

How Was the Romanian Criminal Judicial Process Digitized?

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Abstract

The present study is not intended to provide an exhaustive analysis of the Romanian criminal justice system during pandemic, the author trying to express some opinions on some very debated issues in the Romanian doctrine and jurisprudence.

The author provides a pragmatic approach, starting with the analysis of some current Romanian procedural regulations, and answers to the question in the title of the study.

Keywords: digitization, criminal process, summons, electronic signature, videoconference.

I. Introduction

The end of 2019 and the beginning of 2020 meant a change of life for Romania and for the entire World. Not because humanity has never experienced another pandemic, but because the one generated by the new COVID-19 virus has proven to be more destructive than the previous ones, not only from a medical point of view. The pandemic generated by the new coronavirus took us by surprise and we do not refer only to justice, but to all sectors of social life.

In terms of justice, March 2020 meant a blockage of the Romanian judicial system. The trials were suspended, with some exceptions, which showed and demonstrated that the Romanian judicial system was far from a modern one, ready for a transformation or a technical transition, which would have made it both attractive and safe for the participants.

The timid attempts to regulate by the two presidential decrees², which established and subsequently extended the state of emergency, remained only at the theoretical stage. Some judges were happy when the decrees ceased to be applied, as they did not have the necessary resources to implement the aforementioned provisions. The only gain following the state of emergency was, apparently, the scheduling of the files during a court hearing, an operation that continued with many imperfections.

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² Decree of the President of Romania no. 195/2020 on the state of emergency, published in the Official Monitor no. 212 of March 16, 2020 and the Presidential Decree no. 240/2020 on the extension of the state of emergency on the territory of Romania, published in the Official Monitor no. 311 of April 14, 2020.

Evidently, the modernization of the criminal judiciary system is necessary for many other reasons, not only for those expressed above. The new COVID-19 pandemic was just a pretext to speed up this process of modernization, of transition. We are not supporters of the complete robotization and computerization of justice, we do not support the disappearance of the classic ways of exercising the legal professions, on the contrary, but at the same time we believe that justice must rise to the level of development of society.

What does the modernization of the criminal judiciary system actually mean from the perspective of those briefly presented above?

Or how do we transpose social (or physical?) distance into the administration of justice? The simplest answer is: by communication through electronic means, by electronic file and, respectively, by conducting the judicial process through videoconference. Simple, but at the same time complicated, customized by types of proceedings, respectively criminal and non-criminal (civil, administrative, professional).

What tools does the procedural law offer today and how should its possible directions of change be addressed?

II. The criminal trial

2.1. Romanian Code of Criminal Procedure³

In criminal proceedings, many issues are sensitive. Thus, if the participant in the criminal proceedings indicates an e-mail address for summons and communication, the judicial body is obliged to summon him and communicate the documents regarding the judicial procedure in this manner.

The difference from the non-criminal judicial process is that, in the criminal proceedings, once this method has been chosen, which is regulated exclusively at the discretion of the person to be summoned, the judicial body has no other possibility to communicate with the person concerned other than by electronic correspondence.

According to art. 81 of the Romanian Criminal Procedure Code – *The rights of the injured person*

– „In the criminal proceedings, the injured person has the following rights: (...) d) the right to be informed, within a reasonable time, about the status of the criminal investigation, at his/her express request, conditioned by the indication of an address on the territory of Romania, an electronic messenger or e-mail to which this information is communicated”.

From the manner in which the text of art. 81 of the Romanian Criminal Procedure Code is written, it would result that the injured person may indicate only an e-mail or

³ Law no. 135/2010, published in the Official Monitor no. 486 of July 15, 2010.

electronic messenger, and not the address on the territory of Romania, and will be informed only through this type of communication.

Art. 92 of the Romanian Criminal Procedure Code refers to the rights of the suspect's lawyer and the defendant providing in paragraph (2) that the suspect's or defendant's lawyer may request to be informed on the date and time of the act of criminal investigation or of the hearing conducted by the judge of rights and freedoms. The notification may be performed by telephone, fax, e-mail or other similar means, a report in this regard being mandatory to be concluded. In this case, however, the choice of the method of communication belongs to the criminal investigation body, regardless of the information provided by the suspect's or defendant's lawyer.

According to art. 257 paragraph (5) of the Romanian Criminal Procedure Code, the summons may be sent by e-mail or by any other electronic messaging system, with the consent of the person summoned.

The text regulates the possibility of summoning, respectively summoning a person before the criminal investigation body by e-mail, if the summoned person has given his consent in this regard.

Another interesting provision is that of art. 259 paragraph (9) of the Romanian Criminal Procedure Code, according to which

„if the suspect or defendant lives abroad, for their first hearing the summons shall comply with the stipulations of international criminal law applicable to the relation with the requested state. In the absence of such stipulation or in case the applicable international law allows it, the summons shall be sent by registered mail. In that case the recipient's signature on delivery of the registered letter or the refusal to take delivery of said letter shall be deemed proof of completion of the summons procedure. For their first hearing, the suspect or defendant shall be informed in the summons that they have the right to indicate a mailing address on the territory of Romania, an e-mail address or an electronic messaging address where they wish to receive all communication concerning the trial. In case they fail to comply, the communications shall be sent to them via registered letter again, and the receipt for that letter from the Romanian postal service, listing the documents being mailed, shall serve as proof of completion of the procedure.”

Also, paragraph (13) of the same article states that *a summons sent via e-mail or a system of electronic messaging shall be sent to the electronic address or coordinates indicated to the judicial body for that purpose by the summoned person or by their representative*. Again, in this case the indication by the suspect or defendant residing abroad of an e-mail address obliges the judicial body to summon him/her and to send him/her all communications regarding the process by e-mail.

Art. 289 paragraph (5) states that the complaint in electronic form meets the formal conditions only if it is certified by electronic signature, in accordance with the legal provisions. By the phrase *„complaint in electronic form”*, the Romanian legislator meant the complaint sent by e-mail (e-mail), which is valid as a way of notifying the criminal investigation body, only if it is signed with electronic signature, under the

conditions of Law no. 455/2001⁴. At the same time, the validity of the electronic signature, of the certificate issued, can only be verified by accessing the complaint sent by e-mail, without being printed. After printing, the electronic signature becomes a simple photo, with no legal value. From this perspective, it may be necessary to add a condition, namely the need to certify in a report the electronic signature applied in accordance with the law, for complaints sent by e-mail, since between the person receiving e-mail and, which, has the possibility and may verify the validity of the electronic signature and, respectively, the person which will process the respective complaint, there is no identity.

According to the of the Romanian Criminal Procedure Code, prosecution and judicial investigation may be conducted by videoconference, a set of provisions expressly referring to this modern way of communication:

- *art. 106 par. (2): A detained person may be heard at the detention facility through videoconference, in exceptional situations and if judicial bodies decide that this does not harm the proper conducting of the trial or the rights and interests of the parties.*
- *art. 204 par. (7): The challenge of the appeal is ruled in the presence of the defendant, unless he is unjustifiably absent, has disappeared, is evaded or due to ill health, due to force majeure or necessity cannot be brought before the judge. It is considered that the defendant deprived of liberty is also present if, with his consent and in the presence of the chosen or ex officio defense counsel and, as the case may be, of the interpreter, participates in ruling the challenge by videoconference at the place of detention.*
- *art. 235 par. (3): The defendant is heard by the Judge for Rights and Liberties in respect of all reasons on which the proposal to extend the pre-trial arrest term is based in the presence of a retained or court appointed counsel. The hearing of the defendant may be conducted with his consent and in the presence of a lawyer chosen or appointed ex officio and, as the case may be, of an interpreter, also by videoconference, at the place of detention.*
- *art. 364 par. (1): The case will be adjudicated in the presence of the defendant. Bringing the detained defendant to trial is mandatory. It is considered that the defendant deprived of liberty is also present if, with his consent and in the presence of the chosen or appointed ex-officio defense counsel and, as the case may be, of the interpreter, participates in the trial by videoconference at the place of detention.*
- *art. 364 par. (4): (...) If the detained defendant has requested to be tried in absentia, the court may order, on request or ex officio, that the defendant be able to draw conclusions during the hearings and be given the opportunity by videoconference in the presence of the defense counsel chosen or appointed ex officio.*

⁴ Republished in the Official Monitor no. 316 of April 30, 2014.

By analyzing the above legal texts, first of all we notice that, in the criminal process, unlike the non-criminal one, the use of videoconferencing is expressly regulated. Secondly, we note that this means of distance communication is permitted only under certain conditions, namely:

- only the detainee, deprived of his liberty, can participate in the criminal proceedings by videoconference;
- sometimes, in certain cases, the consent of the person deprived of liberty is required to participate in the criminal proceedings by videoconference (art. 204 para. 7 Romanian Code of Criminal Procedure, art. 235 para. 3 Romanian Code of Criminal Procedure, art. 364 para. 1 Romanian Code of Criminal procedure), sometimes not, the court deciding on the use of this method of conducting the criminal process, establishing the existence of exceptional cases and considering that this method does not affect the proper conduct of the process or the rights and interests of the parties (art. 106 para. 2 Romanian Code of Criminal Procedure, art. 364 para. 4 of the Romanian Code of Criminal Procedure);
- the chosen or ex officio lawyer and, as the case may be, the interpreter, must be present.

Restricting the right to participate in criminal proceedings by videoconference only to the detainee is a measure that clearly opposes the digitization of the judicial process. We consider the intervention of the Romanian legislator necessary, in the sense of regulating the right of option of each participant in the criminal judicial process to use the videoconference.

In order for the solution not be arbitrary, we consider the consent of the detainee to use the video conference necessary. Moreover, the extension of the right to use video conferencing to other participants in criminal proceedings must be a measure which also implies the consent of the person concerned.

With regard to the need for the presence of the chosen or ex-officio lawyer (and of the interpreter, as the case may be), in court practice the interpretation has been crystallized that the chosen or ex-officio lawyer (and the interpreter, as the case may be) must be physically present near the defendant in state of detention, at the place of detention. Otherwise, it has gone so far as to consider that the right to defense has not been respected, which would lead to the absolute nullity of the judgment thus rendered. This interpretation is wrong and restrictive, in our opinion. As long as the detainee is considered to be present at the trial, if he/she participates by videoconference, we do not see why the lawyer in turn cannot be considered present by the same technological means or in the hypothesis that he/she is in the courtroom. There is no provision of the law requiring the lawyer to be physically present with the detainee.

On the other hand, according to the provisions of art. 351 para. 1 of the Romanian Code of Criminal Procedure, the case shall be tried by the court established according to the law and shall be debated in the court oral, direct and adversarial session, and according to the provisions of art. 350 para. 1 the trial takes place at the headquarters

of the court. Or, as long as the judge, the prosecutor and the clerk are in the courtroom, it is natural for the lawyer to be able to sit there as well. The case file is also in the courtroom. During the judicial investigation, situations may arise that require the study of documents, or the submission of documents to the file. However, if the lawyer (or the interpreter, as the case may be) were required to be present at the place of detention, outside the courtroom, the proper conduct of the criminal proceedings would obviously be affected, as would the rights and interests of the parties.

Apparently, the criminal judicial process is (more) technological than the non-criminal one, in the sense that it allows any person, participant in the process, to choose if the communication with the judicial body takes place by e-mail or by classical means, respectively postal correspondence, procedural agent. The use of video conference is also regulated, with the limits already specified.

2.2. Law no. 114/2021⁵ on some measures in the field of justice in the context of the COVID-19 pandemic

By this normative act adopted with a slight delay compared to the beginning of this period, the Romanian legislator regulates the possibility of ordering measures necessary for the functioning of justice as a public service in order to prevent and combat the effects of the COVID-19 pandemic. The first shortcoming is found in art. 1 para. 2, which stipulates that the measures regulated by this law can be ordered only for reasons generated by the COVID-19 pandemic. The benefits of technologization of the judicial process are obvious and should not be abandoned with the end of the pandemic.

In criminal cases, the consent of the litigant in order to communicate the procedural documents by e-mail is presumed, and the judicial bodies will request, where appropriate, urgently, by telephone, the indication of e-mail addresses for the communication of those documents. If objective reasons prevent the use of e-mail, the other means of communication provided by law shall be used.

The use of videoconferencing exclusively for persons deprived of their liberty and in pre-trial detention is left to the discretion of the judicial body, which will establish that the videoconference does not affect the flow of the process or the rights and interests of the parties. For all other participants in the criminal proceedings, the use of video conferencing can only be allowed with their consent. This possibility will be made known to them at the first hearing or, as the case may be, by a notice communicated by telephone, e-mail or other such means which ensure the transmission of the notice and confirmation of receipt, the person being asked if he/she agrees in this sense.

From a technical point of view, videoconferencing is carried out by means of audiovisual telecommunication that allow the verification of the identity of the parties and guarantees the security, integrity, confidentiality and quality of the transmission,

⁵ Published in the Official Monitor no. 457 of April 29, 2021.

the recording of the hearing being mandatory. Videoconferencing is not used in the case of a hearing during a criminal investigation, in the trial of cases with juvenile defendants, of those related to judicial rehabilitation, nor when the court declares the court hearing as non-public.

III. Conclusions

Trying to summarize, we can conclude that the digitalization of the judicial process is prevented primarily by the lack of permissive legislative regulations in this direction, regulations that, without abdicating the principles of the judicial process, without creating the possibility of violating the fundamental rights of the litigant, should clearly establish the legal frame of the use of electronic means in the judicial process. This conclusion does not contradict the above, the existing regulations, especially those in criminal proceedings, needing to be improved in the future.

Secondly, there is a need for a proper endowment of all the courts in Romania, as well as the prosecutor's offices, accordingly (stable, secure and strong internet connections, modern terminals, data storage cloud systems, electronic signatures).

Thirdly, the direction of development and modernization of the criminal judicial system must be unitary and reach the territory from the center. We will give only three current examples that support this need:

- the first electronic file application used by the courts was made by the Cluj Court of Appeal. The second application was made by the Arad Tribunal. Currently, the Timișoara Court of Appeal (and not only) uses both applications, an unnatural situation;
- courts (within the same court of appeal) have different rules for sending correspondence by e-mail, especially regarding the size of the files;
- electronic files are accessed on different links, created individually by each court in the country that administers them.

Fourthly, the participation of each person in the judicial process and we have in mind here the judge, the prosecutor, the clerk, the lawyer, the expert, the witness, the interested party, the defendant, must be possible by videoconference, both in criminal proceedings and in the non-criminal one, by using a modern, safe, certified technology, which would represent, as we stated before, a guarantee of the observance of the principles of the due process, of the fundamental rights and freedoms of the litigant.

References

1. Presidential Decree no. 195/2020 on the state of emergency, published in the Official Monitor no. 212 of March 16, 2020
2. Presidential Decree no. 240/2020 on the extension of the state of emergency on the territory of Romania, published in the Official Monitor no. 311 of April 14, 2020.

3. Romanian Criminal Procedure Code – Law no. 135/2010, published in the Official Monitor no. 486 of July 15, 2010.

4. Law no. 114/2021 on some measures in the field of justice in the context of the COVID-19 pandemic, published in the Official Monitor no. 457 of April 29, 2021.