# Videoconference in Criminal Proceedings – Between Ideal and Current Social Reality

***Dr. Matei-Ciprian Graur*[1]**

**Abstract**

*The need to implement technology in the criminal process has become increasingly acute with the change in the paradigm in which human interaction is being thought at this time. The current social order, given the need for physical separation imposed by the medical reality, has prompted judicial bodies to adopt modern measures to prosecute criminal proceedings.*

*Also, the fast pace at which the contemporary world is turning into an "information" one marks all areas of society. In this context, judicial proceedings cannot stay away from technology involvement. Although justice is done by the people and for the people, the use of technology is a reality of today, having the advantages of reducing the costs of judicial proceedings, speeding up, but also making it easier for the individual to have access to them. As a result, new information technologies determine the adaptation of the working methods of the "actors" of justice, but also mark a reconsideration of the ways of exercising the rights of parties involved in judicial proceedings*[2]*.*

*Also, the current social context, which often involves the need for a physical distance, has prompted judicial bodies to "modernise" the criminal process.*

*An interesting and topical aspect concerns the use of videoconferencing in criminal proceedings. Videoconferencing has the advantage of facilitating distance hearings, thus avoiding unnecessary travel, reducing the costs of criminal proceedings, shortening deadlines and avoiding security issues. For these reasons, the use of videoconferencing has spread across the different justice systems in both domestic and international judicial cooperation procedures*[3]*.*

***Keywords:*** *videconference, criminal proceedings, fair trial, physical distance, right of defence*

## I. National Controversy

Taking into account the current social situation, especially the risk of infection with the new coronavirus, both the Timişoara Court and many courts in the country have resorted to the trial of cases with detainees by videconference.

---

[1] Center of Research in Criminal Sciences, West University Timisoara, Romania. Contact: matei.graur88@e-uvt.ro.

[2] Daniela Dediu, *Videconference in national criminal proceedings and international judicial cooperation in criminal matters. Right to a fair trial*, Pro Lege Magazine, 2018, www.revistaprolege.ro, 28.05.2020.

[3] *Ibidem.*

During the state of emergency there were provisions derogating from the rules laid down in the Code of Criminal Procedure at that time, an example of this being the lack of the consent of the person detained to be heard by videconference.

Once the state of emergency ceases, given that there are no provisions derogating from the provisions of the Code of Criminal Procedure (except for changes to the consent of the detained person[4]), they are fully applicable to such situations.

Thus, the concrete issue relates to the presence of the lawyer – either in the courtroom or in the detention place.

According to Art. 106 par. 2 Code of Criminal Procedure, the person in detention may be heard at the place of detention by videconference, in exceptional cases and if the judicial body considers that it does not affect the proper conduct of the trial or the rights and interests of the parties. According to Art. 106 par. 3 Code criminal procedure, in the case provided under par. 2, if the person heard is in any of the situations provided under Art. 90, the hearing may take place only in the presence of the lawyer at the place of detention.

The legislator's will to guarantee the right of defence, including the need to give a concrete possibility to the person in possession of direct contact with the lawyer.

At the same time, the modern means of conducting the criminal process that we are obliged to resort to in the current social context are at odds with those provisions.

It is obvious that in the context of the trial of a large number of cases with persons detained (cases for parole, appeals to execution, pre-trial arrest checks, complaints against the conclusion of the supervisory judge, applications for merger of sentences, indictments with inmates etc.), it is difficult to imagine a continuous flow of lawyers to the penitentiary in order to put conclusions from this place.

In fact, we consider that the role of the lawyer must be performed in the courtroom, directly before the court, as he is an important actor in carrying out the act of justice.

Thus, we have found that the practice of the courts in the country is that of a lawyer still be present in the courtroom, while the prisoner is heard by videconference.

This was also the practice of the Timişoara Court during the state of emergency.

The legal issue that we consider should be discussed is that of the possible invoking absolute nullity if the lawyer is not present at the place of detention, in relation to the provisions of Art. 281 par. 1 lett. f Code criminal procedure – assisting the suspect or defendant, as well as the other parties, when the assistance is mandatory.

From our point of view, even if the lawyer is present in the courtroom, but the person inmate is offered the possibility of direct video contact with him, without the presence of the judge and prosecutor in the courtroom (if such direct contact is requested), the guarantees of the right of the defence are respected.

Therefore, even if we can formally consider that the provisions of Art. 106 par. 3 Code of Criminal Procedure are violated, it would operate at most the relative nullity of the act thus achieved, and it is necessary to prove any harm.

---

[4] Amendments adopted by Emergency Ordinance 70/2020 on the regulation of certain measures, starting with 15 May 2020, in the context of the epidemiological situation caused by the spread of coronavirus SARS-CoV-2, for the extension of certain deadlines, for the modification and completion of Law no. 227/2015 on the Fiscal Code, the National Education Law no. 1/2011, as well as other normative acts.

However, the injury cannot be proved if the judge of the case ensures that, although the lawyer was present in the courtroom, the person inmate benefited from all the guarantees specific to the rights of the defence.

The problem must also be considered taking into account the social context in which we find ourselves, the multitude of cases that must be judged by videconference, but also the reality of criminal justice at this time, which must constantly anchor itself in concrete needs, but also keep pace with technology in this branch of law.

It is important to note that the Multiannual Action Plan 2014-2018 on European e-Justice[5] established among the objectives that the use of videoconference, teleconference or other appropriate means of distance communication for hearings should be extended, where appropriate, to avoid the need to go to court in order to participate in judicial proceedings, especially in cross-border cases. It is noted that electronic communication between the judicial authorities of the Member States should be further developed, in particular in the framework of instruments adopted in the European judicial area in the field of civil, criminal and administrative law (e.g. via videoconferencing or secure electronic exchange of data).

We note that the conference can be analysed from a double perspective: This can be considered a genuine evidence procedure, thus obtaining means of proof in criminal proceedings, but at the same time the videconference can be considered as a genuine way of conducting criminal proceedings.

The provisions of the Code of Criminal Procedure refer to the hearing of the person in detention, or to listening to them, so the conference is rather the means of carrying out the probation process.

In recent doctrine[6], the videoconference has been included in the category of auxiliary probative processes, along with confrontation.

According to the provisions of Art. 364 par. 1 Code criminal procedure, if heard by videoconference, the person deprived of liberty shall be deemed to be present at the trial.

Hearing by videconference shall also be governed by the provisions of Article 597 (2) ind. 1 of GO 18/2016, as well as Art. 29 of Law 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during criminal proceedings.

## II. Controversy at European Level

The videconference in criminal proceedings has borne controversy at European level, with the European Court of Human Rights considering how the application of the provisions governing it affects the rights of the defence.

The European Court of Human Rights has shown that the use of videoconferencing in criminal proceedings is in itself compatible with the right to a fair trial, but has paid particular attention to the safeguards accompanying the use of such a procedure in criminal proceedings.

---

[5] Multi-annual action plan 2014-2018 on European e-Justice (2014/C 182/02), published in the Official Journal of the European Union No C182/2 of 14 June 2014, www.eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52014XG0614(01) & from=EN, 28.05.2020.

[6] Gheorghiță Mateut, *Criminal Procedure. The general part*, Ed. Legal Universe, Bucharest, 2019, p. 573.

In a number of cases against Italy relating to trials involving mafia members, the European Court of Human Rights ruled on the compliance of Article 6 of the Convention with the use of videoconferencing[7].

In *M. V. v. Italy*[8], it was found by the European Court of Human Rights that the plaintiff had been accused in Italy on 16 March 1992 of association for the commission of mafia-type crimes and murder and was remanded. Since 2000, the complainant has been placed under a strict solitary regime involving, inter alia, restrictions on contacts with the outside. For this reason, he was no longer transferred from prison to court, but still had the opportunity to attend the trial by means of an audiovisual link with the room where the debates took place.

Before the Strasbourg Court, the applicant complained that he had been compelled to participate by videoconference in the appeal proceedings, alleging infringement of Article 6 (1) and (3) of the Convention, since the use of that technical means caused him difficulties in exercising his rights of defence.

The Court found that although it is not expressly provided for in par. (1) of Art. 6 of the Convention, the possibility of the accused to take part in the trial results from the object and purpose of this article. Thus, from the interpretation of paragraphs c), d) and e) of par. (3) of the aforementioned article, it is apparent that "any accused" has the right "to defend himself", "to ask or request the hearing of witnesses", and "to be assisted free of charge by an interpreter, if he does not understand the language used at the hearing", matters which cannot be conceived without his presence. Article 6 of the Convention, read as a whole, therefore recognises the defendant's right to actually participate in the trial, which includes, in principle, among other things, not only the right to attend, but also to listen to and follow up on the debates.

With regard to the exercise of the rights of the defence, the Strasbourg Court revealed that the applicant was able to enjoy an audiovisual link with the courtroom, which allowed him to see the people who were present and to hear what was being said. He was also seen and heard by the other parties, by the judge and by witnesses, having the freedom to make statements before the court, from the place of detention. It is certainly possible that, due to technical problems, the connection between the courtroom and the place of detention may not be ideal, which may cause difficulties in conveying voice and images. However, in the present case, at no point in the debate on appeal has the applicant sought, himself or through its defenders, to inform the judge of the hearing or visual difficulties.

The Court also pointed out that the plaintiff's defender had the right to be present at the location of his client and to contact him in a confidential manner. This possibility was equally recognised to the defender in the courtroom. Nothing demonstrates that, in the present case, the applicant's right to communicate with his lawyer without being heard by third parties has been infringed.

Regulations in Italian legislation on videoconferencing were also subject to constitutional review[9]. Thus, according to Decision No 342/1999[10], the Constitutional Court of Italy has established that distance participation does not infringe the rights of

---

[7] M. V. v Italy, judgment of 29 June 2006; Case Z. v Italy, judgment of 27 November 2007; Case A. v Italy, Judgment of 27 November 2007, www.echr.coe.int, 28.05.2020.

[8] Extract from Daniela Dediu, *op. cit.*, www. Revistaprolege.ro, 28.05.2020.

[9] *Ibidem.*

[10] Available online at www.giurcost.org, 28.05.2020.

defence guaranteed by Article 24(2) of the Italian Constitution. He rejected the idea that only the defendant's physical presence in the courtroom would ensure the effectiveness of that right. Article 146a does not only regulate the technical means of putting into practice the link between the courtroom and the place of detention, but also requires certain results, including the effective participation of the accused in proceedings with a view to the proper exercise of the rights of the defence. For example, the legislator guaranteed contact between the defendants, the right of the defender to be present at the location of the prisoner and the possibility of consultation between the defendant and his lawyer.

The appearance in person of the accused does not imply the same decisive importance in appeal as at first instance, the application of Art. 6 of the Convention on Appeals depending on the role this appeal plays in criminal proceedings according to the internal legal order.

The Court held that the applicant's participation in the appeal proceedings by videoconference *pursued legitimate purposes in the light of the Convention*, relating to the protection of public order, the prevention of criminal offences, the protection of the rights to life, freedom and safety of witnesses and victims of offences, as well as respect for the requirement of a reasonable period of time for judicial proceedings.

According to the Ordinance of the Constitutional Court of Italy no. 483/2002[11], distance participation has the following objectives: A) the protection of public order with reference to the possible actions of the accused of intimidation in relation to the other parts of the trial; B) to avoid transferring the accused from prison to the courtroom to renew contacts with criminal associations to which he is affiliated; C) accelerating the conduct of complex and long processes taking place in different instances. At the same time, the Italian constitutional court revealed that the system introduced by Law no. 11/1998 guarantees the right of the person accused of crimes of exceptional seriousness to participate in the trial, balancing the requirements of the protection of the community and those of the process.

In *Sakhnovskiy v. Russia's* case[12] the state of affairs was as follows, and in this case the Court found *an infringement of the Convention.*

In 2001, the plaintiff was sentenced to imprisonment for murder. In 2002, the Supreme Court rejected his appeal. In 2007, the presidium of the Supreme Court upheld a review, overturned the judgment in appeal, and returned the case for review, considering that the applicant's right to be assisted by a defender during the appeal hearing had not been respected. In the course of the new appeal proceedings, the plaintiff watched the arrest hearing by videoconference because the Supreme Court rejected his request to appear in person. Prior to the start of the debate, the plaintiff was presented to his newly appointed public defender, who was in the courtroom, and the Supreme Court granted them 15 minutes of confidential meeting by videoconference. The plaintiff tried to refuse to be represented by the lawyer, considering he needed to meet with him personally. The Supreme Court rejected the applicant's objection to his lawyer, finding it unreasonable. The court held that the plaintiff did not apply for a colleague to replace the lawyer or seek permission to choose another lawyer. In a different decision, the Supreme Court decided not to accept the applicant's new statement of appeal and to examine the case file on the

[11] *Ibidem.*

[12] Available online at www.echr.coe.int, 28.05.2020.

basis of the statement lodged in 2002 by the applicant's former lawyer before the previous hearing in appeal proceedings. The same day, the Supreme Court examined the substance of the case and upheld its judgment in 2001.

The applicant alleged, in particular, that the criminal proceedings against him had been conducted in violation of Article 6 §§ 1 and 3 (c) of the Convention, claiming that in the appeal proceedings he had not beengiven free legal assistance and that, moreover, he had been unable to defendhimself effectively because he had communicated with the court of appealby video link.

The Court observes that the original conviction was quashed by the Presidium of the Supreme Court in 2007 specifically because of the breach of the applicant's right to legal assistance. It is thus clear that for the authorities the case was complex enough to require the assistance of a professional lawyer. Given that, as well as the Court's own assessment of the complexity of the issues raised before the appellate court, the Court concludes that the assistance of a lawyer was essential for the applicant in the second set of the appeal proceedings.

The Court has considered the arguments of the Government in support of their position and accepts that Ms A. was a qualified lawyer and that there was no explicit disagreement between her and the applicant on the substance or strategy of his defence. While it is established that Ms A had read the case file, it is unclear how much time she spent on it and the Government have not submitted any specific information or evidence on this point. She was *a priori* prepared to assist the applicant, and this is, without doubt, a relevant consideration. However, these arguments are not decisive; the Court must consider whether the arrangements for the conduct of the proceedings, and, in particular, for the contact between Ms A. and theapplicant, respected the rights of the defence.

The Court emphasises that the relationship between the lawyer and his client should be based on mutual trust and understanding. Of course, it is not always possible for the State to facilitate such a relationship: there are inherent time and place constraints for the meetings between the detained person and his lawyer. Moreover, in exceptional circumstances the State may restrict confidential contacts with defence counsel for a person in detention (see *Kempers v. Austria* (dec.), no. 21842/03, 27 February 1997, or *Lanz v. Austria*, no. 24430/94, § 52, 31 January 2002). Nevertheless, any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances.

In the present case, the applicant was able to communicate with the newly-appointed lawyer for fifteen minutes, immediately before the start of the hearing. The Court considers that, given the complexity and seriousness of the case, the time allotted was clearly not sufficient for the applicant to discuss the case and make sure that Ms A.'s knowledge of the case and legal position were appropriate.

Moreover, it is questionable whether communication by video link offered sufficient privacy. The Court notes that in the *Marcello Viola* case the applicant was able to speak to his lawyer via a telephone line secured against any attempt at interception. In the case at hand the applicant had to use the video-conferencing system installed and operated by the State. The Court considers that the applicant might legitimately have felt ill at ease when he discussed his case with Ms A.

In addition, in the *Marcello Viola* case counsel for the defendant had also been able to send a replacement to the videoconference room or, conversely, attend on his

client personally and entrust the lawyer replacing him with his client's defence before the court. A similar conclusion was reached in the case of *Golubev* where the Court did not find a violation of Article 6 on account of a hearing via video link because, *inter alia*, "the applicant's two lawyers were present at the appellate hearing [in the hearing room] and could have supported or expanded the arguments of the defence... The applicant was able to consultwith his lawyer in private before the hearing. Furthermore, since theapplicant had two lawyers, he could choose one of them to assist him in thedetention centre during the hearing and to consult with him in private."None of the options described above was available to the applicant in thecase at hand. Instead, the applicant was expected either to accept a lawyerhe had just been introduced to, or to continue without a lawyer.

The Court concludes that the arrangements made by the Supreme Court were insufficient and did not secure effective legal assistance to the applicant during the second set of the appeal proceedings.

## III. Cross-border Videconference – Model to be Followed Internally

At European level, the Council of Europe has implemented a Guide on the use of videconferences in cross-border judicial proceedings[13]. This guide has been drafted by the General Secretariat of the Council for information purposes only and is useful for both Member States' legislators and judicial bodies.

It is useful to note that the Guide covers cross-border proceedings, but the aspects contained in it can also be used in domestic cases involving judicial bodies in the Member States.

The guide concerns the use of videoconferencing equipment in cross-border judicial proceedings in the European Union. It examines the uropazeonal, technical and legal aspects of the use of technology for videoconferencing. Furthermore, it analyses the use of equipment in courts and witness rooms, as well as the use of portable equipment. The guideline applies in cases where videoconferencing is used for any part of court proceedings, in particular for obtaining evidence from remote locations in other EU Member States. The guide provides advice and guidance for legal professionals, clerks and technical staff.

It examines practical considerations relating to the use of videoconferencing equipment which is of particular interest to legal professionals and court staff, and then examines technical issues of particular interest to technical staff. Annex I to the Guide provides details on the legal framework for the cross-border use of videoconferencing in criminal matters as well as in civil and commercial matters. The other Annexes describe the technical standards to be taken into account and provide a summary of the key steps to be followed in the use of videoconferencing in cross-border judicial proceedings. The aim of the document is to help users by providing advice and guidance. Does not replace detailed operating instructions or detailed operating instructions. This document mainly concerns the use of videoconferencing in court proceedings of criminal, civil and commercial courts.

However, many of the technical aspects relating to the use of videoconferencing are more generally applicable in the wider justice community. The hearing of

[13] Available online at www.consilium.europa.eu, 28.05.2020.

witnesses and experts does not always take place in the courts and it is possible to establish a connection for videoconferencing between courts and other locations, such as consular and diplomatic representations, prisons, hospitals and asylum centers. This document can be used as such as a basis for the use of videoconferencing in other procedures[14].

## IV. Conclusions

Obviously, videconference is and will be used more and more in criminal proceedings. Why? Firstly, due to the need to uropaze procedures in relation to the current social situation. We also note today that the videconference is not only a derived probationary procedure, as it was classified by doctrine, but it is in itself a way of protecting participants in the act of justice.

The need to protect against the new coronavirus during this period has led us to use this probative procedure much more often than before.

Is this a time when justice is changing technologically?

Technology is welcome in the area of justice, a good example being the existence, at this point, of the electronic file, recently implemented in our country.

However, what judicial bodies need to take care of is how the practical application of technological procedures will respect the right to a fair trial. How important, under these circumstances, is the direct, physical contact between the defendant and his lawyer, or between the judge and the defendant?

Therefore, the application of technology to the justice system will have to be carried out without extreme interference with the rights of the defence, and only in this way it will succeed in the criminal proceedings.

**References**

1. Dediu, D., *Videconference in national criminal proceedings and international judicial cooperation in criminal matters. Right to a fair trial*, Pro Lege Magazine, 2018, www.revistaprolege.ro, 28.05.2020.

2. Mateut, Gh., *Criminal Procedure. The general part*, Ed. Legal Universe, Bucharest, 2019.

3. Multi-annual action plan 2014-2018 on European e-Justice (2014/C 182/02), published in the Official Journal of the European Union No C182/2 of 14 June 2014, www.eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52014XG0614(01) & from=EN, 28.05.2020.

4. www.consilium.europa.eu.

5. www.echr.coe.int.

6. www.giurcost.org.

[14] *Ibidem.*