

The impact of digital technology on the monitoring of court proceedings in the time of COVID-19

The problem of how society and courts adapt to digital technology in a time of online proceedings is not particularly new, as online hearings of arbitration were held in Russian courts long before the pandemic. The process of courts digitalization creates a number of challenges in several directions: in the context of balance between quality of offline and online processes, in the context of the COVID-19, and additionally, in the context of admission of journalists, human rights activists, or citizens (who are not parties to an action) to these "covid" online (or in the future, non-covid) trials. In this report, I would like to highlight the problem of how to ensure transparency of procedures and the possibility to monitor such online sessions and online broadcasts of court proceedings.

In the post-COVID time, monitoring of court proceedings can be held in the following options:

- a) offline, in the courtroom (Option A)
- b) online, in the courthouse with a separate area/room provided for the broadcast of hearing (Option B)
- c) online, within the general broadcast on the Internet (Option C)
 - on the courts' websites
 - on other platforms

The Bill on "Remote Trial" expanding opportunities for distant participation of all parties to the processing *je jure* is currently under consideration on first reading in the State Duma. To do so, the bill requires to provide an application and special biometrical identification. At the same time, the guarantees of transparent and open remote trials for monitoring of procedures by journalists, observers, and citizens are not specified in the current bill. Even assuming that to participate, observers, similarly need an application and identification, **the Court may deny the remote participation if there is not technical feasibility and if the hearing itself is held in private.**

Without dwelling on the details of the legal loopholes created by the bill for the parties to an action only (functionality of the online platform for documents exchange and system of videoconference and other related issues of data security; protection of privacy, lawyer-client confidentiality, equality of sides, examination of evidence, etc.), Russian lawyers and attorneys say the majority of courts are not provided with devices for online procedures. The "biometrical" identification collected by PJSC *Rostelecom* contributes to the situation. The experts highlight the monopolistic nature of data collection and fear taint of corruption and personal data leaks.

In the case of the bill adoption, there is a question on what legal basis and conditions would the civil monitoring be implemented considering the pandemic limitations and existing options of such surveillance (see above). The guarantees of transparency and openness are not specified enough in the suggested legislative regulation of remote administration of justice in Russia.

Meanwhile, according to Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights (ECHR) and legal positions of the European Court of Human Rights (ECHR), the key instrument for transparency is the opportunity for all who wish to present during the trial, to receive the information regarding the venue, time and process, the content and arguments upon decisions taken on time. The institute of independent civil surveillance from the media and organizations of civil society is an

important element to monitor compliance with these principles.¹ Principle 2 of the Council of Europe European Commission for the efficiency of justice adopted on June 10, 2020, particularly, states that **justice administered in public should be maintained to the utmost extent, including access to the process by alternative means such as online services or courts' websites and other devices (telephone, e-mail, etc.)**. Increased consultation and improved coordination with the judicial staff (including lawyers, judicial officers, intermediaries, and social services) help to ensure a decent level of access to justice. **Access to justice should be guaranteed to every person applying to the court**, however, in the time of healthcare crisis, special attention should be paid to vulnerable groups, who are mostly at risk to be affected by such circumstances.² Principle 5 of the present Declaration dedicated to “cyber justice” states: “Turning to information technology provides an opportunity to continue the public administration of justice during a health crisis. However, the rapid emergence and overuse of this opportunity may equally lead to negative consequences. **Information technology solutions such as online services, remote hearings, and video conferencing, as well as the subsequent development of digital justice, must in all cases respect fundamental rights and principles of the fair trial**. To reduce the risks related to the implementation of information technology, its use and availability for all users should have a clear legal basis. In this regard, special attention must be paid to the vulnerable groups of people. Therefore, it is necessary to make a regular assessment of the impact of such technologies on the administration of justice and if necessary take corrective actions. Cybersecurity and personal data protection should be prioritized”.

Unfortunately, the above-mentioned international legal standards and principles are frequently neglected in Russia. Limited access to courts due to the COVID-19 is especially noticeable to the public and journalists. No uniform rules are governing in what cases and what order participants and observers may attend processes, and decisions on the subject are either delegated to the presidents of courts or are at the consideration of a particular judge. Finally, since the pandemic started in March 2020 in Russia, the COVID agenda itself, considering the policy of universal vaccination, has changed significantly toward the liquidation of regulatory “excesses”: legal systems, in general, adapted to the new external conditions and managed to develop new procedures that consider not only strict limitation but the realization of individual human rights.

Nevertheless, the operation mode of courts in Russia still has not experienced changes since the pandemic started in 2020, namely, courts often deny access to journalists, observers, and ordinary participants, who are not parties to an action. Some courts explicitly restrict access to participants of the process (subpoena, preliminary notice of arrival). In 2020, under the pretext of coronavirus restrictions, the observers of MHG, representatives of human rights organizations, and journalists were not allowed to hearing on cases of public interest (cases of A. Shestun and A. Navalny). Besides, arbitration courts indicate on their websites that only one representative may participate in the session³. The presence of multiple representatives is possible, as an exception, during the cases of bankruptcy and in the courts of general jurisdiction. Meanwhile, courts do not mention an opportunity for citizens and journalists to attend public trials. On the subject, in March 2021, Moscow attorneys and lawyers filed a petition with Moscow courts and

¹ On the role of journalists and NGOs as “public” and “social controllers”, and their right to receive and disseminate information of public interest, see the ECHR decisions for the cases “Hungarian Helsinki Committee (Magyar Helsinki Bizottság) v. Hungary” of November 8, 2016 of the year; Youth Initiative For Human Rights v. Serbia, 25/06/2013, 48135/06, § 20; Guseva v. Bulgaria (no. 6987/07, 17 February 2015), § 41, etc.

² Thus, judicial systems should give priority to cases that affect this group of people, for example, cases of domestic violence, in particular against women and children, cases involving the elderly or people with disabilities, or cases concerning dire economic circumstances. The vulnerabilities arising from the crisis should be taken into account.

³ For example, <https://msk.arbitr.ru/node/15929> or <https://voronej.arbitr.ru/node/13390>

City Hall requesting to return transparency, pointing at an actual private mode of proceedings and the impossibility for journalists and civilians to attend court sessions.

In this regard, there is an impression that in most cases, the judicial staff sees participants and visitors as an obstacle rather than full-fledged actors supposed to facilitate compliance with fundamental principles of justice.

All complications are exacerbated while turning the process into the remote format. First, as noted before, the feasibility of remote proceedings rests on the technical support of courts, while at present time, this technical ability is usually unavailable even in arbitration courts and depends on a particular region, court, and even a courtroom. Second, courts don't share links to the process on their websites and don't provide any information about the possibility to join the broadcast online. The preliminary monitoring with the efforts of civil organizations in some regions of Russia shows that it's usually hard and even impossible to receive any information about the opportunity to participate in the process remotely on websites or by phone.

Taking into account the current practice of admission journalists and observers in the context of COVID restrictions and legal lacuna in the proposed bill, the Moscow Helsinki Group recommends that the OSCE:

1. Emphasizes the need for state bodies to plan the budget, to finance and subsequently audit courts for the technical provision of videoconferencing systems (VCS) of courtrooms (option A), waiting rooms for spectators (option B), the functioning of broadcast platforms for court hearings in real-time (option C) and subsequent recording. Special attention in this planning, financing, and audit should be given to the issue of information security (IS), including training information security specialists, encouraging them to work within the court buildings and to work with electronic platforms. As an example of ensuring the broadcast of a court session, we can take the system implemented by the Constitutional Court of the Russian Federation.

2. Notes the urgent need for reforming the existing system of courts' websites in Russia. First of all, in terms of informing about the upcoming processes, opportunities for participants and observers to be present, incl. to connect to the processes carried out in a remote format. It is necessary to develop the effectiveness of various forms of feedback (the above-mentioned electronic document management system, the State Service portal, SMS-informing) and by phone. It is possible to introduce special sections on courts' websites dedicated specifically to information about the court session online with links for a) participants of the process, b) other participants (It may be excessive to include journalists and observers into a separate category). It is also necessary to separately analyze the content and form of information placement for visitors, aiming at the simplest, clear, structured, and visually attractive (with the use of infographics) form of information presentation. Perhaps the OSCE / ODIHR should pay attention to methodological recommendations on this topic.

3. Pays attention to the possibility of obtaining information about the work of the court, as well as pointing out missing or incorrect information with the help of feedback forms on the website, by phone and SMS-informing or through electronic portals: to verify the given forms or numbers, instruct the staff of the apparatus about information available to visitors and the process of providing it, if possible, set up an automatic response system, etc.

4. Ensures that in the conditions of the "vaccination" stage of the pandemic, it is possible to introduce more flexible access arrangements for persons who are not parties to the process into court buildings. For example, the following persons may be allowed into the courtroom: a) those who recovered, or/and b) under 18 years of age, and/or; c) vaccinated, and/or d) with a certificate

of contraindications to vaccination, etc. It is possible to develop other criteria related solely to precautions for infection with coronavirus, which would not thus limit, but expand the circle of persons admitted to the offline court session until the pandemic is completely stopped. During the pandemic, when holding a hearing offline, participants who do not meet these requirements should alternatively be allowed to watch the video broadcast of the meeting in real-time in a special section of the court's website.

5. Indicates to the public authorities the need to create a system for assessing the work of the courts by citizens and consider the assessment of citizens as one of the indicators of the effectiveness of judges and the judicial system.

6. Within the framework of the OSCE / ODIHR's work, special attention should be paid to recommendations that emphasize the particular role and function of journalists and civilian observers in the administration of justice, incl. in a remote format. Introduces separate provisions on journalists, observers, and listeners into the rules of the courts. Specifically explains to the court staff that citizens have the right to be present at any court session, incl. those carried out remotely until it is declared closed based on an appropriate definition.

7. Supports activities on constant monitoring of the openness and accessibility of courts, on collecting citizens' feedback on the work of the judicial system (for example, the campaign "The Court through the Eyes of Citizens" in Russia, other civil initiatives). Describes such practices and recommends their dissemination and development in all OSCE participating states.