



Policy paper

on the matter of holding court hearings in the form of web conferencing

Summary

The COVID-19 pandemic has accelerated the implementation of information technologies in court proceedings. The holding of court hearings in the form of web conferencing has caused a restriction of the principle of publicity of court hearings, namely, access for the public to courts is prohibited, and national law provides no compensation for this restriction. International law stipulates that restrictions of the publicity principle must be lawful, proportionate, and necessary in a democratic society. Many states are now developing rules for conducting remote court hearings. Such rules should provide guarantees to compensate for restrictions of the publicity principle. Absence of guarantees will cause violations of the publicity principle and complaints to national courts and international human right protection bodies. In any case, public trust in the judicial system will suffer. In order to avoid this, we propose that states enact legal guarantees to compensate for restrictions of the publicity principle of court proceedings caused by healthcare reasons.

Introduction

The COVID-19 pandemic has caused changes in the operation of the judicial system. Courts in Poland, Russia, Turkey, and other countries tried “urgent” cases only. Access for the public to courts was fully prohibited, and many cases were tried in the form of web conferencing.

In a number of countries, information services were being developed and implemented in legal proceedings even before the pandemic. It would be impossible to try 100% of cases in the form of web conferencing, which was done in Kazakhstan¹, without extensive preparations. By the beginning of the pandemic, not all states had good smooth-running tools in order to urgently transfer the operation of courts in remote format. According to trial monitoring² and reports of intergovernmental organizations³, one of the problems of remote justice is that courts refuse to follow the publicity principle during the pandemic; prohibition of access for the public was compensated by live broadcasts from the courtroom only occasionally.

The pandemic has posed a serious challenge for the judicial systems of states, but the complexity of the challenge does not mean that states are no longer obliged to follow the

¹ The courts of Kazakhstan have shifted to remote work due to the emergency regime, the Supreme Court of the Republic of Kazakhstan, April 27, 2020. <https://sud.gov.kz/rus/news/sudy-kazahstana-pereshli-na-distancionnyy-format-raboty-iz-za-rezhima-chp> (date of visit: November 2, 2020).

² Summary report on the publicity of justice and information openness of courts in the period of the pandemic, 2020, <https://courtmonitoring.org/ru/projects/otchet-y-o-monitoringe/svodnyj-otchet-po-glasnosti-pravosudiya-i-informatsionnoj-otkrytosti-sudov-v-period-pandemii/> (date of visit: November 2, 2020); Court Monitoring Report, Court Watch Poland, https://courtwatch.pl/wp-content/uploads/2020/09/FCWP_2020_web.pdf (date of visit: November 9, 2020).

³ OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic, Organisation for Security and Co-operation in Europe, 17 July 2020, p. 124. <https://www.osce.org/odihr/human-rights-states-of-emergency-covid19> (date of visit: November 2, 2020).

principle of publicity in legal proceedings⁴. The EU-Russia Civil Society Forum supports the recommendations of intergovernmental bodies⁵ and international non-governmental organizations⁶ on ensuring the right to a fair trial, but these recommendations overlook the principle of open justice. We urge all stakeholders to ensure the right to a public hearing in remote justice.

The international standards of public court proceedings

A public trial is one of the guarantees of a fair trial, and it is stipulated by part 1 of Article 14 of the International Covenant on Civil and Political Rights, part 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and at the national level. As the European Court of Human Rights (ECtHR) reiterated, “the holding of court hearings in public...protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in courts can be maintained”⁷. According to the European Court, a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public⁸.

Deviation from this principle is possible on condition of notice to the UN and the Council of Europe⁹. In absence of such notice, the publicity principle may be restricted for a number of reasons, namely, “the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society... or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

Exclusion of the public from a hearing should occur only when it was strictly necessary in the circumstances of a case¹⁰. In a decision to conduct a closed trial, the judge must state the reasons for such decision¹¹. If public cannot easily access the place of the trial, the state is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access¹².

Therefore, restrictions of the publicity principle are possible, but only in situations that are defined by the law and by virtue of a court’s decision for a specific case. If, however, public

⁴ European Commission for the Efficiency of Justice, Declaration on Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic, 10 June 2020. <https://rm.coe.int/declaration-en/16809ea1e2> (date of visit: November 2, 2020); OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic, Organisation for Security and Co-operation in Europe, 17 July 2020, p. 125. <https://www.osce.org/odihr/human-rights-states-of-emergency-covid19> (date of visit: November 2, 2020).

⁵ OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic, Organisation for Security and Co-operation in Europe, 17 July 2020, p. 125. <https://www.osce.org/odihr/human-rights-states-of-emergency-covid19> (date of visit: November 2, 2020); The functioning of courts in the Covid-19 pandemic, OSCE ODIHR, 2 November 2020, p. 28. <https://www.osce.org/odihr/469170> (date of visit: November 2, 2020).

⁶ Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings, FairTrials, 3 April 2020. <https://www.fairtrials.org/news/safeguarding-right-fair-trial-during-coronavirus-pandemic-remote-criminal-justice-proceedings> (date of visit: November 2, 2020).

⁷ *Krestovskiy v. Russia*, ECtHR (14040/13), 28 October 2010, § 24.

⁸ *Riepan v Austria*, ECtHR (35115/97), 14 November 2000, § 29.

⁹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 4; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 15.

¹⁰ *Welke and Bialek v. Poland*, ECtHR (15924/05), 1 March 2011, § 74.

¹¹ *Chaushev and Others v. Russia*, ECtHR (37037/03 39053/03 2469/04), 28 October 2010, § 24.

¹² *Riepan v Austria*, ECtHR (35115/97) 14 November 2000, § 29.

access to courts is totally prohibited, *e.g.*, in order to prevent the spreading of infectious diseases, the state is obliged to compensate for such restriction and provide a different form of access to hearings for the public.

Problem

Holding court hearings in the form of web conferencing is an urgent measure to combat the pandemic and not a result of a progressive and thoughtful court reform; consequently there is no legal regulation of remote court hearings¹³. In Bulgaria and Serbia, the remote court hearings were held on the basis of special decisions of executive authorities¹⁴, in Poland, - on the basis of decisions of court chairpersons, and in Russia, on a basis of a joint decision of the Presidium of the Supreme Court of the Russian Federation and the Board of Judges¹⁵.

Simultaneously with the decision to conduct hearings in the form of web conferencing, a decision was made to prohibit the access of the public and journalists to courts. In this respect, the principle of publicity was not taken into consideration, which is against the international standards. A particular judge can do a live broadcast of the proceedings at his/her discretion and if technically possible. *E.g.*, in Russia a court managed to organize broadcasts of hearings in one scandalous case¹⁶ but refused to broadcast court hearings in another case despite a public campaign demanding publicity¹⁷. Thus, the decision on the compensation of the restriction of the publicity principle remains at full discretion of the court.

Current decision making process on the issue of the remote justice contradicts with the international regulation of the right to a fair trial, in particular:

first, the need to prevent infectious diseases is not a ground for closing the trial to the public;

second, neither chairpersons of courts, nor Supreme Courts and the judicial self-governing bodies, nor executive authorities are authorized to make decisions limiting the principle of publicity of justice.

The only way to resolve the conflict between the international provisions on a fair trial and restrictive measures, which has been caused by the pandemic, is the adoption of a law by the Parliament stipulating measures for compensation of the restriction of the publicity principle.

States realize the problem of the gap in the legal regulation of remote justice and are in the process of adoption on legal regulation. *E.g.*, in Russia the Ministry of Justice has drafted amendments¹⁸ to the Codes of civil and arbitration procedure, which include the right of participants of trials to participate in hearings via web conferencing. However, the law does not

¹³ The functioning of courts in the Covid-19 pandemic, *Op.cit.*, p. 22.

¹⁴ *Ibid.*

¹⁵ Decree of the Presidium of the Supreme Court of the Russian Federation and of the Presidium of the Board of Judges of the Russian Federation No. 808 of March 18, 2020. <http://www.supcourt.ru/files/28814> (date of visit: November 9, 2020).

¹⁶ In Russia, the United Press Service of the St. Petersburg Courts had live broadcasts of the Oleg Sokolov trial “to provide openness and publicity of justice...with three cameras (shots) to the Internet via... the Court Portal system”, announcement of June 8, 2020. <https://t.me/SPbGS/4961> (date of visit: November 3, 2020).

¹⁷ “Ensure Transparency of Yuri Dmitriev and Svetlana Prokopyeva’s Trials!” EU-Russia Civil Society Forum. <https://eu-russia-csf.org/solidarity-dmitriev-prokopieva/> (date of visit: November 9, 2020).

¹⁸ Draft Federal Law entitled “On Amendments to the Code of Arbitration Procedure of the Russian Federation, the Code of Civil Procedure of the Russian Federation, the Code of Administrative Offences of the Russian Federation, and other legal acts of the Russian Federation”, the Ministry of Justice of Russia. <https://regulation.gov.ru/projects#search=01/05/10-20/00109498&departments=30&npa=109498> (date of visit: November 9, 2020).

mention the right of publicor journalists for remote presence at hearings if physical presence in the courtroom is impossible. Therefore, the problem of compensation of the restriction of the publicity principle for public healthcare reasons remains unresolved.

Recommendations for states

In order to avoid damage for the society's confidence in the judicial system as well as complaints to international human rights protection bodies that will be made by public and the media regarding illegal restriction of the principle of publicity of court hearings, we recommend the following:

- to raise the professional qualifications of judges and their awareness of the importance of the publicity of justice, in particular, for the reputation of the judicial system; the decisions of judges on closing trials to the public must be legal, proportionate and necessary in a democratic society; the prohibition of physical access to the court for the public must be compensated;
- in cooperation with the professional community and civil society organizations, to adopt a law on the rules of conducting remote court hearings where guarantees of compensation of the restrictions of the publicity principle for public healthcare reasons shall be stipulated.

Recommendations for stakeholders and organizations

In order to help states realize the threat that remote justice poses for the principle of publicity of justice, we urge all stakeholders:

- to approve these recommendations and promote the need for reforming the law in accordance with the guarantees of the right to a fair trial in their states.

Conclusions

The practices of remote justice during the pandemic have identified problems including the absence of legal regulation and the actual abolition of the principle of publicity of justice. States are trying to hastily eliminate the gaps in legal regulation; however, no due attention is paid to the guarantees of the principle of publicity of justice. The adoption of the law on conducting court hearings in the form of web conferencing without stipulating guarantees of the restriction of the publicity principle for healthcare reasons will result in violations of the guarantees of the right to a fair trial, become an obstacle for the work of the press, and undermine the society's confidence in the judicial system.

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