EXPERT OPINION

Of the Law 7315 "On Amending the Law of Ukraine 'On the Judicial System and Status of Judges' regarding the Judicial Proceedings during the Martial Law or State of Emergency"

July 2022

The analysis was prepared within the framework of the project "Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine" which is implemented by the Council of Europe's Division of Co-operation Programmes

Executive summary

1. This opinion has been prepared within the Project "Ensuring the effective national implementation of the right to a fair trial (Article 6 of the Convention) in Ukraine" and has been written by Prof. Dr. Lorena Bachmaier.[1] The consultant was provided with an English translation of the law, delivered by the CoE Project, and also a comparative table, showing the prior text and the provisions which have been amended.

2. Law 7315 "On Amending the Law of Ukraine 'On the Judicial System and Status of Judges' regarding the Judicial Proceedings during the Martial Law or State of Emergency" (Law 7315), only introduces changes to two Articles. As stated in the Explanatory Note attached to the Law 7315, the reforms try to respond to an urgent need caused in the functioning of the courts due to the military aggression of Ukraine. Since the ordinary system of communicating the scheduled hearings and the court decisions is suspended under martial law, "to prevent the threat and the life and health of judges and participants of the judicial proceedings as well as for the sake of the state information security", another system for informing the litigants needs to be in place. Powers of judges and judicial authorities cannot be limited during marital law, thus rules have to be adopted that allow the functioning of the judicial courts to continue operating.

3. Since the ordinary usual ways of communicating with the parties to the proceedings are suspended (under martial law) or not available (postal service not working), the purpose of Law 7315 is first to introduce the possibility to notify the litigants via online through the official web regarding the hearings, the court decisions in the case and the enforcement document. The amendment of Article 11.1 Law On the Judicial System and Status of Judges (Law JSJ) provides that the litigants can be informed on the hearings and the court decision to their case via the web portal of electronic services and also via mobile application. Since the postal service is not operating under normal circumstances, this electronic communication would serve as a communication channel with the litigants. However, this communication "will not have the status of an official notice" as set out in the Explanatory Note (para.1) but will have only informative character.

4. The second amendment allows for the holding of judicial meetings remotely via videoconference. The possibility of holding meetings of judges to discuss "matters of internal operations" via videoconference introduced in Article 128 Law JSJ seeks to improve the "security level" during the regime of martial law and other emergencies.

5. The analysis of the two amendments introduced by Law 7315 on the Law JSJ as to its compliance with the ECHR, shows that there are no serious problematic issues. The assessment confirms that, the amendment of Article 128 Law of the Judiciary and

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Status of Judges (Law JSJ) does not present any concerns from the point of view of the Convention and CoE standards.

6. With regard to the amendments introduced in Article 11 Law JSJ, only the part affecting the notification of the judgment affects compliance with Article 6 para. 1 ECHR. This provision requires that the judgments shall be pronounced publicly, and this is not provided in Article 11 Law JSJ. However, this limitation would be justified under Article 15 ECHR. Article 15 ECHR specifies which are the rights that are non-derogable under martial or emergency laws, and thus cannot be suspended. The judicial acts envisaged under the new Articles 11 and 128 are not included under the non-derogable rights. Moreover, the possibility of informing litigants via online on court decisions and on the hearings; and the holding judicial meetings for internal decisions via videoconference do not affect any right of the ECHR, and thus are measures completely compatible with it. As to the restriction of the right to have the judgments publicly pronounced, the measure enshrined in Article 11 Law 7315 could amount to a restriction of Article 6 para. 1 ECHR. However, being also a derogable right, its derogation is compatible with Article 15 ECHR.

7. It has to be recalled that Article 15 para. 1 ECHR sets out three conditions for a valid derogation of the Convention rights in cases of state of emergency: it must be in time of war or other public emergency threatening the life of the nation; the measures taken in response to that war or public emergency must not go beyond the extent strictly required by the exigencies of the situation; and the measures must not be inconsistent with the State's other obligations under international law.

8. Since there are sufficient grounds known to all that the current war prevents from public offices to function normally, including the courts, these amendments, rather than restricting rights of the litigants, seek to overcome a current practical problem, and provide them a way of being informed on the progress of the judicial proceedings and its outcome.

9. Safe this point which interferes with the Convention but whose restriction is presently justified, the rest of the amendments introduced in these two articles, are unproblematic, and can be assessed as positive as they seek to ensure the effectiveness of the rights to a fair trial. Although the regulation of the judicial meetings via videoconference could be improved to ensure that these meetings comply with the principle of confidentiality and the right to data protection, at the present emergency state, further reforms and improvements will have to wait until the war conflict is ended.

10. The reform merits a positive assessment as it responds to a pressing need that has to be addressed to protect the procedural rights of the litigants and the safety of the judges. There are not important recommendations to this legal amendment, since it is in compliance with the ECHR and is to be assessed in a state of emergency setting, caused by a terrible war. In any event, these would be some minor recommendations.

Recommendations

I. In so far it is feasible under the present war circumstances, consider introducing means to ensure the publicity of the judgment when the possibility of online communication to the litigant is used.

II. Since the online communications is only for informative aims, it should be clarified when do the terms for appeals start running and how to prevent that procedural terms are held indefinitely by litigants acting in bad faith.

III. With regard to the judicial meetings, there are some issues which would need to be ensured: 1) Make sure that there is a secure line to communicate among the judges, so that it complies with the requirements of cybersecurity and data protection; 2) Ensure that the remote meeting does not allow other persons not entitled to take part in the deliberations to be present while they take place; 3) Prevent the recording of those meetings.

List of Abbreviations

CoE	Council of Europe
CPC	Civil Procedure Code
Diia	Portal Diia
ECHR	European Convention on Human Rights
EU	European Union
Law JCJ	Law On the Judicial System and Status of Judges
Law 7315	Law 7315 “On Amending the Law of Ukraine ‘On the Judicial System and Status of Judges’ regarding the Judicial Proceedings during the Martial Law or State of Emergency”
para.	paragraph
PEC	(*Italian*) posta elettronica certificata

I. Introduction

1. This opinion has been prepared within the Project "Ensuring the effective national implementation of the right to a fair trial (Article 6 of the Convention) in Ukraine" and has been written by Prof. Dr. Lorena Bachmaier.[2] The consultant was provided with an English translation of the law, delivered by the CoE Project, and also a comparative table, showing the prior text and the provisions which have been amended.

2. This opinion shall review the recently adopted Law 7315 "On Amending the Law of Ukraine 'On the Judicial System and Status of Judges' regarding the Judicial Proceedings during the Martial Law or State of Emergency" (hereinafter Law 7315), with a view to assessing its compliance with the Council of Europe standards and European best practices. It aims to support the national authorities in ensuring better alignment of the Law 7315 with Council of Europe standards.

3. When assessing the novelties introduced, it will not be discussed the whole system of judicial notifications as regulated in the Law "On the Judicial System and Status of Judges", nor the effectiveness or shortcomings of summons and other notifications in practice. Under the present circumstances of war, where the normal function of every institution is simply not possible, this assessment will take into account the reasons that have triggered this reform and the context where these amendments will be enforced.

4. Therefore, the level of implementation of the e-justice and possible needs related to the software used and any other IT problems, will not be addressed either. It is true that assessment of these legal provisions are closely linked to the technological aspects of their implementation, and thus both fields –law and technology– cannot be completely separated and should ideally be assessed together. However, such a comprehensive assessment falls out of the scope of this opinion.

5. The Law of Ukraine 7315 provides for the amendment of two provisions, namely Article 11 (Publicity and openness of judicial proceedings) and Article 128 (Meeting of Judges) of the Law on the Judiciary and Status of Judges (JSJ). While the amendment on Article 11 Law JSJ has general application, extending the e-justice to the notifications mentioned in the amended provision, the changes introduced in Article 128 Law JSJ allow for certain online judicial meetings, but only under exceptional circumstances: state of emergency and quarantine.

6. As a preliminary issue, it must be stated, that Article 15 ECHR specifies which are the rights that are non-derogable under martial or emergency laws, and thus cannot be suspended. The judicial acts envisaged under the new Articles 11 and 128 are not included under the non-derogable rights, thus the possibility of informing litigants via online (instead as via postal service) of the hearings and the court decisions, and holding judicial meetings for internal decisions in emergency cases are measures that are compatible with Article 15 ECHR. It has to be recalled that Article 15 para. 1 ECHR sets out three conditions for a valid derogation of the Convention rights in cases of state of emergency: it must be in time of war or other public emergency threatening

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the life of the nation; the measures taken in response to that war or public emergency must not go beyond the extent strictly required by the exigencies of the situation; and the measures must not be inconsistent with the State's other obligations under international law.

7. This assessment is based on desk research since this consultant has not been provided with other practical or empirical data, nor with information about the technical devices or level of cybersecurity of the courts. Obviously, the general war situation is known, but the details on which courts are still functions with certain normality and which ones have been simply destroyed or are not operative, are data that are not known to this consultant. Thus, the scope of the analysis carried out, will be focused exclusively on the provisions that have been amended by Law 7315, and eventually provide recommendations to national authorities for further improvement. To what extent the practical implementation of the newly adopted amendments may compromise fundamental aspects of the judicial proceedings, should be further discussed with the Ukrainian authorities and the users of the e-system.

II. Article 11 Law JSJ

General requirements on electronic judicial notifications

8. The amendment introduced in Article 11 consists in the addition of a paragraph providing for the notifications of judicial acts, including the judgment "via the Unified State Web-Portal of Electronic Services, including by means of the mobile application of Diia Portal (Diia), and also the acceptance of the enforcement document by the litigant who "has signed in via the Unified State Web-Portal of Electronic Services or the mobile application of Diia Portal (Diia)."

9. This reform tries to address the current problem in Ukraine, where the usual online court registry and information system, as well as the postal service, is not functioning correctly or has been suspended (depending on the areas of war conflict). This reform is not aimed at taking steps towards the digitalisation of courts and the courts communications, but to respond to a present and urgent need, created by the situation of a war scenario, where courts nevertheless have to continue performing their judicial functions.

10. In a normal setting, the handling of notifications and summons in practice can be burdensome, time-consuming, costly and cause delays, especially when it is carried out by way of the ordinary postal office or in person by handing over the notice or the summons by an officer, there has been a strong shift towards extending more efficient notification systems, by using technological tools in all EU countries. To that end, legal reforms have been passed and courts have been provided with specific software to communicate more speedily via e-notifications with parties and other persons participating in judicial proceedings. Most European systems have adopted electronic communications and also electronic management of the judicial proceedings, albeit to a different extent.

11. For example, in Germany, legal documents associated with all civil proceedings can be served electronically. To transfer, the document must be provided with a legitimate electronic signature and protected against unauthorized access by third parties. Electronic documents must be delivered via a secure transmission channel (De-Mail, special electronic mailboxes) and protected against unauthorized access by third parties. Every lawyer, notary, court-appointed enforcement officer and tax consultant, and any other person who, due to their job, is expected to be exceedingly reliable, as well as every public law authority, body or institution is required to open a secure transmission route for electronically served documents. Documents may only be served electronically on other parties to the proceedings if they have expressly agreed to the transfer of electronic documents.

12. Some countries have even gone further, imposing the electronic communications and the electronic file as mandatory. This is the case, for example, in Spain where the Civil Procedure Code as amended on 5 October 2015, where the way of communication between the parties and the courts takes place via the LexNET platform (the e-justice platform). Lawyers and court representatives need to sign up to the platform to carry out their professions and will always be served electronically. From 2016 onwards it is mandatory for all professionals working in the justice sector to use remote systems to serve documents relating to proceedings to the courts. Thus, the parties –via their lawyers or court representatives– shall file all their documents to the court via the electronic system. Under Article 273(3) of the Civil Procedure Code, all justice-sector professionals must use the remote or electronic systems in place in the Courts Service to submit documents (initiating documents or otherwise), and other documents, in a way that guarantees the authenticity of the submission and ensures there is a reliable and complete record of the submission and receipt of those documents, as well as the date of submission and receipt. In any case, at least the following entities must use electronic means when communicating with the Courts Service. Only individuals self-represented are excepted from using LExNet, but these cases are very exceptional. These provisions apply to all kind of proceedings since the Civil Procedure Code has general application.

13. In Italy, Since the entry into force of Article 16(4) of Legislative Decree No 179/2012, simple service by the courts takes place exclusively via electronic means to the certified email (PEC) address; this procedure can be used in all kinds of proceedings and only where it is not possible to communicate via PEC can the court registry note be sent by fax or passed to the bailiff for formal notification. Formal notification may be carried out via certified email, for which an electronic copy may be taken from the paper document (Article 149 *bis* CPC). This procedure is the ordinary method for formal notification, as an alternative to direct personal service in all types of proceedings. Different professionals are required to make their certified email address available on the appropriate registries: legal professionals, legal persons, commercial undertakings, and public bodies. This will allow the courts, the bailiffs, and the court representatives of the parties to effect formal notifications by way of an authenticated electronic document, digitally signed, by delivery to the PEC address (Article 149 *bis* CPC) obtained from a public register. The receipt of formal notification must contain a certificate of conformity of the digital copy with the document from which it is copied, and the service provider's records of acceptance and of delivery into the

addressee's inbox, both of which contain the message's identification code. It is not permitted to effect simple service or formal notification by other forms of electronic communication (for example via text message, or to an email address other than the PEC address), as these methods would not provide a legal guarantee that the addressee had received the message.

14. These are just a few examples of the implementation of the e-notifications in some European countries, and it can be affirmed that all have moved towards the digitalisation of the justice systems and also the communications with the litigants and other professionals and stakeholders. Therefore, even if the reform of Law 7315 in Ukraine is triggered by the emergency situation and the suspension of the access to the Unified State register of Court decisions" and the "List of the Cases Scheduled for hearing", the online information foreseen in the new Article 11 Law JSJ would be in line with the move towards a system of electronic communications introduced in all EU legal systems.

The scope of the amendment of Article 11

15. The amendments introduced in Article 11 para 1 Law JSJ are two: 1) the possibility of posting on the official web the information on the court hearings scheduled; and 2) the possibility to notify the litigant on the "court decision in the case". The text of this provision in the English version uses the terms presentation and receipt of the court decision, which this consultant has interpreted as notification. These two amendments in Article 11 Law JSJ will be addressed separately.

1. Announcement of judicial hearings

16. Article 11 Law JSJ provides for the openness of the judicial proceedings. The newly introduced possibility for the announcement of the judicial hearings –date, time, venue, parties, matters–, in the official web "including by means of the mobile application DIIA, according to the Explanatory Note seeks to allow litigants –not the public– to be informed on the hearing of his/her case and thus provide for the possibility to attend to the court hearing (in presence or remotely).
17. The right to a public hearing is a subjective right and acts as a safeguard for the defendant or parties to the case, in other words, by rendering the administration of justice visible, a public hearing contributes to the achievement of the aim of Article 6 para. 1, namely a fair trial.[3] While the public character of proceedings before judicial bodies protects litigants against the administration of justice in secret with no public scrutiny, publicity is also a means whereby confidence in the courts can be maintained, contributing to the achievement of the aim of a fair trial[4] Article 6 para. 1 does not,

[3] See, e.g. *Malhous v. the Czech Republic*, Appl. no. 33071/96, of 12 July 2001, paras. 55-56.

[4] See, e.g. *Diennet v. France*, Appl. no. 18160/91, 26 September 1995, para. 33; *Hurter v. Switzerland*, Appl. no. 53146/99, 15 December 2005, para. 26; *Lorenzetti v. Italy*, Appl. no. 32075/09, 10 April 2012, para. 30).

however, prohibit courts from deciding, in the light of the special features of the case, to derogate from this principle.[5]

18. Within this context, the newly introduced provision, ensures that by communicating the information on the judicial hearing on-line, the right to a public hearing is ensured from the perspective of the defendant. It is unclear how the right on the side of the citizens to attend to the public hearing is provided. Nevertheless, this right might be suspended at the present circumstances and such suspension for security reasons would be in line with the content of Article 15 ECHR. This is not the issue addressed here, as this assessment is not dealing with the questions on how to ensure that the public can attend at trials when held online or whether the trials should be on livestream. The point here is whether informing the litigants of the time and place scheduled for the hearing can be done online with an informative character under an emergency situation as the present one. The answer is yes, and as this is clearly justified under Article 15 ECHR, it is compliant with the ECHR.

2. The possibility for the online notification of the "court decision in the case"

19. The main features of the amendment introduced by the Ukrainian Law 7315 on the system of notifications are: its material scope is limited; it applies only to parties to the case; it applies to all kind of proceedings; it does not impose a mandatory electronic communication; it requires the prior signing up into the e-platform for electronic services; it can also be used via a mobile application (Diia portal); and as set out in the Explanatory Note, it is not an official communication, but has only an informative character.

20. It is unclear what is meant by "the court decision in the case". During any judicial procedure many court decisions are given, and a distinction is to be traced between interlocutory decisions and the judgment, as for the judgment the requirement of publicity is different. Therefore, I will address first the general rules on procedural notifications (of any procedural decision), and at the end the specific requirements for the notification of the judgment.

21. As to the **limited scope,** the newly added paragraph mentions only three notifications: 1) the information on the court hearing and the notification for the court session; 2) presentation and receipt of the court decision; 3) and the enforcement document. Article 11 Law 7315 is, in principle, in conformity with the ECHR and the European standards, which under certain circumstances and safeguards, provides and encourages (and even obliges) to communicate with the parties and other participants to the proceedings via the electronic notifications system implemented in the relevant legal system. Therefore, the amendment is perfectly in line with European standards and the requirements for more efficient court proceedings and procedural management. Moreover, at the present moment in Ukraine, it may be the only way to communicate with the litigants and keep them informed on the date for trial, and the outcome of the proceedings.

[5] *Martinie v. France* [GC], Appl. no. 58675/00, 12 April 2006, paras. 40-44.

22. If the technological requirements were in place, it would be even recommended to extend the possibility of e-communication to other procedural acts and notifications to those who have signed into the e-communication platform. Important is that any electronic notification system ensures the receipt by the addressee, and that generally in case of notification of the judgment and other documents which require receipt, the prior consent of the party is given. Acceptance of this communication system is done in practice by signing in via the official notifications system. This appears to be provided in the amendment introduced by Law 7315, and thus no objections are to be formulated to this rule.

23. Usually the date of the notification determines the timeframe for filing appeals and other remedies against the notified judicial decision, and thus it is important to clarify when the judicial decision is deemed notified –the date sent by the e-system or after a time lapse since the judicial decision has been notified, e.g., because the communications system has not been opened by the person to be notified or because the needed receipt has not been received. This should be clarified. However, since the online notification system under Article 11 Law JSJ will "not have status of an official notice", but only to inform the litigant so that he/she can take further actions, this problem does not arise in the case of this amendment. However, it introduces some uncertainty as to the procedural terms and deadlines. In any event such flexibility, since it is completely justified in the present Ukrainian scenario, it should not pose a problem.

24. The e-notification system introduced under the newly amended Article 11 Law JSJ seems to apply **only to "the litigants"** who have signed into the platform. It is unclear if the provision providing the e-communication of the hearing and the court decision and enforcement document will also be notified to the lawyers and court representatives. If the litigant is represented by lawyer, it would be enough that the lawyer is notified, and not directly the party him/herself.

25. It has to be assessed in the positive that this provision applies **to "all proceedings",** and thus extends this exceptional e-notification to all courts and not only to certain jurisdictions. This is positive. However, as in the criminal proceedings the public prosecution is party to the case (litigant, in the terms used in Article 11), it shall be determined what specialities apply to the e-notifications to this institution. Since there should not be a requirement for the signing up of each public prosecutor, but for the whole prosecution service, certain bylaws may clarify how this will be implemented in practice. Of course, this is a minor issue, not relevant for the compliance with ECHR standards.

26. Finally, the system envisaged under Article 11 Law JSJ only provides **for a possibility**, as it says that the information "can" also be facilitated via the electronic system. This approach seems to be the most adequate in the current war setting.

27. The approach to the system of notifications is slightly different when it refers to the notification of the judgment, since Article 6 para. 1 ECHR states: "Judgment shall be pronounced publicly". In accordance with the ECtHR case law this does not require necessarily the reading out of the judgment in open court, since other means of

rendering a judgment public may also be compatible with Article 6 para. 1 ECHR.[6] In order to determine whether the forms of publicity provided for under domestic law are compatible with the requirement for judgments to be pronounced publicly, "in each case the form of publicity to be given to the judgment under the domestic law ... must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1."[7] The object pursued by Article 6 para. 1 in this context – namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – must have been achieved during the course of the proceedings, which must be taken as a whole (*ibidem.*, para. 32).

28. In sum, in ordinary circumstances where the judgment is only notified to the litigants via online, and thus it is not pronounced publicly, sufficient publicity must be achieved by other means: "it must be ascertained whether the public has access by other means to the reasoned judgment which was not read out and, if so, the forms of publicity used must be examined in order to subject the judgment to public scrutiny".[8]

29. Therefore, in order to fully comply with Article 6 para.1 ECHR the possibility to notify the judgment to the litigant via the electronic platform, should as a rule not preclude the access to the judgment to the public. Thus, other means of subjecting the judgment to public scrutiny would as a rule need to be in place. However, under application of Article 15 ECHR, this right can be derogated under justified circumstances, which are currently in place in Ukraine.

Recommendation

In so far it is feasible under the present war circumstances, consider introducing means to ensure the publicity of the judgment when the possibility of online communication to the litigant is used.

4. Further issues regarding practical implementation

30. Once the main features of the newly introduced rule have been analysed, and it has been confirmed that in general the amendments are adequate for notifications, in practice attention should be drawn to the possible problems that may arise in the use of the electronic communications system, and how to address them. Electronic communications, especially when transferred via secure channels and when they include digital signature and are encrypted, are highly reliable. However, as much as cybersecurity and data protection are ensured, no digital system is immune to computer system failures, crashes or excess downtimes. Delivery of messages are sometimes retained or not supported due to overloaded systems, etc. All these problems are even more acute in the situation of war. The Law 7315 has therefore

[6] *Moser v. Austria*, Appl. no. 12643/02, 21 September 2006, para. 101.

[7] *Pretto and Others v. Italy*, Appl. no. 7984/77, 8 December 1983, para. 26; *Axen v. Germany*, Appl. no. 8273/78, also of 8 December 1983para. 31)

[8] *Ryakib Biryukov v. Russia*, Appl. no. 14810/02, 17 January 2008, paras. 38-46.

adopted the correct approach, by stating that these communications are not official, but only informative. In doing this it prevents the problems that failures in the computer systems cause major procedural problems, precisely when due to a lack of timely notification or receipt procedural deadlines are missed or the party is not informed on time of the data of the hearing. The present amendment correctly states that the online system will inform the litigant, but does not trigger the running of the procedural term.

Recommendation

Since the online communications is only for informative aims, it should be clarified when do the terms for appeals start running and how to prevent that procedural terms are held indefinitely by litigants acting in bad faith.

Article 128

31. The amendment introduced by Law 7315 in Article 128 Law JSJ allows to hold judicial meetings to discuss "matters of internal operations of the court and take decisions on the matters discussed" remotely via video conference, in accordance with the requirements of this Law. This provision is foreseen only for exceptional circumstances mentioned in the added paragraph of Article 128 Law JSJ, namely state of emergency or quarantine situations imposed by the government of Ukraine.

32. Ukraine is presently under emergency state since 24th February 2022. While emergency state is usually a temporary situation, the case law of the ECtHR has never required a certain time limit for application of Article 15 ECHR, and indeed, the cases demonstrate that it is possible for a "public emergency" within the meaning of Article 15 ECHR to continue for many years. The newly introduced Article 128 Law JSJ does not refer to the conditions, requisites, or extension of the declaration of emergency state, but it only provides for online videoconferences meetings when such situation has been declared by the Cabinet of Ministries. Whether such exceptional situation exists that justifies for a country to takes measures to derogate from their ECHR obligations, is an issue that lies in general within the assessment of the national authorities and the ECtHR has granted a wide scope of interpretation. At the present war scenario this is out of discussion, as it is well known for everybody that the war scenario clearly justifies the declaration of state of emergency and the martial law.

33. Since holding internal operational judicial meetings online does not affect any ECHR obligation, Article 15 ECHR is not even relevant here, as the declaration of the state of emergency is only the situation describing under which circumstances the judges shall not convene in person to discuss internal issues. The same applies to the quarantine situation.

34. This amendment seeks to address the problems of difficulties in holding in person meetings of judges for deciding internal operation issues and to protect them at the present state of insecurity in the country. It is to be understood that it does not aim to change any court proceedings or establish online trials or hearings. Participation in courts via videoconference is regulated under Article 11 paragraphs 4 to 7 of the Law

JSJ.[9] Meetings for deliberation of judgments are not envisaged either in this provision. In that regard the Article 6 ECHR principles and safeguards are not applicable here, since the internal meetings of judges would be included within the court management and judicial organization field. In that regard, the general standards on the use of videoconference in court proceedings[10] are not relevant for the assessment of this newly introduced provision.

35. This type of online/videoconference meetings are in principle, in conformity with the ECHR, even more when there is an exceptional situation that makes it impossible to meet in person or justifies limiting these meetings for health or security reasons. These situations are correctly described in the provision, and thus the scope of application is in accordance with the necessity principle. In any event, even if there were no such exceptional circumstances it would fall within the discretionary powers of the legislator to allow for these meeting to be held via videoconference, as the ECHR standards do not require a specific form for the judicial internal meetings to take place. It is up for the national law to establish when judges should meet in person and when they can resort to an online video-connection.

36. What is positive is that the law now specifically foresees the possibility to have these meetings via videoconference, taking into account the difficulties, danger or impossibility to meet in person due to the war in Ukraine, and previously due to the measures to prevent the spread of the Covid-19 and the consequent quarantine imposed to all citizens. Thus, addressing this problem is already something that merits a positive assessment. On the other side, a similar provision is already included in Article 95 Law JSJ for the meetings of the Selection Commission of Judges and in Article 98 para 1 Law JSJ for the High Qualification Commission's meetings. It is true that this commission does not deal with the internal organisation of the courts or its management but being in both cases "administrative" matters and not implying jurisdictional functions, the same principles are applicable.

    Article 95 para. 14 Law JSJ reads:

    > "14. A member of the Selection Commission may participate in meetings and adoption of decisions of the Selection Commission remotely using electronic means of videoconferencing."

    And Article 98 para 1 Law JSJ:

    > "1. The Commission meetings may be held in the videoconference mode according to the procedure set forth by the Rules of Procedure of the High Qualifications Commission of Judges of Ukraine. Members of the Commission may participate in meetings and decision making remotely using electronic means of

[9] Article 11.7 Law JSJ even provides for the possibility to hold court hearings via videoconference.

"Upon a court decision, parties to a trial shall be granted an opportunity to participate in a court hearing by methods of videoconference, in the manner stipulated by law. The duty to ensure the videoconference shall be assigned to the court that received a judgment on the videoconference, regardless of specialization and jurisdiction of the court that made that decision."

[10] See, e.g. *Videoconferencing, Courts and Covid-19. Recommendations based on International Standards,* by the International Jurists Commission, published in November 2020, available at:

https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf

videoconferencing in cases and according to the procedure established by the Rule of the Procedure of the High Qualifications Commission of Judges."

37. The present amendment provides specifically for judges to meet also remotely when not exercising jurisdictional functions. This consultant does not see any problematic issue in this rule if it is implemented with adequate safeguards.

Recommendation

There are some issues which would need to be ensured: 1) Make sure that there is a secure line to communicate among the judges, so that it complies with the requirements of cybersecurity and data protection; 2) Ensure that the remote meeting does not allow other persons not entitled to take part in the deliberations to be present while they take place; 3) Prevent the recording of those meetings.