

## Case Study

## NEW STEPS OF DIGITALISATION OF CIVIL JUSTICE IN UKRAINE

**Olena Sereda, Valeriy Mamnitskyi, Polina Kornieva and Iryna Cherevatenko\***

### ABSTRACT

**Background:** *The emergence of virtual space and digital technologies is a natural consequence of the scientific and technical progress of humankind. Currently, digital technologies are actively used in the field of law, particularly within the judiciary. Therefore, the development of e-courts is a response to modern challenges. This paper is devoted to the issue of the evolution of digitalisation in civil justice; specifically, it examines the development and regulatory regulation of the use of electronic courts (e-courts) in civil proceedings. It elucidates the peculiarities and difficulties of using the electronic court to combat bureaucracy in civil proceedings.*

*Furthermore, the paper explores the key elements of e-justice and assesses the possibility of implementing electronic lawsuits in Ukraine's courts. It also delineates the peculiarities of employing electronic means of proof in civil proceedings. Moreover, the paper clarifies the possibility of conducting court hearings online using platforms such as Meet and Zoom, drawing insights from the practices of other countries. Additionally, it compares the American Pacer system with the Ukrainian analogue, the "Electronic Court", as one of the ways to access case materials via the Internet. Lastly, the paper outlines the practice of the Supreme Court regarding the use of electronic subpoenas and the advantages of the electronic form.*

**Methods:** *An analysis of judicial practice and positions of the Supreme Court regarding individual elements of e-justice and the legality of their application was carried out. Also, special attention was paid to the practice of other countries regarding their use of electronic courts and the possibility of similar proceedings in Ukraine.*

**Results and Conclusions:** *Based on the analysis, the authors concluded regarding the further improvement of the electronic court system in civil proceedings. Conclusions highlighted the advantages of digitalisation in the civil justice system.*

## 1 INTRODUCTION

On February 24 2022, the troops of the Russian Federation<sup>1</sup> launched an invasion of the territory of Ukraine and violated its territorial integrity, causing huge losses to defence facilities, civilians and buildings of state authorities and local governments, including court buildings. From that moment on, justice in Ukraine was paralysed. In such cities as Kharkiv, Kherson, Mariupol, Enerhodar, Berdyansk, and Vovchansk, in general, the Russian occupiers committed actions which violated the norms of international humanitarian law, such as self-appointing managers and severing territories from Ukraine's state borders. On the same day, the President of Ukraine signed a decree on the imposition of martial law throughout Ukraine for 30 days.<sup>2</sup>

Nevertheless, for the administration of justice, some courts continued to work under martial law with certain restrictions in implementing the principles of openness and publicity. One of the main issues of the administration of justice under martial law is the availability of participants in the case to court and compliance with the proper consideration of the case, including through the digitalisation of legal proceedings.

On April 26 2022, the Verkhovna Rada of Ukraine registered the Draft Law 'On Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine (regarding the implementation of legal proceedings under martial law or a state of emergency)', the primary purpose of which was the introduction of effective procedural mechanisms under martial law.<sup>3</sup> The possibility of conducting court hearings remotely and notifying case participants about proceedings through various digital messenger resources, e-mails, and announcements on the official Internet resource of the judiciary of Ukraine was explored. Although such innovations were proposed to improve the implementation of legal proceedings, on July 01 2022, this draft Law was rejected.

Analysing this, a number of questions arise regarding the prospects of consolidating these mechanisms in legislation in the future and further improving them through the application of the experience of countries where e-litigation is developed and progressive.<sup>4</sup>

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1 Today, more and more often, the public and the international community are in support of Ukraine. The name "Russian Federation" is written with a small letter.

2 Decree of the President of Ukraine no 64/2022 of 24 February 2022 'On the Imposition of Martial Law in Ukraine' [2022] Official Gazette of Ukraine 46/2497.

3 Draft Law of Ukraine no 7316 of 26 April 2022 'On Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine (regarding the implementation of legal proceedings under martial law or a state of emergency)' <<https://itd.rada.gov.ua/billInfo/Bills/Card/39489>> accessed 22 December 2023.

4 See more in: Xandra E Kramer, 'Digitising Access to Justice: The Next Steps in the Digitalisation of Judicial Cooperation in Europe' (2022) 56 *Revista General de Derecho Europeo* 1, doi:10.2139/ssrn.4034962; Elena Alina Ontanu, 'Adapting Justice to Technology and Technology to Justice: A Coevolution Process to e-Justice in Cross-border Litigation' (2019) 8(2) *European Quarterly of Political Attitudes and Mentalities* 54; Corien Prins, 'Digital Justice' (2018) 34(4) *Computer Law & Security Review* 920, doi:10.1016/j.clsr.2018.05.024; Didier Reynders, 'Digitalising Justice Systems to Bring Out the Best in Justice' (2021) 4 *Eucrim* 236, doi:10.30709/eucrim-2021-030; Judith Townend and Lucy Welsh, 'Justice System Modernisation, Digitalisation and Data' in J Townend and L Welsh, *Observing Justice: Observing Justice* (Bristol UP 2023) 40, doi:10.51952/9781529228694.ch003.

## 2 DIGITALISATION OF CIVIL JUSTICE: GENERAL REMARKS

It should be emphasised that the process of digitalisation of civil justice was forced to accelerate in 2020 amid the pandemic when the question arose about the possibility of the judicial branch of power performing its main function, that is, justice under quarantine restrictions. The inability to hold court hearings under martial law has led to the activation of the further introduction of the e-court system; as life continues, civil disputes continue to be generated and exist, and they need to be resolved by the courts. In view of the foregoing, it seems relevant to study digitalisation, civil proceedings, comments on possible shortcomings and the formation of its own proposals for improving this institution.

The digitalisation of legal proceedings in Ukraine's legal system requires increasingly systematic analysis and consideration of the prospects for its modernisation.<sup>5</sup> The above concept is borrowed; therefore, the domestic law at the present stage does not provide an interpretation of the concept of 'digitalisation'. In general, this concept should be considered as a process of changing information into a digital form that computer can be read and analysed by a computer.<sup>6</sup> We prefer to use this term due to the wider context and the recognition by the main stakeholders like the UN and the EU.<sup>7</sup>

This concept is understood as the digitalisation of information for further perception by a computer program. However, in terms of the rapid evolution of legal relations, digitalisation covers not only the digitalisation of data but also the complex process of transition of entire legal institutions to the electronic format. In this aspect, it would be expedient to identify the directions of digitalisation that will be relevant specifically for developing civil procedures. Such an institution should single out such a concept, known as e-litigation, the legal nature of which is reflected in literature.<sup>8</sup>

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5 Concerning the Ukrainian development please see in: Henriette-Christine Boscheinen-Duursma and Roksolana Khanyk-Pospolitak, 'Austria and Ukraine Comparative Study of E-Justice: Towards Confidence of Judicial Rights Protection' (2019) 2(4) Access to Justice in Eastern Europe 42; Iryna Izarova, 'Digitalisation of Justice in Ukraine: Some Remarks on the Main Goal' in K Gajda-Roszczyńska (ed), *Impact of the COVID-19 Pandemic on Justice Systems: Reconstruction or Erosion of Justice Systems – Case Study and Suggested Solution* (V&R unipress 2023) 235.

6 'Digitalization' (*Oxford Learner's Dictionaries*, 2023) <<https://www.oxfordlearnersdictionaries.com/definition/english/digitalisation?q=digitalisation>> accessed 22 December 2023. Some authors use the term "digitization", see more here: Federico Iannacci, 'Digitising Criminal Justice in England and Wales: Revisiting Information-Growth Dynamics' (2009) 3(1) Transforming Government: People, Process and Policy 50, doi:10.1108/17506160910940731; Jane Loo and Mark Findlay, 'Digitised Justice: The New Two Tiers?' (2022) 33 Criminal Law Forum 1, doi:10.1007/s10609-022-09431-x.

7 European Commission, 'Digitalisation of Justice' (European Commission, 2023) <[https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/digitalisation-justice\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/digitalisation-justice_en)> accessed 22 December 2023; United Nations Development Programme, 'Digitalization and e-Justice' (UNDP, 2023) <<https://www.undp.org/rolhr/justice/digitalization-and-e-justice>> accessed 22 December 2023.

8 Boscheinen-Duursma and Khanyk-Pospolitak (n 5); Z Hadecka and A Shtabrat, 'Implementation of Electronic Judicial Systems' (2021) 1 Efektyvna ekonomika doi:10.32702/2307-2105-2021.1.80.

### 3 KEY ELEMENTS OF E-JUSTICE IN UKRAINE

We propose considering the following elements as integral components of e-justice in Ukraine: 1) filing a claim and other procedural document via the Internet; 2) use of means of proof in electronic form; 3) holding a court hearing online via video conferencing such as Meet and Zoom platforms, as well as e-mail; 4) formation of an electronic dossier, and hence the transfer of document circulation and office work into electronic form; 5) providing access to case files for participants in the process and other persons via the Internet; 6) use of electronic subpoenas; 7) implementation of all legal proceedings exclusively through Internet-based platforms, including electronic courts or cyber courts (e-courts).<sup>9</sup>

Based on the foregoing, we consider it appropriate to analyse such signs and prospects for their application and improvement in the conditions of martial law in Ukraine.

In accordance with the order of the State Judicial Administration of Ukraine dated December 22 2018, No. 628 'On testing the subsystem "Electronic Court" in local and appellate courts', the operation of the subsystem "Electronic Court" in test mode began in all local and appellate courts.<sup>10</sup> The property of this project was the possibility of filing claims in electronic format, which is a convenient step in the fight against established bureaucracy. Although this mechanism has become a promising step towards the digitalisation of civil procedure, there are some difficulties in its application. Art. 43 of the Civil Procedure Code of Ukraine (hereinafter – CPC)<sup>11</sup> stipulates that documents (including procedural documents, written and electronic evidence, etc.) may be submitted to the court, and procedural actions may be performed by the parties to the case in electronic form using the Unified Judicial Information and Telecommunication System (hereinafter - ESITS),<sup>12</sup> except as provided for in this Code. And further, para. 2 of Pt. 1 of Art. 177 of the CPC procedure expressly provides for the possibility of filing electronic claims.

Initially, at the beginning of the introduction of this system, there were frequent cases where the courts refused to accept claims that were filed electronically, referring to a) the inconsistency of the claim with the legal form and b) the absence of the fact of the full

9 Iryna Izarova and Henriette Christine Boscheinen-Duursma, 'Towards sustainable civil justice: Lessons from Ukraine and Austria' (2022) 1 (Espec) *Revista Jurídica Portuguesa* 55; Maksym Maika, 'The Implementation of E-justice within the Framework of the Right to a Fair Trial in Ukraine: Problems and Prospects' (2022) 5(3) *Access to Justice in Eastern Europe* 249, doi:10.33327/AJEE-18-5.2-n000320

10 Order of the State Judicial Administration of Ukraine no 628 of 22 December 2018 'On Testing the Subsystem "Electronic Court" in Local and Appellate Courts' <<https://ips.ligazakon.net/document/SA18177>> accessed 22 December 2023.

11 Civil Procedure Code of Ukraine no 1618-IV of 18 March 2004 (as amended of 16 December 2023) <<https://zakon.rada.gov.ua/laws/show/1618-15#Text>> accessed 22 December 2023.

12 'Functioning of the Unified Judicial Information and Communication System' (*Ukrainian Judiciary, State Judicial Administration of Ukraine*, 2023) <[https://dsa.court.gov.ua/dsa/inshe/func\\_ecits/](https://dsa.court.gov.ua/dsa/inshe/func_ecits/)> accessed 22 December 2023.

functioning of the ESITS. The decisive argument for the position of the possibility of filing claims with the court in electronic form was the conclusion of the Supreme Court in the panel of judges of the Cassation Administrative Court when considering case No. 160/1841/19,<sup>13</sup> which resolved conflicts regarding the possibility of applying the institution of electronic claim. The panel of judges of the Supreme Court concluded that from December 22 2018, applications and other procedural documents received by all local and appellate administrative courts through the subsystem "Electronic Court" should be registered and considered in the prescribed manner.

Therefore, further application of the institution of electronic claims will significantly contribute to the development of the process of digitalisation of civil proceedings, especially in conditions of martial law, when the issue of filing a quick and "safe" claim is appropriate.

Secondly, the issue of using electronic means of proof is an important element on the way to the formation of electronic legal proceedings. Considering the development of scientific and technological progress, improving means of communication and storage of information, using computer equipment and information, and introducing electronic evidence into the system of means of proof is undoubtedly a progressive innovation. Electronic evidence is information in electronic (digital) form containing data on the circumstances relevant to the case, in particular electronic documents (for example, text documents, graphic images, plans, photographs, video and sound recordings, etc.), websites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form (Pt. 1 of Art. 100 of the CPC).

The law enforcement practice of national courts is ambiguous in determining electronic evidence, as there are some difficulties in establishing the authenticity of the evidence and the author himself. For example, in case No. 908/1264/18, the Supreme Court established whether the official e-mail address of one of the parties to the dispute from which the evidence was submitted was electronic.<sup>14</sup> In addition, the Court was quite critical of the authentication of the person submitting evidence in the case due to the fact that the sender did not use QES (qualified electronic signature) that could identify him as a person. The court found the evidence inadequate. Therefore, when using electronic evidence, several problematic issues arise that must be resolved at the legislative level.

Thirdly, the innovation of recent years has been the possibility of holding court hearings online via video conferencing on the Meet and Zoom platforms, which was regulated by Order No. 169 of April 8 2020, of the State Court Administration of Ukraine, according to which the Procedure for working with technical means of videoconferencing during a court hearing with the participation of the parties outside the court premises was approved. This proposal was a novelty at that time, but because of this, several questions

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13 Case no 160/1841/19 (Administrative Cassation Court of the Supreme Court of Ukraine, 6 August 2020) < <https://reyestr.court.gov.ua/Review/90846939> > accessed 22 December 2023.

14 Case no 908/1264/18 (Commercial Cassation Court of the Supreme Court of Ukraine, 7 November 2019) < <https://reyestr.court.gov.ua/Review/85470804> > accessed 22 December 2023.

arose, namely the expediency of introducing such a procedure into Ukrainian law and further implementation.

Despite all the possible gaps, electronic means of communication met its expectations, simplifying the possibility of persons accessing the court. In addition to the analysed aspects to further expand the use of such technology, it is worth noting that the practice of using such technologies has long been employed by the countries of the European Union have long utilised such technologies in their legal systems, benefitting from more robust opportunities for the introduction of information and communication technologies and e-justice in legal proceedings.

It should be noted that implementing information and communication technologies and e-justice in other countries has been conducted consistently for more than ten years through multi-year pilot projects, which made it possible to determine through practical application the most effective procedures that should be introduced into the current legislation.

We believe that using video conferences for civil proceedings can effectively consider cases that resolve the impossibility of judicial proceedings due to the issue of "cross-borderness". The application of this mechanism is quite relevant due to the migration processes that took place during martial law in Ukraine, and the further praised practice of applying e-communication will serve as a lever on the way to electronic legal proceedings.

Fourthly, the next step to improve digitalisation in Ukraine is introducing a single working electronic document management system, which can solve well-established issues of proper consideration of civil cases.<sup>15</sup>

Domestic law is already on the way to establishing an electronic document management system, provided for in paragraph 6.1 of paragraph 6 of the Regulations on the procedure for the functioning of individual subsystems (modules) of the Unified Judicial Information and Telecommunication System, namely 'electronic record keeping, including the movement of electronic documents within the relevant bodies and institutions and between them, registration of incoming and outgoing documents and stages of their movement'.<sup>16</sup>

Thus, in the future, the prospect of a complete transition of document circulation to the electronic space in Ukraine is a fundamental and necessary prerequisite for improving the e-judicial system and adjusting it to the practice of European Union countries.

The fifth crucial element of digitalising legal proceedings is access to online case files for participants and other individuals involved in the process.

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15 Maika (n 9).

16 Decision of the Supreme Judicial Council no 1845/0/15-21 of 17 August 2021 'On approval of the Regulation on the procedure for the functioning of individual subsystems of the Unified Judicial Information and Telecommunication System' <<https://zakon.rada.gov.ua/rada/show/v1845910-21#n22>> accessed 22 December 2023.

A prerequisite for the possibility of the existence of such a system around the world was the practice of the United States. The electronic publication of judicial acts was started in the order of experiment in 1988 based on the Pacer system.<sup>17</sup> Currently, it is possible for all interested parties to open access to court case files and related information in the Pacer system over the Internet.<sup>18</sup>

The Pacer system includes the following information: a registry of incoming applications; information in the case, such as subject and price of the claim, case number, participants of the meeting, and at what stage of consideration the case is located; court decisions and rulings; and a calendar of cases scheduled for consideration and considered. The system allows you to search by type of case, date of application, name of the party to the case, name of the judge, representative of the party and other parameters. Federal courts independently maintain a database of their cases by sending data daily to the centre of the Pacer system. An analogue of this system in the domestic space is the “Electronic Court” system,<sup>19</sup> which provides an opportunity for quick access to the court case, to track its movement, and to view information about the progress of the court case. To use the “Electronic Court” service, the system user must go to the official web portal ‘Judiciary of Ukraine’,<sup>20</sup> search for a court and register their personal account through which the system user can receive all necessary information about the course of the trial. To connect to the “Electronic Court” system, it is necessary to have an electronic qualification signature for registration. Thus, the functioning of the e-court system regarding the possibility of free access to case materials is an important asset on the way to the digitalisation of civil procedure because the possibility of such digitalisation is the foundation for moving away from ‘the power of paper media’.

Sixth, a step towards digitalisation is the use of electronic subpoenas. However, the question arises: what is the legal nature of such a procedural document?

In general, according to the Code of Civil Procedure, the court summons the participants of the case to a court hearing or to participate in the commission of a procedural action if it recognises their turnout as mandatory. The court notifies the parties of the case of the date, time, and place of the trial or the commission of the relevant procedural action if their turnout is not mandatory. Subpoenas serve as a formal notification from the court.

In accordance with the resolution, the Civil Court of Cassation of July 13 2022,<sup>20</sup> it was noted that the defendant (referred to as Citizen B) contested the decision of the Court of Appeal, arguing that it was adopted in his absence and therefore should be overturned. He claimed that he was not properly notified of the date, time and place of the case. However, the Court of Appeal had sent a subpoena to Citizen B’s email address, which they had consistently used throughout the entire case period; in particular, they sent procedural applications from this e-mail address to the Court of Appeal. Therefore, the CCS of the

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17 Pragma Jha and J Nayak, ‘COVID-19: The Catalyst to an e-Judiciary’ (2020) 18 *Supremo Amicus* 644.

18 *PACER Public Access to Court Electronic Records* <<https://pacer.uscourts.gov>> accessed 22 December 2023.

19 *Electronic Court* <<https://id.court.gov.ua>> accessed 22 December 2023.

20 Case no 761/14537/15-c (Civil Cassation Court of the Supreme Court of Ukraine, 13 July 2022) <<https://reyestr.court.gov.ua/Review/105325048>> accessed 22 December 2023.

Supreme Court ruled that sending a subpoena to the e-mail address of the party in the case is proper notice, provided that the participant in the trial had provided that e-mail address and used it to send certain procedural documents to the court. Thus, as noted by the panel of judges of the CCS of the Supreme Court, the appellate court fulfilled the obligation to notify Citizen B. of the date, time and place of the case.

Summarising the above circumstances, it can be concluded that, indeed, the system of electronic subpoenas can and should take place in the modern legal space (especially in conditions of martial law, when persons are forced to leave their place of permanent residence), but taking into account an important feature, namely: a) notification of the existence of a person's e-mail; b) permanent use and access to this mail. In order to avoid the problem with inactive e-mail, we propose improving the mechanism of electronic court summonses through the Diia<sup>21</sup> application. The advantage of this form of subpoena, in our opinion, may be: a) the impossibility of losing this application, unlike e-mail, and (b) the speed and unhindered receipt of the subpoena in the application.

Seventh, one of the key issues is the complete transfer of legal proceedings to the e-court system. In this case, we are referring to a certain abstraction, although analysing the practice of the United States (the PACER system, as noted above), the complete transfer of the trial into electronic form may occur in the future. Again, turning to U.S. practice, we can talk about improving e-litigation by introducing artificial intelligence. A total of fifteen states use automated systems to assess the risks of releasing those arrested on bail. The main task is not to replace the judge but to exclude subjective factors that may affect the decision from the process. The work is based on data from 1.5 million court cases in the U.S. The assessment uses nine criteria, including age, former convictions, cases of ignoring court decisions and other facts from the criminal history of the suspect. The solutions of the algorithm are recommendatory in nature. However, in our opinion, artificial intelligence cannot be a perfect regulator of public relations because it is only a computer program written by people that operates according to a specially created algorithm (as we know, algorithms can very often fail and create dissonances). Therefore, we agree with the opinion on the possibility of creating a system, but one that will be exclusively auxiliary in nature.<sup>22</sup>

## 4 CONCLUSIONS

The digitalisation of legal proceedings is becoming an increasingly integral part of the legal development of the state, especially during martial law. It is worth noting that Ukraine is on the right path to improve the e-court. However, aligning national legislation with world standards for a fully functional e-justice system is a significant step towards reforming civil

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21 *Diia: Government services online* <<https://diia.gov.ua>> accessed 22 December 2023.

22 Goda Strikaitė-Latušinskaja, 'Can We Make All Legal Norms into Legal Syllogisms and Why is That Important in Times of Artificial Intelligence?' (2022) 5(1) Access to Justice in Eastern Europe 8, doi:10.33327/AJEE-18-5.1-a000095.



litigation. Digitalisation is not merely a trend but also a great saving of human resources and funds. In particular, utilising videoconference for civil proceedings can be an effective way to consider cases with cross-border implications; this mechanism is especially relevant amid migration processes that take place during martial law in Ukraine. Embracing e-communication practices will further advance electronic legal proceedings.

A second proposal involves the mechanism of electronic court summonses through the Diia application. This approach offers several advances, including the impossibility of missing this application compared to e-mail, and ensures the swift and unhindered receipt of the subpoena of the summons.

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