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Ensuring Guarantees Of Rights Of Participants In Electronic Criminal Proceedings

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ABSTRACT

When it became known about the COVID-19 pandemic as a global challenge to the entire world community, it became known about the COVID-19 pandemic. By this time, the courts of many states, including Uzbekistan, used in criminal proceedings the experience of conducting court proceedings in the mode of video conferencing (VCS), automatic distribution of cases, consolidation and results of investigative actions by audio, published, published court decisions on the Internet, sending executive documents for compulsory execution in electronic format, etc.

KEYWORDS

Transactions, Invalid Transactions, Disputed Transactions, Limited Mobility, Incompetence, Invalidation Of Transactions Made By Persons Who Do Not Understand The Importance Of Their Actions.

INTRODUCTION

The use of digital technologies by courts in Uzbekistan dates back to the adoption of the Resolution of the Cabinet of Ministers of the Republic of Uzbekistan "On measures to introduce modern information and communication technologies into the activities of courts" dated December 10, 2012, which was

the basis for the provision of interactive services and the introduction of electronic document management into the judicial system. Since 2013, the National Information System of Electronic Judicial Proceedings "E-SUD" has been developed and launched in Uzbekistan.

By the Law of the Republic of Uzbekistan dated May 23, 2019, amendments were made to the criminal procedural legislation regarding the use of videoconferencing in criminal proceedings. This computer technology has made it possible to conduct trials at a considerable distance, when the court and the convicted person are far from each other. Positive aspects can be noted when considering a criminal case in the videoconferencing regime: the possibility for witnesses, victims who are outside the territory where the trial is taking place, in order to save their money, to participate in the court and give evidence at the place of residence, the likelihood of interrogating additional witnesses in court to establish truth in the case, shortening the time for consideration of cases.

With the onset of the COVID-19 pandemic, the relevance of remote court hearings has increased, the highest judicial body of Uzbekistan explained to the courts about the need to take measures to timely consider criminal cases using videoconferencing¹.

It should be noted that in order to protect the rights and freedoms of citizens, ensure the openness and transparency of the courts, the leadership of Uzbekistan is taking all the necessary measures, including those aimed at introducing modern information and communication technologies into the judicial system. On September 3, 2020, the President of Uzbekistan signed the Decree "On Measures to Digitalize the Activities of the Judiciary", which defines the tasks of digitalizing the activities of the judicial authorities, namely: ensuring the openness and transparency of the activities of the judicial community by

introducing special information programs; expanding the possibility of remote participation in court hearings, including through mobile devices and other forms of electronic interaction, as well as creating conditions for the parties to receive court decisions online; recording of court sessions in all courts by means of audio recording based on the petition of the parties in the case and with the consent of the presiding judge, as well as the formation of court records using the system of automatic generation of court documents, the development of a mobile application that provides an opportunity to participate in court sessions in the mode of video conferencing and much more².

In different countries of the world, procedures related to the introduction of remote justice have both similarities and differences. In many countries, before the outbreak of the COVID-19 pandemic, laws and regulations had already been passed on the organization of videoconferencing in court sessions. However, it was the coronavirus pandemic and the quarantine measures taken by the states that became a kind of impetus for the mass use of communication technologies by courts.

An analysis of the practice of courts on the use of information technology in the administration of justice has shown that during the period of restrictive measures related to the coronavirus pandemic, most countries of the world have transferred legal proceedings to a remote format in order to prevent the threat of the spread of coronavirus infection.

At the same time, the increase in the volume of criminal cases, the consideration of which is carried out in the videoconferencing regime, the conduct of electronic document circulation has revealed some features of information

¹ www.supcourt.uz. Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On some issues of the application of legislation by the courts in connection with the introduction in the

territory of the Republic of Uzbekistan of measures to prevent the spread of coronavirus infection COVID-19."

² <https://prezident.uz/>

technology. The analysis of the remote court session showed the following:

- In areas remote from the center, there is still a problem with connecting to a single Internet network.
- Not all citizens acting as victims, witnesses can use new technologies, the trial and interviewing of its participants in most cases takes place in court buildings, which can put pressure on victims and witnesses when they give evidence;
- Insecurity of the network, i.e. conducting a public court session via the Internet can give wide publicity to the participation of a citizen in court and cause a violation of his honor and dignity;
- The participation of the accused in custody in the court session in the videoconferencing regime and giving testimony to them raises some doubts about their veracity, since the interrogation procedure is carried out with the participation of employees of the remand prison;
- It is noted that the conduct of the court session in the videoconferencing regime restricts the rights of the defender and the accused to talk with each other, correct their own testimony and formulate questions;
- Lack of legislative regulation of the court session in the format of the videoconferencing.

Of course, the introduction of digital technologies in the activities of courts, the holding of court sessions in the videoconferencing regime, especially during the COVID-19 pandemic, helped to solve the primary tasks of the state in the administration of justice. But still, taking into account the specifics of criminal proceedings, the following

factors should be taken into account, requiring an early decision.

1. When working with electronic documents, legislative protection against unauthorized access and the prevention of changes in their content to documents is required. Digitalization should meet the requirements of criminal proceedings, its features, including those related to the confidentiality of the testimony of victims, witnesses and other participants in the process.
2. During the height of the COVID-19 pandemic, the likelihood of its second wave, there is a need to develop a unified digital platform for courts with an increased level of channel protection, through which the information of persons involved in the case is transmitted, as well as an independent server for storing information on each specific case ... It is appropriate to note the specifics of cases in which offline court sessions would be held in closed court sessions (crimes against sexual freedom, in cases involving state secrets, etc.), since this issue should be regulated separately in the law.
3. Conducting court sessions in the videoconferencing regime should in no way violate the rights of participants in criminal proceedings. The accused should be given the opportunity to communicate with his defense lawyer in unlimited time, victims and witnesses should give their testimony in court freely, without any pressure from the organizers of the videoconferencing process. At the same time, ensuring the safety of all participants in a trial is a fundamental element of a fair trial.
4. All participants in the process should be guaranteed the rights to defense of both the accused and the victims and witnesses. As a rule, the defender needs to provide a

separate room with an established Internet network or Skype, in order to communicate freely with his client in an unlimited time period. In this context, the accused should also be ensured his right to an objective, free narration of the events of the crime, since the accused, who is in custody, participates in the court session in the videoconferencing regime in the presence of the employees of the institution for the execution of punishment and is under their supervision.

5. Of course, we cannot completely replace real litigation with digital technologies. However, today's events related to the coronavirus pandemic have forced the judiciary to use the power of video conferencing in judicial activities, and thus exercise their functions of administering justice.

Therefore, our task is to use new technologies only with the condition of guaranteeing the rights of citizens participating in criminal proceedings. In addition, it should be borne in mind that when assessing the evidence collected in the case, the court must check its reliability, taking into account the quality of the image, sound and other factors that may subsequently be important for deciding whether a person is guilty or innocent.

Glimpse of Videoconferencing and Judicial Proceedings: General

Considerations in Covid-19 in an Electronic Criminal Proceedings

In utmost felonious or civil trials (as distinct from procedural sounds and prayers), the individual parties (or, in felonious matters, the prosecutors and indicted) and their attorneys

typically appear physically in person before the Court. The same is true when a person arrested or detained on a felonious charge is first brought before a judicial authority within the first hours or days after arrest.

Still, in response to the COVID-19 outbreak, numerous judicatures are making available an option, or assessing a demand, that individualities and their attorneys appear at similar sounds only by videotape-conferencing or analogous backups for physical presence.³

Indeed, the UN Human Rights Council, in a resolution espoused by agreement in July 2020 Urges States to insure that judicatures have the necessary coffers and capacity to help to maintain functionality, responsibility, translucency and integrity, and to insure due process and the durability of judicial conditioning, including effective access to justice harmonious with the right to a fair trial and other abecedarian rights and freedoms, during extraordinary situations, including the COVID-19 epidemic and other extremity situations;

Encourages States to make available to judicatures current information and

dispatches technology and innovative online results, enabling digital connectivity, to help to insure access to justice and respect for the right to a fair trial and other procedural rights, including in extraordinary situations, similar as the COVID19 epidemic and other extremity situations, and to insure that judicial and any other applicable public authorities are suitable to unfold the necessary procedural frame and specialized results to this end;

³ See on this, and more generally, Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights (“OSCE ODIHR”), “The functioning of courts in the

Covid-19 pandemic” (2 Nov 2020), <https://www.osce.org/odihr/469170>, pp 13, 20-28.

As a starting point, whenever all the parties give their free and completely informed concurrence to the use of videotape-conferencing in any given judicial proceedings, its use in similar circumstances would appear not to give rise to enterprises under transnational mortal rights law and rule of law norms. In furnishing for and assessing whether concurrence is freely given and completely informed, regard must be given to the particular situation of women, children, aged persons, persons with disabilities, persons deprived of liberty, and others who may be in a situation where they may be forced or manipulated into furnishing concurrence that isn't completely voluntary and informed.

As the coming section will bandy, the demand of hype of sounds must also be admired .when similar technologies are used. As enterprises the duty of videoconferencing as a cover for physical presence of an individual party (including, in felonious proceedings, the indicted person) in a judicial hail, without the party's concurrence, the situation is more complex.⁴

An original question is whether, for the type of hearing concerned, transnational law confers a right of the individual to be physically present, if so, the coming question is whether transnational law permits the right to be limited in some circumstances, including through a denigration in situations of exigency, and whether the applicable criteria for such a limitation or denigration are met.

As will be described in the sections that follow, transnational law easily contemplates a right of the indicted to be physically present for his or her felonious trial, and the right of a person

arrested or detained on felonious charges to be physically present for his or her original hail before the judge. The broader right of anyone deprived of liberty on any ground to challenge the legality of his or her detention before a court may also indicate the right to be brought physically before the court. Indeed if transnational law doesn't confer a right of individualities to be physically present for the type of hail in question, if such a right is handed for by public law, also the question must also be considered whether the duty of videoconferencing in the circumstances is permitted under public law and whether it's being applied in a manner that completely respects the right of the existent to nonpublic communication with their counsel, as well as rights of non-discrimination and equal access to justice.⁵

In sounds other than those for which transnational law and norms contemplate a right of physical presence, the non-consensual duty of videoconferencing on a judicial hail may be admissible if it's grounded in law, non-discriminatory, time- limited and demonstrably necessary and commensurate in the original circumstances of the COVID-19 epidemic and the specific characteristics of the individual case and is enforced with safeguards to address the other fair trial rights of the affected person.

Journey of Videoconferencing and Criminal Trials

The right to fair trial under transnational mortal rights law, including as set out in the ICCPR, applies to all felonious cases and civil suits. The general demand of fairness is farther

⁴ This briefing note only addresses the imposition of videoconferencing against the wishes of an individual party or accused who wishes to be physically present for the hearing, it does not address the use of videoconferencing for the examination and cross-examination of witnesses.

⁵ See e.g. European Court of Human Rights (“ECtHR”), *Marcello Viola v Italy* (2006), <http://hudoc.echr.coe.int/eng?i=001-77246>, para 68.

developed upon by a set of specific guarantees in felonious proceedings. For case, composition 14 (3) of the ICCPR provides in part. In the determination of any felonious charge against him, everyone shall be entitled to the following minimal guarantees, in full equivalency

(b) To have acceptable time and installations for the medication of his defence and

to communicate with counsel of his own picking;

(d) To be tried in his presence, and to defend himself in person or through legal

backing of his own picking; to be informed, if he doesn't have legal backing, of this right; and to have legal backing assigned to him, in any case where the interests of justice so bear, and without payment by him in any similar case if he doesn't have sufficient means to pay for it;

(e) To examine, or have examined, the substantiations against him and to gain th attendance and examination of substantiations on his behalf under the same conditions as substantiations against him; The Human Rights Committee has articulated certain limits to the compass for denigrations from composition 14 in situations of exigency. It has said that, “Safeguards related to denigration, as embodied in composition 4 of the Covenant, are grounded on the principles of legitimacy and the rule of law essential in the Covenant as a whole” and that “ the principles of legitimacy and the rule of law bear that abecedarian conditions of fair trial must be admired during a state of exigency”.⁶

Likewise, the Committee has emphasised States derogating from normal procedures needed under composition 14 in circumstances of a public exigency should insure that similar denigrations don't exceed those rigorously needed by the extremities of the factual situation. The guarantees of fair trial may noway be made subject to measures of denigration that would circumvent the protection of non-derogable rights..⁷Swinging from abecedarian principles of fair trial, including the presumption of innocence, is banned at all times.

In cases potentially leading to the duty of the death penalty, then non-derogable right to life (and not to be arbitrarily deprived thereof), including under composition 6 of the ICCPR, is also engaged. Since, as the Human Rights Committee has held, “ the guarantees of fair trial may noway be made subject to measures of denigration that would circumvent the protection of nonderogable rights”, and “ as composition 6 of the Covenant is non-derogable in its wholeness,” accordingly “ any trial leading to the duty of the death penalty during a state of exigency must conform to the vittles of the Covenant, including all the conditions of composition 14.” Consequently in all circumstances, including the COVID-19 epidemic and other public extremities, “ In cases of trials leading to the duty of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The duty of a judgment of death upon conclusion of a trial, in which the vittles of composition 14 of the Covenant have not been admired, constitutes

⁶ General Comment no 29 on States of Emergency (article 4) (2001), <https://undocs.org/CCPR/C/21/Rev.1/Add.11>, paras 15-16.

⁷ General Comment no 32, <https://undocs.org/CCPR/C/GC/32>, para 6. See also Inter-American

Commission on Human Rights, “IACHR Calls on the OAS States to Ensure That the Emergency Measures They Adopt to Address the COVID-19 Pandemic Are Compatible with Their International Obligations” (17 April 2020), http://www.oas.org/en/iachr/media_center/PReleases/2020/076.asp

a violation of the right to life (composition 6 of the Covenant).”⁸

Composition 14 (3) (d) of the ICCPR, as shown over, specifically recognizes the right of a person, in full equivalency, “ to be tried in his presence”.

The European Convention on Human Rights doesn't contain a provision specifically furnishing for the right “to be tried in one’s presence”.²² Still, the European Court of Human Rights judgments that contemplate use of videoconferencing in civil proceedings or felonious appeal sounds, specifically discrepancy similar proceedings with felonious trials, in respect of which the Court constantly emphasizes the need for physical presence.⁹

The Court has affirmed that, “ In the interests of a fair and just felonious process it's of capital significance that the indicted should appear at his trial”, and that, “ the right to be present at the trial is one of the foundation rights of an indicted”.¹⁰

The African Charter on Human and Peoples’ Rights makes a general provision for fair trial in its composition . The African Commission on Human and Peoples’ Rights developed on this in its 2003 . Principles and Guidelines on the Right to a Fair Trial and Legal Backing in Africa, affirming that “ In felonious proceedings, the indicted has the right to be tried in his or her presence” and, “ The indicted has the right to appear in person before the judicial body.”

⁸ General Comment no 32, paras 6 and 59; General Comment no 36 on article 6 right to life (2019), <https://undocs.org/CCPR/C/GC/36>, paras 41 to 42, 67.

⁹ E.g. *Sakhnovskiy v Russia* [GC] (2010), <http://hudoc.echr.coe.int/eng?i=001-101568>, para 96; *Marcello Viola v Italy* (2006), <http://hudoc.echr.coe.int/eng?i=001-77246>, para 50; and *Golubev v*

Composition 16 (3) of the Arab Duty on Human Rights provides that everyone charged with a felonious offence has “ The right to be tried in his presence”.¹¹

Easily, the implicit compass for duty of videoconferencing against the wishes of the person is at its narrowest in felonious trials. Indeed, given the vittles and judicial logic set out over, it's delicate to see how on-consensual videoconferencing of the indicted and his or her counsel could ever be compatible with the safeguards needed of a felonious trial, particularly recalling the Human Rights Committee’s above- noted protestation that, “ Swinging from abecedarian principles of fair trial, including the presumption of innocence, is banned at all times.”

The ICJ is ignorant of any case in which the Human Rights Committee, the European Court of Human Rights or any other indigenous mortal rights court has plant thenon-consensual Duty of videoconferencing on the indicted and/ or his counsel in a felonious trial, to be compatible with the right to a fair trial.

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¹⁰ *Golubev v Russia* (decision, 2006), <http://hudoc.echr.coe.int/eng?i=001-78357>, citing *Colozza v*

Italy (1985), Series A no 89, para 27.

¹¹ The American Convention on Human Rights makes general provision for fair trial under its article 8 (more particularly, the “right to be heard”), but does not specifically address whether the person should be tried in his or her presence.

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