

About Legality of *On Line* Trials in Criminal Procedure

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Abstract

Online trials and human rights standards cover various aspects of the right to a fair trial contained in Article 6 of the European Convention on Human Rights (ECHR) and / or the prohibition of torture and torture in Article 3 of the ECHR, in particular how to ensure the principle of legality and procedural guarantees in criminal court proceedings during an unprecedented health crisis in modern times. The status of subjects in criminal proceedings may depend on their ability to express themselves clearly and to represent their interests. A virus pandemic Covid-19 has posed unprecedented challenges when it comes to many human rights, including the area of justice in the context of a new reality, from the principle of publicity, the right to defense or the right to a fair trial. The use of IT solutions could not necessarily replace physical presence in the absence of clear regulations and proper enforcement by courts. An additional issue has become the availability of reliable software that would enable a secure and stable connection. Numerous problems could suddenly open up issues related to the ECHR: poor sound system in the courtroom, internet connection, concerns regarding personal data, confidential communication with counsel, and public access to the trial. Provision in law, standards and pro futuro procedures can prevent such situations in the future.

Keywords: *right to a fair trial, prohibition of torture, principle of publicity, principle of legality.*

I. Instead of an introduction

One of the biggest challenges of today is certainly a life during the pandemic caused by the COVID19 virus and its consequences, but also the organization for the day after, having in mind the consequences of the disease and the appropriate response to this global problem. At the same time, the consequences in the field of criminal law and more broadly in the field of human rights are obvious. In modern times, the Republic of Serbia has twice encountered the suspension of certain rights and freedoms, during 1999 and 2020, during the aggression of the COVID19 virus, as an epidemic of world proportions. This certainly affected the exercise (restriction) of the rights provided by international and domestic standards in criminal proceedings. The question is, whether these restrictions are necessary, and only for criminal offenses, non-compliance with health regulations during the epidemic and transmission of infectious diseases. The introduction of a trial using the *online Skype* platform, for these two crimes (violation of self-isolation measures), as a form of participation of a detained defendant in criminal proceedings, is extremely debatable. While it is

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important to sanction individuals who do not comply with health regulations during a pandemic, as a measure of general and special prevention, this must in no way prejudice the rights guaranteed in international and domestic law.

The use of the *Skype* application or some other computer program for trials is not problematic *only* if as such it is provided by procedural legislation, which is still not the case so far. This conduct of the executive and the judiciary regarding and this form of judicial decision-making was not only a characteristic of Serbian criminal procedural law, but also of other countries of the same or similar model of judicial organization during the pandemic. Therefore, we cite here only as an example the invalid verdict of the Basic Court in Dimitrovgrad from March 2020, where the defendant was found guilty of the criminal offense of failing to comply with health regulations during the epidemic under Article 248 of the Criminal Code. The defendant was sentenced to three years in prison, the maximum sentence, which includes the time the defendant spent in custody¹.

Such a verdict passed after the *Skype* trial opened several questions, among which are the basic ones: non-respect of the principle of immediacy and the principle of publicity. Such an open question of legality of work and decision-making of courts is certainly not with the aim of giving a message whether to sanction all those who do not respect health measures adopted and in order to prevent the spread of corona virus, but that such an important topic should be regulated by positive regulations, even during a state of emergency. The answer therefore cannot be simple, so let us move on in following order.

II. The use of technical means for the transmission of image and sound in criminal proceedings in international and community law

Technological achievements of the new age and the use of technical means for the transmission of sound and images have brought a whole series of changes in criminal matters in traditional criminal law, which not only accelerate them but also change the manner and concept of conducting proceedings. Following the practice of the ICTY, we noticed that they were among the first in Europe to start using the trial via video link or *Skype* trial. The court established by the decision of the UN Security Council was thus a pioneer in this area. Thus, the 1994 Rules of Procedure and Evidence of the *Ad Hoc* Tribunal were amended² Rule 71 point A provides that the Trial Chamber may order, in the interests of justice, that an out-of-trial testimony be taken, specifying in point D that such testimony may be given both in court and out of court, by videoconference. A similar solution provides for the EU Directive 2012/29³ as the possibility of giving testimony to victims and witnesses using communication technologies. The Directive stipulates in its standards that national legislation will regulate the use of technical means for the transmission of images and sound – video links, as an option for additional protection of victims and witnesses.

¹ <http://rs.n1info.com/Vesti/a584070/Odrzana-prva-Skajp-sudjenja-struka-upozorava-krse-prava-okrivljenih.html>.

² <https://www.icty.org/bcs/documents/pravilnik-o-postupku-i-dokazima>.

³ Directive 2012/29EU of the European Parliament and of the Council of October, 25 2012 establishing minimum standards on the rights, support and protection of victims of crime.

In France and Great Britain, even before the measures of imprisonment due to the pandemic caused by the COVID 19 virus, videoconferencing was used during the trial, while in Russia; this model of working on long-distance hearings was introduced as the so-called *hybrid* trial. These are trials that are conducted mainly before the Commercial Court, and the judges are in the court building – in the courtroom, and the parties are in their premises. This is a great practical solution in the administration of justice in the largest country with a veto, having in mind the existence of great distances between the regions.

The French right the shape of the hearing leaves as discretionary BC and in the judges, but still not completely defined who should be in charge (of the court or the parties) for a choice between *on-line* trials or traditional leadership concussion among those present. Trials in the UK are a small problem with *online* jury trials.

Doctrine and jurisprudence in the United States have been largely against pleading guilty through the use of videoconferencing in proceedings leading to a pandemic caused by COVID 19. That's right, following Hillman's allegations⁴ The U.S. Supreme Court gave an interpretation of the relevant provisions of the Federal Rules of Criminal Procedure, in the context of protecting the defendant's right to a trial in presence, Part VI of the Amendment to the USA Constitution. The presence of the accused implies physical presence, and personal contact and interaction with the judge is irreplaceable, so that virtual reality is inadequate to the actual presence. The right to a fair trial and a fair trial cannot be held against Judge Brennan (in the case of *Bruton v. USA*) if the defendant is not directly present, if there is a forced atmosphere generated by detention, without adequate support from counsel as counsel.

On the other hand, at the time of the pandemic in the USA, a verdict based on plea bargaining was passed in 2020 in the Federal Court in St. Louis. The defendant was in custody, and housed in one room, the judge in another, and the prosecutor and defense counsel were in their offices. The comment that could otherwise be given on concluding an agreement between the prosecutor and the defendant in such specific conditions is even more difficult, because it (the agreement) is part of the pressure on the defendants to plead guilty in order to avoid imprisonment. The absence of the public and the principle of immediacy were not legally justified in this particular case⁵.

The relative surprise of the judiciary with the emerging situation related to the dangers and challenges of COVID 19 does not obviously mean that there has been no consideration of these issues in relation to standards of conduct. The case law of the European Court of Human Rights, similar to the American judge Brennan, stated that the rules of the European Convention on Human Rights apply equally to distance hearings. So is the Grand Chamber in *Sakniovskiy v. Russia*⁶ ruled that the use of videoconferencing was neither an advantage nor a disadvantage over the standard of the right to a fair trial under Article 6 of the Convention, as a technology that could be used in court proceedings. However, this does not relieve the national authorities of their obligations under Article 6 of the ECHR and the principle of fairness. It is the court that must ensure the legality of the proceedings and ensure a fair balance of all interests.

⁴ Hillman, Z.M., (2007) Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally "Present" when Pleading Guilty by Video Teleconference?, Journal of High Technology Law, Vol.VII, No.1.

⁵ https://www.stltoday.com/news/local/crime-and-courts/federal-court-in-st-louis-holds-first-guilty-plea-by-videoconference/article_fd5f6525-fbff-5316-9e79-f8624d768.

⁶ [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-101568%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-101568%22]}).

Such legal reasoning indicates the only possible solution, i.e. that the use of videoconferencing and related practical means is feasible only if as such, it is provided for in the national procedural legislation.

One of the unresolved issues in *online* trials is information security and party identification. The technical quality of videoconferencing is a prerequisite for the effective participation of all parties to the proceedings. If no courts may own platform with the information system that allows identification of the parties, to use an open communication platform, such as *Skype*. The courts in Serbia used *Skype*, and the security of this communication platform for court hearings is problematic. Russian commercial courts do not have these problems; they already have their own video platforms built. For the correct use of these IT platforms, it would also mean introducing the participants to the procedure of use.

In the UK, special guidelines have been developed for distance hearings – online hearings, which must comply with the rules of conduct as in the courts. However, in the case of persons with a communication disability, these instructions may not be particularly useful. The fairness of the procedure is further complicated by cross-examination in the online format, because there is no solution here for now, and this will have to be worked on separately. The possibility of equal participation of subjects in the proceedings, the efficiency of the judiciary and the fairness of the proceedings remain the most important aspects when a judge makes a decision on the use of videoconferencing, regardless of its format.

Insight into the files from the earliest stage of the proceedings is a special issue, especially in online trials. While access and exchange of documents electronically has been a common practice in the UK for many years, this could not be said for trials in some other countries. Even without special research, we can claim that in the criminal proceedings that were conducted in Serbia, there was no such interaction between the parties and the court.

This in fact jeopardizes the reaction of one of the parties to new evidence that could emerge during the trial. This has to do with the moment until which new evidence can be submitted and the decision of the national legislation accordingly. Such issues do not arise in the UK, as the parties are required to disclose their direction of defence during the pre-trial proceedings.

The principle of publicity, as an indisputable value of modern criminal procedure by applying online trials, has at least two problems. On the one hand, there is the need to protect the parties from conducting court proceedings in secret without any public control, and the desire to maintain trust in the courts, on the other. *Skype* trials are certainly not available to the general public and there is no need to discuss the issue of their compliance with one of the requirements of Article 6 of the ECHR. Monitoring of court prosecutions can do the courts open and accessible regardless of distance, and whether the case when the information about the trial online publicly available. Such an objection can be remedied by timely informing the public and the media about the place and model of the discussion and the ways for an effective approach. But ... in the case of applying the principle of publicity in real-time online trials, the question of the privacy of the participants in the procedure and the risks to their privacy arises. Although the sessions of the appellate and highest courts are mostly public, the question is how safe it is in the first instance chambers, due to the so-called zoom bombing or the possibility of unauthorized shooting and privacy violations.

While all sessions of the Supreme Court of the UK are public, one of the solutions can already be seen in, for example, the Serbian legislator, because in organized crime

proceedings it provided for the possibility of recording the entire procedure, which then allows subsequent public insight into the course and credibility of the entire procedure.

For a trial to be fair, it would be extremely important to be able to see the entire courtroom, not just the faces of those speaking at a given moment. This detail, although not conventionally provided for, is implied as such.

Article 6 of the ECHR provides for the guarantee of discretion in communication between the defendant and the lawyers of defence during the criminal proceedings. The right to effective legal aid includes the right of the accused to communicate privately with his lawyer. If a lawyer is unable to meet with his client and receive confidential instructions from him without supervision, his assistance is not in line with the standard of the right to a defence. In online trials, there must be all the technical possibilities to avoid any pressure or influence on the accused (especially the detainee) that may not be visible in the regular proceedings. In criminal proceedings conducted online, and especially if the defendant is in custody, as long as he is not provided with a secure line of communication with counsel, his right to defence is not fully exercised. In France, it is not regulated where the defence counsel is in online trials, so this is certainly something that is left to court practice, and that is not the best solution.

These are just some of the problems and solutions in online trials that we have given as an example. From those that are purely technical in nature, but as such are still regulated by procedural legislation, not technical instructions, at trials, to those that violate basic principles of criminal procedural law, such as the principle of immediacy, publicity, the right to counsel and confidentiality. conversation, prohibition of torture and other torture, all of which together can call into question the need for efficient resolution of court proceedings, but also with the right to a fair trial. Justice is not a matter of technique and a matter of compromise, but a principle from which it cannot be an exception, regardless of all the difficulties that accompany the time of the pandemic. The fact is that such situations caused by the COVID 19 pandemic must be foreseen in the future, which indicates the possible need for a unified regulation of online trials.

III. The right to a fair trial and online procedure in the jurisprudence and legislation of Serbia

The current Code of Criminal Procedure does not currently provide the possibility of trial through using of technical means for the transmission of sound and images, only in the proceedings before the first instance court, leaving that possibility (the court may) only in the procedure of deciding on a legal remedy. As an exception to the principle of immediacy in criminal proceedings, this is the case here:

1. Where there are certain exceptions, such as securing the presence of the accused for security or other reasons, and

2. When the condition is met that there are appropriate technical conditions for that, so the accused may appear at the hearing by technical means for the transmission of sound and images (Article 449, paragraph 4 in fine of the CPC). This possibility can also be applied at a hearing held before a court that decides on an appeal against a second-instance judgment (Article 464, paragraph 1 of the CPC).

In the context of the right to justice according to the case law of the European Court of Human Rights, the direct presence of the defendant before a court of law is not as decisive as when it comes to a trial before a court of first instance. However, this does not exclude the exceptional possibility that the first-instance trial in which the participation of the defendant is secured via video link will be assessed as in accordance with the guarantees contained in the right to a fair trial.

The rule is that the direct presence of the defendant in the first-instance procedure implies, in principle, his/her ability to participate in the hearing. This undoubtedly follows from the subject-matter and purpose of paragraph 1 of Article 6 of the ECHR. In addition, the provisions of paragraph 3 of Article 6 of the ECHR, which guarantee every accused one the right to defend himself/herself, to examine or request the examination of a witness and to be provided with a free interpreter if he/she does not understand or speak the language of the trial, are unfeasible without his/her presence at trial.

Ensuring the presence of the defendant via video link before the court of legal remedy is not necessarily incompatible with the right to a fair trial, provided that the defendant is able to follow the procedure and be heard without technical difficulties, and to have an effective and confidential conversation with the defense counsel/person.

Guided by this analogy, and at the time of the COVID19 pandemic, which did not only affect our country and countries in the region, the question of the legality of the Decree brought on April 1st, 2020 was raised, which prescribes the possibility for a defendant in custody to participate in the main trial assistance of technical means and to refer to any criminal proceedings (therefore, for any criminal offense) conducted before the first instance court. The decision on that is made by the president of the panel, i.e. the single judge, provided that he/she considers that securing the presence of the accused at the main trial is difficult due to the danger of spreading a contagious disease. This provision shall apply during a state of emergency, provided that there are appropriate technical possibilities.

Pursuant to the provisions of Article 32 of the Constitution of the Republic of Serbia and Article 6 of the ECHR, the right of access to a court and a reasoned decision are part of the right to a fair trial, which means that in no case can there be deviations from human and minority rights, it should be also in accordance with legislative solutions.

This means that trials via video link or Skype application are then in contrary to the principle of immediacy, but also in contrary to the principle of publicity.

However, having in mind the fact that the Decree of the Government of Serbia of April 1st, 2020 has brought the right to hold such trials, which was just introduced in 2020, needs to be explained why the participation of the defendant in the main trial via video link does not diminish the guarantees contained in the right to a fair trial.

According to the cited Decree, during the state of emergency declared on March 15th, 2020, in criminal proceedings before the first instance court, when the presiding judge or single judge finds that securing the presence of the accused in custody is difficult, or at the main trial, due to the danger of spreading a contagious disease, he/she may decide to ensure the participation of the defendant in the main trial through technical means for the transmission of sound and images, if this is possible given the technical conditions.

This Decree came after the initiative of the courts for such a way of working, which was accepted by the Ministry of Justice by instructing the courts to act in a uniform manner, so that such a Decree would be adopted soon.

Skype trials in special courtrooms were therefore recommended by the Ministry of Justice, in order to ensure the safety of defendants and court employees, and to prevent the spread of the corona virus.

The trial via the Skype application, i.e. online, also opens up problems in the light of the absolute prohibition of torture, inhuman or degrading treatment or punishment.

In the light of the basic principles of criminal procedure, starting from the principle of legality, conducting main trials in this way, may reduce the guarantees for protection against maltreatment, which arise from Article 25 of the Constitution of the Republic of Serbia and from Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms that must not be deviated even during a state of emergency.

A defendant who was a victim of abuse/maltreatment and who is physically under the control of officials who abused him/her or who are in close hierarchical or organizational connection with the perpetrators of the abuse during the main trial, and not in the court building, may be discouraged from taking out the allegations of abuse he/she suffered to the court because of fear of retaliation.

The situation in which the defendant does not have personal contact with his defense counsel/person but communicates through technical means for the transmission of images and sound, can significantly contribute to discouraging the defendant from presenting allegations of abuse to the court or defense counsel/person.

In order to avoid this situation, the text of the Criminal Procedure Code should include this possibility for the first instance procedure, for special cases, of course, with guarantees that it would provide the defendant not only the right to a fair trial, the principle of immediacy, but also guarantees protection from maltreatment or torture, which all mentioned would be a violation of Article 3 of the ECHR.

In the function of justice and respect for the protection of human rights, which are listed as rights from which there are no deviations, this could be ensured through the activities of the NPM mechanism in which the fourth branch of government participates, i.e. the Protector of Serbian Citizens with the Provincial Ombudsman and civil society organizations.

The legality of the trial, which takes place partly in an online form, would be then strengthened by good organization and explanation, by the participation of the ombudsman and other institutions and in this way, it would be reduced to a minimum the doubts about its validity (legality).

The current imperfections of the state of emergency solutions on online trials should not discourage us from conducting them, but to use them in such a way, and when we introduce them in the CPC, of course, in accordance with the Constitution of Serbia and the ECHR, to allow them to contribute to preserving the rule of law and respect for human rights of all citizens.

V. Conclusion or where are we and where to go next

The holding of a remote trial – online in criminal proceedings in Serbia and in the world was imposed by the COVID19 pandemic. In order to protect the application of the principle of immediacy in criminal proceedings and the legitimate interests of a democratic society – security and safety risks, public health, harm reduction to the participants in the procedure, but also to the staff in the court and the prosecutor's

office, holding hearings and not their postponement, when undertaking procedural actions through online trials, technical means for image and sound transmission must still be applied restrictively. The decision to conduct such a trial modality should be in court and the basis in the Law.

This requires judges to have special technical skills, pre-trial logistical arrangements and additional management responsibilities. At the same time, it is necessary to establish the existence of a legitimate interest in *an online* trial, i.e. for a virtual trial among those present instead of the physical presence of the trial subject before the court.

In order to be able to approach an online trial, the principle of equality of arms between the parties as an aspect of the principle of fairness through the assessment of effective virtual participation must not be violated either.

Technical resources in terms of applying the highest standards in image and sound transmission must be adjusted in terms of a high standard of image, sound and opportunities for effective participation of the defendant in the examination of witnesses and presentation of other evidence, as parties equal to the prosecutor.

And while in the real world we mainly focus on the legal status and protection of the rights of the accused, which are discussed in this paper, the fact is that exactly the same conditions must be provided to the victim of a crime, as a condition *sine qua non* for a fair trial.

The question arises, assuming that an online form of trial is envisaged in procedural law, to what extent are legally binding rules necessary or would guidelines representing soft law be sufficient? The rapid and continuous development of communication technology provides for the right to some experts come to the formulation of soft regulation, by means of a guideline, rather than legally binding regulations. However, the type of regulation should depend and of the legal system in each country. In the country of continental legal tradition, that is certainly the Code of Criminal Procedure. In any case, it is important to have appropriate guidelines (in any form). In addition to regulations, two other elements are important for a successful distance trial:

- (1) Cooperation of all subjects in remote proceedings and online trials and
- (2) Taking into account the experience gained in remote procedures during the pandemic caused by the COVID-19 virus.

This means that it will be necessary to amend the existing procedural legislation in order to bring it into line with new forms of trials via videoconferencing. Some problems could be related to the strict legal determination of cases and situations in which remote proceedings are allowed, without leaving room for discretionary decision-making by judges, especially in critical situations, such as the health crisis caused by the COVID-19 pandemic.

Relativization of criminal procedural solutions or freer interpretation of certain criminal procedural principles through deviation from the usual rules is not a good solution, but the determination of online trials only when the legal conditions are met. In criminal procedural law, there is no possibility to apply the analogy in criminal proceedings. And there can be no deviations through parallels with some other proceedings, without a legal basis (parallels with administrative proceedings, for example).

It is this analogy in online trials that could be linked to a document adopted almost 10 years ago regarding the position of the victim in criminal proceedings, but Directive 2012/29 / EU and its solutions have not yet been fully implemented in

domestic legislation and courts. This is not only due to the increased caution of case law, but more as a reflection of the lack of technical possibilities for the same. Namely, it is not possible to talk about the application of modern criminal procedure possibilities that provide technical means for image and sound transmission as a substitution of direct presence of subjects in criminal proceedings when such technical possibilities are still not provided in all courts. If we have not succeeded in the field of protection of victims' rights, then we should fully consider the issue of online trials without the presence of the defendant and see how we could implement it in courts of all levels, for all proceedings and for all subjects.

The revision of existing procedural legislation is something that is necessary to bring regulations into line with the new form of trial now unquestionably imposed by the pandemic. Some of the problems could be solved by making this a strict exception, without leaving the discretionary power of the acting president of the panel – the judge, especially in situations such as the health crisis.

Critics of *online* trials in Serbia gave less attention even to solutions that are in these procedures applied; paid less attention even to the solutions applied in those proceedings and paid more attention to the lack of regulation due to the lack of solutions in the law.

So, some problems with the trial via video conference connections can be attached to the decision regarding the non-fortification procedures and solutions. Without effective safeguards in terms of ensuring the principles of publicity, privacy in communication with counsel, protection from torture and torture through the national preventive mechanism against torture, the principle of immediacy – active participation in court decisions on detention, are just some of the aspects to consider, ensuring a lawful and proper online trial.

To conclude, the effective participation of any subject in criminal proceedings online depends on their ability to express themselves clearly and to represent their interests. This principle is an integral part of the right guaranteed by Article 6 of the ECHR in civil and criminal proceedings. The COVID-19 online trials and pandemic have posed unprecedented challenges to many human rights, including the administration of justice in the face of a new, virtual reality: trials have had to continue, while the rules of physical distance and barriers; along with travel restrictions did not always allow the parties to be present at the hearing. The use of IT solutions could not necessarily replace physical presence in the absence of clear regulations and established approaches by courts. Without clearly legally defined conditions for online trials, they would call into question the meaning of legality and legal security of citizens. This would violate the values envisaged by the Universal Declaration of Human Rights, the ECHR and public order.

Long-term changes and improvements in the work of national courts, following experience in COVID-19 online trials, can contribute to legal certainty and the full application and respect of the rule of law in a society. This would confirm the rule that the level of protection of human rights in criminal procedure legislation is a reflection of the state of human rights in society as a whole, regardless of whether this protection takes place directly before the court in physical presence, or in an online format.

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