet of Ministers of Ukraine set up the quarantine by Resolution № 211 "On Prevention of the Spread of Coronavirus COVID-19 in Ukraine", and for this period there was introduced a special regime in Ukrainian courts. As a result, the judicial system faces the question: "How to simultaneously ensure the right of citizens to effective judicial protection under Art. 55 of the Constitution of Ukraine, Art. 4 of the Civil Procedural Code (hereinafter referred to as the CPC of Ukraine) (Cyvilnyi procesualnyi kodeks Ukrainy, 2020), other national legislation and protect the population from such an acute infectious disease?"

Hence, the question arose of urgent development of an appropriate mechanism or using alternative means that would allow all participants in the trial to properly participate in the administration of justice not neglecting to comply with the quarantine rules. Having such an opportunity will significantly increase the efficiency of court proceedings, ensure the right of court participants to provide their explanations to the court, reduce the workload of judges, modernize the trial and, most importantly, protect litigants from the spread of the disease. These and other issues need to be studied and understood, in the course of the research, and the objective of this study is to identify gaps in the regulation of civil proceedings during the quarantine.

II. Main material presentation

In the mechanism of protection of rights, freedoms, interests of a person, as well as interests of the state and society, the judicial form of protection is the most effective and perfect one. However, in connection with the Coronavirus disease pandemic on March 11, 2020, the Cabinet of Ministers of Ukraine set up the quarantine by Resolution № 211 "On Prevention of the Spread of Coronavirus COVID-19 in Ukraine", and for this period there was introduced a special regime in Ukrainian courts. As a result, the judicial system faces the question: "How to simultaneously ensure the right of citizens to effective judicial protection under Art. 55 of the Constitution of Ukraine, Art. 4 of the Civil Procedural Code (hereinafter referred to as the CPC of Ukraine),

other national legislation and protect the population from such an acute infectious disease?"

Due to the significant spread of COVID-19 and setting up the quarantine throughout Ukraine on March 12, special attention needs to be paid to the organization of the continuous operation of courts to dispense justice and ensure the constitutional right of citizens to fair judicial protection. And the most important thing in such conditions is to ensure continuous and safe access of citizens to justice, especially in the courts of the first instance, because citizens apply to them, first of all, and judges of local courts are the first to protect human rights and freedoms.

One of the ways out to these issues was the appeal of the Chairman of the Council of Judges of Ukraine to all judicial institutions of Ukraine on March 16, 2020, with a request to establish a special regime of courts. In particular: to explain to citizens the possible postponing of the cases consideration in connection with quarantine measures and the possibility of considering cases by videoconference; to terminate all activities not related to the procedural activities of the court or functioning of the judiciary (round tables, seminars, open days, etc.); to suspend the personal reception of citizens by the court management; to limit the number of people attending hearings if they are not the participants in those court hearings; not to allow the admission to the court hearings and court premises of persons with signs of respiratory diseases: pale face, red eyes, cough; to reduce the number of court hearings scheduled for consideration during the working day; if possible, to conduct court proceedings without the participation of the parties (written proceedings); judges and court staff at the slightest signs of illness have to take measures for self-isolation, to inform the relevant health care institution and the court management by phone or e-mail (Legal Newspaper Online, n.d.).

An interesting recommendation of the Council of Judges of Ukraine was the request to the courts to acquaint the participants of the trial with the materials of the case remotely (if technically possible) by sending scanned copies of the case to the e-mail address specified in the application and accepting applications through remote communication means. Thus, the indication of the e-mail address in the procedural documents suddenly took on a new meaning.

The next day, March 17, the Council of Judges of Ukraine adopted a decision approving similar recommendations, adding that when considering the possibility of videoconferencing, the judges should take into account that such consideration does not prevent the spread of the disease completely. It should be noted that the recommendations of the Chairman of the Council of Judges of Ukraine, and later the Council of Judges of Ukraine itself, were timely and gave some guidance to the courts on how to work in quarantine.

As a result, some courts have prohibited access to the court by visitors who do not have a subpoena. Although the Council of Judges of Ukraine offered to limit the access and that is not identical to the ban. Thus, for the developed democratic countries, ensuring publicity, even in the face of restrictive measures and the introduction of audio or video conferencing, remains a priority. There were cases when some courts ceased to hear cases in court, except for "urgent" ones. At the same time, some courts did not impose severe restrictions during quarantine, did not prohibit participants in cases, or free listeners from attending court hearings. These courts only advised citizens to refrain from visiting the court and also drew the parties' attention to the possibility of hearings without their participation.

Thus, after setting up the quarantine throughout the country, the courts began to reorganize their work. At the entrance to the courtroom, each person is checked for signs of respiratory diseases, as well as undergoes temperature screening. Court offices have also introduced precautionary measures: it is not allowed to gather a large number of people at the same time, and recommended to send documents by mail (including e-mail) or using the "Electronic Court" system.

On March 26, 2020, the Supreme Council of Justice (SCJ) adopted a decision "On access to justice in the context of the pandemic of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2". Some of the recommendations repeated those previously provided by the Council of Judges of Ukraine. But, in contrast, the SCJ recommended that courts provide justice only in urgent cases. Also, the SCJ addressed the President of Ukraine and the Verkhovna Rada of Ukraine with a proposal to amend the procedural codes that would ensure the right of persons to access justice in quarantine in terms of holding meetings of judicial authorities in real-time via the Internet and extension/suspension of deadlines for appealing court decisions. The SCJ also appealed to the State Judicial Administration of Ukraine (hereinafter referred to as - SJA) to speed up the work on the Unified Judicial Information and Telecommunication System (further - UJITS), in particular, instructed to immediately submit for approval the provisions of the UJITS on remote participation. The SCJ insisted that the system work no later than May 1, 2020. This rule has been enshrined in the current procedural legislation since 2017 (Art. 14 of the CPC of Ukraine).

In this regard, on March 30, 2020, the Verkhovna Rada of Ukraine adopted 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)", which entered into force on April 2, 2020. The law amends, inter alia, economic, civil, and administrative proceedings. The changes affected the organization of the

court's work and the peculiarities of consideration of cases in the conditions of quarantine measures introduction (Verkhovna Rada of Ukraine, 2020).

In turn, the Supreme Court clarified what changes await Ukraine's judiciary. Procedural codes of Ukraine (the Code of Administrative Procedure, the Commercial Procedure Code, and the Civil Procedural Code) were supplemented by provisions on the peculiarities of proceedings in the context of the introduction of quarantine measures, which relate to the following issues:

1. During the quarantine, persons have the right to participate in the court videoconference session outside the court, using their own technical means. One of the elements of "e-justice" is the use of video conferencing systems, which give participants in the process the opportunity to participate remotely in the case. In practice, this "element of justice" has not been used as often as it is today. And even with a small load, the system was failing. There is an obvious need to develop a reliable platform for high-quality litigation (such as the ZOOM platform). But without the two "significant shortcomings" that appeared when using Zoom. They are the time limit of the conference (40 minutes for free) and the lack of confidence in protecting the information needed for quality justice.

2. For a person to be able to confirm that it is him/her, it will be necessary to affix an electronic signature (if any) or to confirm his/her identity in accordance with the Law of Ukraine "On the Unified State Demographic Register and documents confirming the citizenship of Ukraine, identity or special status" This provision is understandable because it accelerates the identification of the individual.

3. Procedural terms must be extended for the duration of the quarantine (the Code of Administrative Procedure, the Commercial Procedure Code, and the Civil Procedural Code). The period set by the court in its decision may not be less than the quarantine period aimed to prevent the spread of COVID-19 (the Code of Administrative Procedure, the Commercial Procedure Code).

4. Criminal proceeding also hasits own characteristics (Sudova vlada Ukrayiny, n.d.).

Thus, the law provided the possibility of conducting court hearings by videoconference outside the courtroom, and also extended some procedural terms for the period of quarantine. In order not to deprive citizens of the statutory right to a fair trial, some courts already begin to use in practice the rule as to participating in a court hearing by videoconference outside the court using their own technical means (Art. 212 of the CPC). Despite the transition to video conferencing, courts currently do not have the financial means to purchase a premium account in the ZOOM application, not to be limited to free 40 minutes; however, there is already a pleasant breeze of digitalization.

The fact is that in Ukraine, there is no single software that would allow conducting safely such remote hearings. Currently, Ukraine is only developing a so-called e-court - UJITS, which was supposed to be launched in March last year, but then it was decided to finalize and postpone the start. Now, during the quarantine, this system has been introduced as a matter of urgency since May 1, initially only for civil, commercial and administrative cases. Even though the law on remote hearings has already entered into force, the SJA still advises waiting for a single state product. Public video conferencing programs such as Zoom, Skype, or Google Meet are not recommended. After all, they allegedly do not allow to confirm the identity of the participant or to record the hearing.

As noted above, during the quarantine period, the parties to the case may participate in the court hearing by videoconference outside the courtroom using their own technical means. Confirmation of the person's identity involved in the case is carried out by applying 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 the citizenship of Ukraine (hereinafter referred to as - LU № 5492-VI from 20.11.2011), identity or special status**",** or the State Judicial Administration of Ukraine (Part 4 of Art. 212 of the CPC). The analysis of this provision shows that the parties to the case have the right to participate in the court session by video conference outside the courtroom under two conditions: 1) their own technical means availability; 2) confirmation of the identity of the party to the case: a) by using an electronic signature; b) in the manner prescribed by the Law № 5492-VI of 20.11.2011; c) in the manner prescribed by the SJA of Ukraine.

Thus, the development of modern technology has prompted many people to create an electronic signature. Therefore, we believe that the opportunity to participate in the court hearing using an electronic signature is a positive step towards the introduction of the "Electronic Court" system. By creating their account in the system through registration, citizens, representatives of organizations and institutions can significantly reduce their time to submit or receive various documents related to litigation. A person in this system registers with his/her digital signature, creates an account once; the system accordingly creates a personal cabinet through which a person receives all documents electronically to his/her email address and, very conveniently, 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 electronic 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.

At the same time, participants in the case who received an electronic signature in advance must follow the instructions on the procedure for conducting a court hearing by videoconference, approved by Order 169 of April 8, 2020 by SJA: firstly, it is the registration of a signature in the EasyCon video conferencing system (prototype of Zoom, Skype) on the official web portal of the judiciary of Ukraine at www.court.gov.ua; secondly, submission of an application for participation in a court hearing not later than 5 days before the court hearing; thirdly, provided that the court has the appropriate technical capacity and with the consent of all the participants, the judge presiding over the hearing decides on the possibility of holding such a hearing; fourthly, at the beginning of the court hearing, the secretary creates a video platform for the hearing, invites the parties to the case and identifies them with a passport or other identity document (the secretary is also responsible for the technical conditions, sound and quality of video); fifthly, the course and results of the proceedings are recorded by the court. Upon completion of the proceedings, archival and working copies are created on DVDs, which are attached to the case file.

Besides, the Law provided for the automatic extension of all general and special statutes of limitations established by civil, commercial, family, and labor law. The phrase "extended for the duration of quarantine" gave grounds to assume that the procedural terms were "automatically" extended by the number of days equal to the period of quarantine. In addition to the "automatic" extension of the deadline for appealing decisions, during the quarantine, the deadlines for filing applications on the merits of the case - the recall and explanations of the third parties on the claim or recall. Without the submission of these documents (if the deadline did not expire), the court could not consider the case even in written proceedings, if the defendant did not send a response, the deadline for which was to expire after April 2. Also, since April 2, no decision of the courts of the first instance has entered into force, regardless of the desire of the parties to appeal it; no executive document was issued on such decisions; claims, appeals, and cassation appeals, which were left without motion, could not be returned even though their shortcomings were not eliminated, etc. This completely deprived the court and the parties to the case of any possibility to influence the possibility of considering the case.

The introduced mechanism of "automatic" extension of procedural terms "freezes" the consideration of a significant number of cases by courts, even those that could be considered in written proceedings without summoning the parties, or those where a court decision has already been made. This could have been avoided if the legislator had chosen another way of proceedings, which, on the one hand, would not violate the rights of those participants in the process who for objective reasons cannot exercise their procedural rights in time, and on the other hand - would not "pause" the

proceedings. Moreover, the relevant tool is already in the procedural codes - renewal and extension of procedural deadlines (Shabarovskyi, n.d.).

These inconsistencies in judicial practice were eliminated on July 17, 2020, when the Law of Ukraine № 731-IX of June 18, 2020, came into force, which amends the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine regarding procedural deadlines during the quarantine. As follows from the explanatory note to the Law № 731-IX - an automatic extension of procedural terms leads to abuse of procedural rights by the parties, the court is deprived of the opportunity to move to the next stage due to the extension of previous terms, or decisions of courts of the first instance do not take legal effect as the deadlines for filing an appeal are extended, etc. Of course, such circumstances significantly impede the implementation of effective justice. However, the procedural time limits will now be calculated as follows, namely, at the request of the participants, the court may renew the procedural time limits, provided that the reason for their omission is recognized as valid and including those due to restrictive measures imposed in connection with quarantine. Also, at the request of the person, the procedural term established by the court is subject to extension, if the impossibility of carrying out such procedural action within the allotted term is due to the quarantine restrictions (Art. 127 of the CPC of Ukraine).

Thus, the automatic extension is canceled, and to renew such a period, the party to the case must apply and indicate a valid reason (related to the quarantine restrictions), which led to the omission of the relevant deadlines. Examples of such valid reasons are the impossibility of drawing up a procedural document in connection with the mandatory staying in a quarantine of a person; it is impossible to get home from another country due to the international traffic restrictions; ban on leaving the apartment (no one guarantees that strict quarantine measures will not be reintroduced); as well as other routines of the world affected by the coronavirus pandemic.

Currently, there is no single algorithm for how the judicial system should work in the new conditions. There are only recommendations from bodies such as the Council of Judges, the Supreme Council of Justice, and the State Judicial Administration. These recommendations differ from time to time. Each judicial institution determines its own rules and restrictions: some resort to strict prohibitions, minimizing the handling of cases, others have only published the relevant recommendations. And only in some cases, the courts stopped working completely during the quarantine. This applies mainly to appellate institutions. This option is unacceptable for courts of the first instance. Cassation instances also work in a "limited-habitual" mode: citizens' access to buildings is reduced as much as possible, and the reception of citizens by judges and management is largely abolished. But there is no mass transfer of

cases. Little has changed in the work of higher courts because many cases there are considered in the procedure of simplified claim proceedings - in writing (Articles 274-279 of the CPC). As for open court hearings, there are general quarantine restrictions for the whole country.

In trying to exercise their right to judicial protection, litigants must monitor court websites daily and even hourly, call judicial assistants and secretaries, and appear in court for especially important cases to ensure that the case is not heard without their participation. Most court offices are more likely to work in contactless mode and documents can only be left in a special box. Therefore, participants should take into account that they will not be marked by the court on receipting the document; documents submitted on the day of the court hearing may not reach the judge in time. Participants also need to be aware of court schedules and the workload of judges. If offline meetings are still held, everyone should use medical masks and gloves.

Unfortunately, the main problems facing the court system of Ukraine in connection with COVID-19 are the following: lack of coordination of major bodies, not always well-thought-out decisions, disregard for the constitutional principles of openness, transparency, different reactions of courts due to subjective factors, improper communication with users of judicial services. The judiciary must demonstrate unity in working under the conditions of COVID-19 quarantine to overcome these challenges. Maximum openness is required not only in the publication of decisions but also in the explanation of their logic and operational communication, using the created communication tools. Rules are easier to follow if they are clear and people understand their benefits.

Besides, there is no need to disregard the right to a public trial and close the court hearings for "outsiders". Restrictions are possible only based on the need to maintain social distance between persons who are in the courtroom (1.5-2 m) and the use of means of protection. Perhaps it would be correct to predict that if the court restricts access to the court hearing for visitors, a mandatory video broadcast of that hearing should be provided on the Internet. The openness of the trial and the right of any person to be present at the hearing is one of the elements of the constitutional principle of the court proceedings publicity. The provision on the right of a court to restrict access to a hearing of persons who are not the participants in the trial if such participation would endanger the life or health leads to abuse, as it does not establish the criteria for restricting access to the court hearings.

As to the remote court proceedings, it is advisable to use the experience of other countries that have used public programs that support video conferencing (Skype, Zoom, Google Meet, etc.), and provide participants with the right to participate remotely, thus expanding the range of cases that courts can consider even during the quarantine. It is advisable to keep this experience and continue after the end of the quarantine.

Introducing the quarantine measures has shown that neither the judicial system nor the rights of citizens for judicial protection can be "quarantined" because the main function of the state, even in such conditions, is to ensure the protection of citizens' rights and freedoms. The current situation in the country requires non-standard solutions and ideas to establish access to justice. Now, more than ever, all the challenges facing the judiciary on the way to e-justice must be solved decisively and without delay. Excessive formalism in such circumstances undermines the credibility of the judiciary, which must protect the interests of citizens in any conditions. The main emphasis is on maintaining a balance between ensuring the right of access to justice and protecting citizens (litigants, court visitors) and court staff from the spread of acute respiratory diseases and coronavirus COVID-19.

The quarantine introduced in the state gives grounds and confidence that the e-court will finally work in Ukraine. After all, in this case, it would be the best solution, which will provide an opportunity to consider cases within the time limit set by law and receive all the necessary documents from citizens. After all, any lawful decision must be based on a law adopted by the international rule of law and international human rights standards. It is the State that has the right to ensure the realization and observance of such rights, despite the conditions of the economic crisis and the quarantine.

III. Conclusions

The study allows us to formulate the following conclusions and recommendations that justice in general during the pandemic period was somewhat transformed, and quarantine restrictions on the justice system had not only a negative but also a positive impact. In matters relating to the administration of justice and the holding of court hearings, each judicial institution determines its own rules and follows its algorithm. Courts are cautious about limiting or terminating their procedural activities during the quarantine. In this case, the court administration can be understood: the rule of law cannot exist without the administration of justice, even in such a short period as quarantine measures.

Moreover, the quarantine imposed in the state gives grounds and confidence that the e-court in Ukraine will finally work. In this case, it would be the best solution, which will provide an opportunity to consider cases within the time limit set by law and receive all the necessary documents from citizens. After all, any lawful decision must be based on the Law adopted by international standards of the rule of law and human rights. It is the State that has the right to ensure the implementation and observance of such rights, despite the conditions of the economic crisis and the quarantine. There is no doubt about the full functioning of the Unified Judicial Information and

Telecommunication System, which is one of the key issues today. Moreover, the Concept of this system was approved by the State Judicial Administration of Ukraine in 2018, but in 2019 its full launch was broken down into certain stages and postponed to the period from 2020 to 2023. Undoubtedly, this will be a significant step forward, a way to achieve transparency of court proceedings, because it simplifies access to justice, reduces the time of court proceedings, reduces the cost and speeds up the judicial process, makes communication between court participants and the court faster; adapts national legislation to the legal framework of the European Court of Justice and, as a result, promotes the efficiency of judicial proceedings. Therefore, further research should focus on achieving the above issues.

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