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Public Access to Court Documents

Online discussion

November 24, 2022

Outcome Document

Problem statement

Public access to court documents is a challenging issue not only for Georgia but also in other democracies. On the one hand, it involves the right of the public to observe and monitor the administration of justice, on the other hand it is related to protection of privacy or other confidential information, such as State, commercial, or bank secrecy, protection of minors, etc.

In Georgia, the court decisions are not publicly accessible upon request. Despite the decision of Constitutional Court of June 7, 2019, which found unconstitutional the relevant legislative restrictions, the courts still refuse to disclose court decisions upon request.

On November 24, 2022 with the support of USAID Rule of Law Program, the Group of Independent Lawyers and Democracy Index - Georgia hosted an online discussion: “Public Access to Court Documents”. Presenters from Georgia, United States, Germany, Ukraine and Moldova overviewed the situation existing in their countries, answered the questions from the participants, which was later followed by the discussion.

This discussion was part of the activity of the International Network of Judicial Reformers (INJR). INJR is a voluntary platform of experts and organizations dedicated to the reform of the judiciary. It unifies more

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than 50 persons and organizations from 16 countries and is currently coordinated by Group of Independent Lawyers and Democracy Index Georgia.

Main findings of the discussion:

- There is no unified international standard of access to court decisions. Different countries have different approaches.
- The approaches existing in various countries are usually classified in three models: a. full accessibility b. limited accessibility c. medium accessibility.
- Among the examined systems USA represents the model of full accessibility and the Germany and Georgia represent the model of limited accessibility. Other two countries – Moldova and Ukraine reveal similarity to the model of medium accessibility.
- Introduction of digital technologies in courts pose new challenges due to increased risks of abuse of private data.
- In all covered countries except for USA (where court decisions are published in full) the court decisions are accessible online in anonymized form, however, the names of judges, prosecutors, lawyers are not usually anonymized.
- While with limited access to court decisions German judiciary enjoys high level public trust (over 70%), the transparency of court operations is particularly important in transitional democracies, where there is low level of public trust towards the judges and the judiciary.
- The June 7, 2019 decision of Constitutional Court of Georgia ruled in favour of right to public access to court records, where the exceptions should be limited and covered by law. However this decision has not been yet implemented. The debates have evolved around the question of what would be a sufficient procedure to strike the proper balance. Two draft laws are pending – one filed by ruling party and another filed by opposition.

Three models of public access to the court decisions.

Presentations were started by Georgian presenter which outlined three models of access to court decisions.¹

1. **Full accessibility** – court decisions and casefiles are accessible to the public in full, subject to the limited exceptions. Decisions are published online in full text and can be searched via different search engines.
2. **Limited accessibility** – court decisions are accessible in anonymized form. Casefiles are usually not accessible. In some countries, only high instance court decisions are accessible.
3. **Medium accessibility** – Court decisions are usually accessible in anonymized form. Judge or court may decide case-by-case to access to case-files. Some courts may adopt guidelines. Judges may have wide discretion in granting the access.

¹ This classification is borrowed from IDFI study conducted in 2017. See IDFI, Accessibility of Court Decisions, Situational Study of International Practice https://idfi.ge/ge/international_practice_on_access_to_court_decisions

Country profiles

Georgia

Georgia belongs to the model of limited accessibility. The court decisions and case files are not publicly available upon request. In 2021, GIL has applied to Tbilisi City Court requesting a copy of criminal judgment against former president of Georgia Mikhail Saakashvili, however, the access was denied due to the possible violation of right to privacy.

Constitutional court of Georgia issued a decision dated June 7, 2019 assessing the constitutionality of the norms prohibiting the access to court documents. The Constitutional Court argued that there was a tension between two rights – right to access to public information (particularly, court decisions) and the right to privacy. The Court stated that the current balance was in favor of the right to privacy and this is not proportional to the legitimate aims pursued by the law. The Court held those provisions unconstitutional and instructed the Parliament to adopt new regulations. However, the Parliament has not adopted such regulation so far, while in the meantime the courts continue to deny public access to specific court decisions.

Currently there is a draft law pending in Parliament (proposed by the ruling party), according to which the court issuing decision has to identify the will of each participant of the case concerning the publicity of his/her own data. This places an unreasonable administrative burden on the court. A more reasonable approach is provided by alternative draft filed by the opposition according to which court decisions are *a priori* public but the concerned parties may file an application and request their data to be anonymized. This issue shall be decided by the court in assessing the balance between the right to privacy and the right to access to public information.

Current legislation mandates the courts to publish online all their decisions but this requirement is violated because the trial and regional courts do not publish their decisions since 2020.

Germany

In Germany the judgments of federal courts are always published in anonymized form. The courts of the lands publish the most important decisions but only once they enter into force. It is up to the judge to decide publication of each decision. He/she may decide this issue according to the public interest or according to the legal importance of the case.

While usually published decisions are anonymized, decisions on some high profile cases may be published in full, such as the case of Volkswagen. Generally, the courts are very careful with the publication of private data because they can be sued for violation of the right to privacy.

In Germany casefiles are not usually publicly accessible.

When it comes to guardianship of a mentally ill persons, even other judges will not have access to the casefile. Only the judge of the case will give permission for the access to the casefile.

USA

In the USA almost every state allows access to electronic court records and opinions. The access to the federal court documents is provided by the system called PACER² (Public Access to Court Electronic Records). However, personal information such as bank accounts, social security numbers, ID numbers, etc. are not accessible for the public. Some other private information may also be sealed from court cases, for example some private materials on divorce cases. In USA, justice is considered to be a public matter and everything that happens in courtroom belongs to public domain. Thus, if the person was arrested and convicted for drunk driving and he asks to the court his name to be anonymized, this request will not be granted. There are however some categories of cases which will not publicly accessible such as cases involving minors, adoption, search warrants, etc.

However, the system may be sometimes abused. For example, there were cases when people obtained membership lists of civil rights organization in order to harass and discriminate their members.

In the USA there is also electronic database where the lawyer's disciplinary history can be found.

After the case is sealed, if there is a change of circumstances the judge can lift the seal off the case.

Ukraine

The procedure for providing access to court decisions and maintaining the Register is regulated by the Law of Ukraine "On Access to Court Decisions". From June 1, 2006, the Unified State Register of Court Decisions was created. This is the unified database for collecting, storing, protecting, accounting, searching, providing, electronic copies of court decisions. All written decisions of courts of general jurisdiction in civil, administrative, economic, criminal cases must be entered into the Register. The court enters into the Register all court decisions and separate opinions of judges, expressed in writing no later than the next day after their adoption or production of the full text.

Information that, according to a court decision, is subject to protection from disclosure is removed from the text of the court decision. The court decision on granting permission to conduct intelligence activities is not made public as well as court decisions on those cases that may fall under the definition of "state secret".

Personal identification data is removed from decisions. These data is replaced by letters or numbers.

In addition to the official Register of Court Decisions in Ukraine, there are also a large number of non-governmental commercial search systems for working with legislation, regulatory documents and court decisions.

Moldova

Since 2012 most court judgments in Moldova are published on the Internet. Since 2012, the decisions of the Supreme Court of Justice (SCJ) are considered pronounced (are legally valid) only if published on the

² <https://pacer.uscourts.gov/>

SCJ website. Every year, the courts publish approximately 210,000 decisions and orders which is 89% of the more than 240,000 examined cases and materials.

Moldova is among the countries which digitalized court archive. Thus, court decisions dating 1965-2013 are digitalized and publicly accessible.

The publication of decisions is conditional on whether the court proceedings are held in camera or in public hearing.

The court decisions are anonymized but this does not concern the names of judges, prosecutors, lawyers or other official personnel. Names of criminal defendants are never redacted even if they are minors.

Personal identification data are always hidden (such as individuals places and dates of birth or residence, telephone numbers, personal identification numbers, health information, bank data car license numbers, personal social insurance numbers).

Parties can apply to the court and ask for their anonymity.

Casefiles are not publicly accessible. Exception is when there is a written request before High Judicial Council. Usually, they do not grant such requests. In practice the rules of anonymization are often violated: either there is an excessive anonymization or insufficient anonymization.

In Moldova there is a discussion on making publicly accessible the cases after a certain period of time (5 years or more) for academic study.

Issues raised by the audience:

- In Georgia the right of privacy is often used to avoid public disclosure of information. Thus, the new legislation should make the court decisions generally publicly accessible but the concerned individual may file an application and request anonymization of his/her data.
- Currently Georgian courts do not disclose, even in depersonalized form court decisions when it is obvious that the applicant knows who were parties to the case.
- While the publicity of court documents is an important aspect of transparent justice, personal information in court files may be abused. When they began to publish court decisions in Latin America, companies used bots to download information and blacklist those workers who sued employers.
- In France courts have anonymized the names of judges in some decisions in order to protect them from retaliation stemming from the parties or private individuals.
- Remote hearings may cause problems of privacy of the case of minors for example, as the trial videos may be accessible for the public.
- There are some concerns that bots may be used to create database of court decisions and using algorism to predict specific judge's behavior.
- In Czech Republic Supreme and Constitutional Courts publish their decisions on websites and most important decisions are published in special collections. There is a new law according to which all courts are obliged to publish their decisions since July 2020. Other conditions must be provided by the Decree of Minister of Justice, which is not still issued. Decisions are anonymized.

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