THE PARTICIPATION OF THE PERSONS DEPRIVED OF THEIR LIBERTY IN THE CRIMINAL PROCEEDINGS BY MEANS OF REMOTE COMMUNICATION

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Abstract

Considered since ancient times, the sacred place where justice is administered, the courtroom is gradually opening up to new technologies, either for exceptional situations or for reasons related to the good administration of the act of justice.

The rapid pace at which the contemporary world is transforming into an informational world marks all areas of the society, therefore, justice cannot stand aside from the technological implications. Although it undeniably has a number of advantages such as speed and cost reduction, the implementation of IT technologies in justice brings with it a series of challenges and questions and leads to the adaptation of the working methods of justice actors, legal professionals, but at the same time it also marks a reconsideration of the way of exercising the rights of the parties involved in the judicial proceedings.

This paper work intends to address the compatibility of existing provisions in national law on the participation of persons deprived of their liberty in criminal proceedings by means of remote communication with the provisions of the European Convention on Human Rights and the case law of the Strasbourg Court in terms of the observance of the right of defense and the right to a fair trial.

Keywords: *videoconferencing, criminal procedure, person deprived of liberty, fair trial.*

1. Introduction

Conceived as a useful tool in cross-border proceedings in order to speed them up, and used in particular to hear persons in other countries, hearings by videoconference have gradually made their way into the national legal system.

Its widespread use during the Covid 19 pandemic changed mentalities and subsequent working practices, opened up new perspectives on this working tool which has proved its effectiveness, and today, after a period when it was used on an exceptional basis, participation in trials by videoconference seems to be successfully included among the usual working procedures in the courts of law.

This does not mean that ensuring guarantees of respect for the rights of the defense and the right to a fair trial is not the object of the concerns of legal experts, but on the contrary, it is their constant effort to make this procedural tool compatible with the requirements imposed by the conduct of criminal proceedings in a public, oral and adversarial manner, and at the same time compatible with the ECtHR case-law.

Videoconferencing has the advantage of facilitating remote hearings, thus avoiding unnecessary travel, reducing the costs of criminal proceedings and shortening the periods between the hearings. In the Member States of the European Union in particular, the use of information technologies in general and videoconferencing in particular is encouraged. For example, one of the objectives of the *Multiannual European E-Justice Action Plan 2014-2018*[1] was the extension of the use of videoconferencing, teleconferencing or other appropriate means of remote communication for hearings, as the case may be, in order to avoid the need to travel to court to participate in judicial proceedings, especially in cross-border cases. The same document also states that electronic communication between the judicial authorities of the Member States should be further developed, in particular within the framework of instruments adopted in the European judicial area in the fields of civil, criminal and administrative law (*i.e.*, via videoconferencing or secure electronic data exchange).

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[1] *prolege.ro*.

2. The provisions of national law on the participation of persons deprived of their liberty in trials by videoconference

The use of information technology in courts of law work is not a novelty element. In the old codification of criminal procedure, Law no. 281/2003 introduced provisions requiring the existence of specific facilities, such as technical means to ensure the hearing of the witness without being physically present in the courtroom where the hearing takes place[2], or those allowing the hearing or viewing of recordings of conversations or communications.[3]

De lege lata, *any person deprived of liberty*, whether under preventive measures or in the execution of a custodial sentence, may be heard by videoconference at the place of detention, irrespective of his or her status as a defendant, injured party, civil party, witness, etc. The provisions of art. 106 CPP, which contain general rules on hearing, enshrine the exceptional nature of this evidentiary procedure, which may not be used unconditionally, but only if certain special conditions are met.

Firstly, the evidentiary procedure of hearing by videoconference may be used only when there are certain circumstances which make it impossible to hear the detainee directly at the judicial body's premises (such as in the event of a disaster or illness of the detainee which makes it difficult for him/her to travel to the judicial body's premises, etc.). Secondly, it is necessary for the judicial body to assess that the hearing of persons in this way is not such as to prejudice the rights and interests of the parties or the proper conduct of the criminal proceedings. Thirdly, in cases where legal assistance is mandatory, according to the provisions of art. 90 CPP, the hearing of the detainee by videoconference can only take place in the presence of his/her lawyer at the place of detention.

Unlike the old criminal procedure provisions (art. 314 CPP 1968), which stipulated that the trial could only take place in the presence of the detainee, the current criminal procedure law, which entered into force on 1 February 2014 provides as a matter of principle that the trial must be take place *in the presence of the defendant,* whether or not *he/she is in detention.*

If the defendant is in detention (remanded in custody or serving a sentence), he or she must be brought to trial unless he or she has requested a trial in absentia, in which case he or she will not be brought to trial. Mandatory appearance at trial is justified because the defendant must be given an effective opportunity to be heard by the court, to confront the prosecution's witnesses and to exercise his/her right of defense.

Notwithstanding, the presence of the defendant at the trial is not only the mere physical appearance of the defendant, but also effective participation in the criminal proceedings, which includes not only the right to be present at the trial, but also the right to effectively hear and follow the proceedings (ECtHR, Case *Stanford v. The United Kingdom,* judgment from 23.02.1994, para. 26).

According to the provisions of art. 364 para. (1) thesis II CPP, a defendant deprived of liberty shall be deemed to be present if, with his or her consent and in the presence of his or her chosen or publicly appointed lawyer and, where appropriate, an interpreter, he or she participates in the trial by videoconference at the place of detention. According to art. 364 para. (4) CPP, if the defendant deprived of liberty has requested to be tried by default, he or she may make submissions in open court or take the floor, in the presence of his or her lawyer, by videoconference.

As can be noted, the criminal procedure provisions do not refer to the participation of other parties or litigants in the proceedings by means of videoconferencing, but in court practice this means of participation is used in respect of all participants without exception.

The rules of criminal procedure regulate the possibility of participation in the trial by videoconference also in the case of the settlement of the appeal against the decision ordering preventive measures, these provisions were introduced following the amendment of the Code of Criminal Procedure by GEO no. 18/2016. The purpose stated in the explanatory memorandum of the emergency ordinance adopting these legislative amendments was to „*to fall within the legal settlement terms*[4]".

With regard to appeals against preventive measures, the legislator has reaffirmed the need for the physical presence of the person deprived of liberty before the judge whenever possible. Only in the event that the

[2] Art. 86^7 CPP 1968, introduced by art. I item 45 of Law no. 281/2003, which speaks about -television networks with distorted image and voice- and „video and audio technical means".

[3] Art. 91^1 *et seq.* CPP 1968, amended by art. I item 47 of Law no. 281/2003.

[4] See, in this regard, the explanatory memorandum of the draft law on the approval of GEO no. 18/2016, available on the site of the Chamber of Deputies, *http://www.cdep.ro*.

defendant is missing, evades the procedure or is unjustifiably absent or simply cannot be brought before the judge, or in situations of force majeure or a state of necessity, or for medical reasons, the appeal will be resolved in his/her absence. However, with his or her consent and in the presence of a lawyer chosen or appointed by the bar, the defendant deprived of his or her liberty may participate in the settlement of the appeal by videoconference at the place of detention. In this situation he/she is deemed to be present, thus creating a legal presumption of the defendant's presence[5].

Therefore, according to the provisions of art. 204 para. (6) CPP, for the settlement of the appeal, the defendant is summoned. The appeal shall be conducted in the presence of the defendant, unless he or she is absent without justification, is missing, evades the procedure or cannot be brought before the judge because of ill health, force majeure or necessity. However, the defendant deprived of liberty is also considered to be present when, with his/her consent and in the presence of his/her chosen or appointed lawyer and, where appropriate, of the interpreter, he/she participates in the settlement of the appeal by videoconference, at the place of detention, in this respect, the provisions of art. 204 para. (7) CPP being applicable.

The same provisions are also applicable in what concerns: the settlement of the appeals against resolutions pronounced on preventive measures in preliminary proceedings, according to art. 205 para. (7) CPP; verification of preventive measures in preliminary proceedings, according to art. 207 para. (3) CPP; verification of preventive measures within the trial, according to art. 208 para. (3) CPP and the extension of the measure on the remand custody within the criminal proceedings, according to art. 235 para. (3) CPP.

This evidentiary procedure is used not only in court proceedings but also in enforcement proceedings[6], this means being used in the case of detainees in another prison when they are heard by the supervising judge in another prison. In this respect, the Regulation implementing Law no. 254/2013 contains detailed provisions on the modality the hearing is to be conducted.

The detainee's lawyer has access to the room in the penitentiary or detention center where the videoconference takes place, under the same conditions as the translator or interpreter if the detainee does not speak Romanian.

The administration of the place of detention shall be bound to organise specially designed and appropriately equipped premises for holding videoconferences[7]. The procedure for conducting the videoconference is detailed in the same Regulation implementing Law no. 254/2013, which, in art. 39, provides for all its stages, *i.e.*, the formulation of the request by the judicial body in charge of the case, the identification of the detainee and the taking of measures for his/her participation in the videoconference, the setting of the date and time of the connection, the transmission of the hearing by videoconference simultaneously between the two locations, with the possibility of recording it.

Written evidence cannot be produced in the hearing by videoconference, according to art. 38 para. (13) of the Regulation. The text finds physical impossibility of producing written evidence within this procedure, as the court or the judge must see it, analyse it and put it to the parties for cross-examination, and only then can the judge rule on it.

3. The compatibility of hearing by videoconference with the principles of criminal procedural law

How to reconcile e-justice with the principles that govern the criminal process? How compatible it is with these principles, in particular with the right of defense, as well as with the publicity and immediacy that govern the trial of cases? These are the questions we aim to answer in this chapter of the paperwork.

We show that in addition to the provisions stipulating the cases in which persons deprived of their liberty may be heard by videoconference, in general, there are also legal regulations specifically enacted for special situations, such as that caused by the Covid 19 pandemic.

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[5] M. Udroiu, *Procedură penală. Partea generală. Noul Cod de procedură penală (Criminal Procedure. General Part. New Criminal Code)*, 5th ed., C.H. Beck Publishing House, 2018, p. 345.

[6] According to art. 29 of Law no. 254/2013 on the execution of sentences and measures of deprivation of liberty ordered by judicial bodies in the course of criminal proceedings: „ (1) If a detainee is to be heard in a procedure provided for by this law by the staff or the judge supervising the deprivation of liberty from a penitentiary other than the one in which the detainee is, the hearing can take place by videoconference."

[7] Art. 37 of the Regulation implementing Law no. 254/2013: The directors of the penitentiaries have the obligation to set up a suitable space where the hearing of the detainees will take place via video conference.

For the period of this health crisis in Romania, the legislator has adopted special provisions concerning the hearing of persons in criminal trials (and not only) by videoconference.

Therefore, according to art. 15 of Law no. 114/2021[8] on certain measures in the field of justice in the context of the COVID-19 pandemic: „(1) If the judicial body considers that this does not prejudice the proper conduct of the trial or the rights and interests of the parties, persons deprived of their liberty, other than those under house arrest, shall be heard by videoconference at the place of detention, without their consent being required. (2) The hearing of persons other than those referred to in para. (1) shall be performed by videoconference, at the place where they are present, under their consent. They will be informed of this possibility at the first hearing or, where appropriate, by means of a notification performed by telephone, e-mail or other means which ensure that such notification is delivered and acknowledgement is received, and they will be asked whether they agree to this. The person shall be summoned for a hearing even if he or she is aware of the time limit. The summons shall also state that the hearing is to be held by videoconference, the manner in which it is to be held, the date and the time or, where appropriate, the time interval at which the hearing is to take place, and the fact that the person summoned is bound to observe the solemnity of the court hearing."

Two aspects emerge from the aforementioned text of law, which draw our attention. The first aspect is the hearing of the detainee by videoconference, without his or her consent, *i.e.*, even if he or she has expressed his or her intention to participate in the trial, in order to be heard directly by the court, and the second aspect is that of the presence of the lawyer at the place of detention, since the text makes no reference to the need to hear the detainee in the presence of his/her lawyer, chosen or publicly appointed.

The detainee's remotely hearing by means of audio-video communication, without the person appearing before the court, has been extensively examined by the ECtHR, which has ruled that hearing a person deprived of liberty in this way is in itself compatible with the right to a fair trial, but has held that particular attention must be paid to the safeguards accompanying the use of such an evidentiary procedure. In a number of cases against Italy relating to trials involving members of the Mafia, the European Court has ruled on the conformity of art. 6 ECHR with the use of videoconferencing. For instance, in Case *M.V. v. Italy*,[9] the Court noted that the applicant was arrested and remanded in custody on charges of murder and belonging to a mafia-type organisation and was subject to a restricted prison regime which, among other things, limited his contact with the outside world. Accordingly, the applicant was no longer brought to the hearing room from prison. He was, however, able to participate in the hearings by means of an audiovisual link with the hearing room. The applicant complained before the Strasbourg Court that he had been compelled to participate by videoconference in the appeal proceedings, alleging a violation of art. 6 para. (1) and (3) ECHR, as the use of this technical means made it difficult for him to exercise his rights of defense.

ECtHR held that although not expressly provided for in para. (1) of art. 6 ECHR, the possibility for the defendant to take part in the trial follows from the object and purpose of that article. Therefore, from the interpretation of letters c), d) and e) of para. (3) of the aforementioned article „everyone charged with a criminal offence" has the right „to defend himself", „to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf" and „to have the free assistance of an interpreter if he cannot understand or speak the language used in court", aspects that cannot be conceived without his presence. Therefore, the defendant has the right to participate effectively in the trial, which includes the right to attend, but also to listen to and follow the proceedings. In the Court's opinion, it is undeniable that the transfer of such a prisoner entails particularly stringent security measures and a risk of absconding or attacks. It may also provide the detainee with an opportunity to renew contact with the criminal organisations to which he is suspected of belonging, considering that by their mere presence in the courtroom they can exert pressure on other participants in the trial, in particular victims and witnesses.

In the light of the foregoing, the Court considers that the applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the „reasonable time" requirement in judicial proceedings.

In what concerns the exercise of the right of defense, the Strasbourg Court noted that the applicant was able to take advantage of an audiovisual link with the hearing room, which allowed him to see the persons

[8] Published in Official Gazette of Romania, Part I, no. 457/29.04.2021.

[9] Case *Marcello Viola v. Italy* from 05.10.2006, *http://hudoc.echr.coe.int*.

present and hear what was being said. He could also be seen and heard by the other parties, the judge and the witnesses, and had an opportunity to make statements to the court from his place of detention. Furthermore, the applicant's defense counsel had the right to be present where his client was situated and to confer with him confidentially. This was also a statutory right of defense counsel present in the hearing room. That being so, the Court finds that the applicant's participation by videoconference in the appeal hearings during the second set of criminal proceedings did not put the defense at a substantial disadvantage as compared with the other parties to the proceedings, and that the applicant had the opportunity to exercise the rights and entitlements inherent in the concept of a fair trial, as enshrined in Article 6. It follows that there has been no violation of art. 6 of the Convention.

With regard to another case, *S. v. Russia*, the Strasbourg Court noted that the applicant was charged of murder and arrested on 30.04.2001, being provided with a publicly appointed lawyer. On 20.12.2001, the Novosibirskiy Regional Court found the applicant guilty, sentencing him to eighteen years' imprisonment. On the occasion of the appeal, the applicant requested to be assigned another lawyer to represent him in the appeal proceedings because his publicly appointed lawyer was unable to attend the hearing, as she was already engaged in another trial. On 31.10.2002, the Supreme Court of the Russian Federation examined the applicant's appeal. The applicant participated in the proceedings by video link. No defense counsel attended the hearing and the Court dismissed the applicant's appeal.

The Supreme Court granted an application for supervisory review by the Deputy Prosecutor General and quashed the Supreme Court's appeal decision of 31.10.2002. The Presidium found that the applicant's right to legal assistance had been violated in the appeal hearing and remitted the case for a fresh examination before the appellate court.

At the appeal hearing, the court rejected the applicant's request to attend in person, finding that the video link would be sufficient to ensure that the applicant could follow the proceedings and make objections or other submissions, and that this form of participation would be no less effective than if he was personally present in the courtroom, in circumstances where the applicant was in a detention center in the city of Novosibirsk, more than 3,000 kilometers from Moscow, where the court was located. The Supreme Court then introduced the applicant to his new publicly appointed lawyer, who was present in the Supreme Court's courtroom and then allowed them fifteen minutes of confidential communication by video link before the start of the hearing.

The applicant rejected the assistance of the publicly appointed lawyer. The Supreme Court, noted that the applicant did not rely on any divergence with the lawyer in his defense and did not request her replacement by another publicly appointed lawyer. On the same day, the Court examined the merits of the case and dismissed the applicant’s appeal.

In the analysis performed in this case, ECtHR reiterated that while art. 6 § 3 (c) confers on everyone charged with a criminal offence the right to defend himself in person or through legal assistance, it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems.

Furthermore, the Strasbourg Court revealed that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance trial hearing. However, the attendance of the defendant in person does not necessarily take on the same significance for the appeal hearing. Regard must be had in assessing this question to, inter alia, the special features of the proceedings involved and the manner in which the defense’s interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant. An accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society and follows from art. 6 § 3 (c) ECHR. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness.

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 the lawyer’s knowledge of the case and his legal position were appropriate. Moreover, ECtHR considered that it is questionable whether communication by video link offered sufficient privacy. The Court recalled that in Case *M.V. v. Italy*, 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 his lawyer.

In addition, in Case *M.V. v. Italy*, the counsel for the defendant had also been able to send a replacement to the video-conference room or, conversely, attend on his client personally and entrust the lawyer replacing him with his client's defense before the court. Similarly, in Case *G. v. Russia,* where the Court did not find a violation of art. 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 defense and the applicant was able to consult with his lawyer in private before the hearing. Furthermore, since the applicant had two lawyers, he could choose one of them to assist him in the detention center during the hearing and to consult with him in private. None of the options described above was available to the applicant in the case at hand. Instead, the applicant was expected either to accept a lawyer he had just been introduced to, or to continue without a lawyer.

The Strasbourg Court notes that the Government did not explain why it was impossible to make different arrangements for the applicant's legal assistance. It accepts that transporting the applicant from Novosibirsk to Moscow for a meeting with his lawyer would have been a lengthy and costly operation. While emphasising the central importance of an effective legal assistance, ECtHR examined whether in view of this particular geographic obstacle the respondent Government undertook measures which sufficiently compensated for the limitations of the applicant's rights. The Court notes in this respect that nothing prevented the authorities from organising at least a telephone conversation between the applicant and the lawyer more in advance of the hearing. Nothing prevented them from appointing a lawyer from Novosibirsk who could have visited the applicant in the detention center and have been with him during the hearing. Finally, the Supreme Court could have adjourned the hearing on its own motion so as to give the applicant sufficient time to discuss the case with the lawyer.

For these reasons, the Strasbourg Court concluded that the procedure described did not satisfy the requirements of art. 6 para. (3) in connection with para. (1) of the same article of the Convention.

Considering these jurisprudential landmarks of the ECtHR, certain conclusions can be drawn regarding the use of videoconferencing for the hearing of persons deprived of their liberty.

This evidentiary procedure is not in itself contrary to the right to a fair trial or to the ECHR provisions. However, the measure must pursue a legitimate aim in a democratic society (preservation of law and order, prevention of crime, protection of witnesses and victims of crime, observance of the reasonable time limit for the resolution of the case).

Another aspect which emerges from the same case law concerns the guarantee of the right of defense, which implies, inter alia, the right to appear before a court. In relation to the issue under consideration, the judges of the Strasbourg Court consider that the presence in person of the defendant is not of the same decisive importance on appeal as at first instance.

The audio-video connection must be fluent, even if at some point there may be malfunctions due to technical limitations of the equipment, and allow the defendant to hear and see everything that happens in the courtroom, including the persons present (judge, prosecutor, lawyer, parties and participants - witnesses, experts, interpreters - in the case). In turn, the persons present in the courtroom must perceive the defendant, by seeing and hearing him/her, thus ensuring the public nature of the trial.

The assistance of the person deprived of liberty by his/her lawyer, chosen or publicly appointed, is particularly important. Likewise, the facilities relating to the time the lawyer has available to make contact with the defendant and prepare the defense are considered equally important in the overall fairness of the criminal trial procedure[10].

Returning to the regulations in national law on the use of videoconferencing in emergency situations, as stated above, they do not provide for the hearing of the person deprived of liberty at the place of detention in the presence of a lawyer chosen or publicly appointed. However, we consider that the general rules on the hearing of persons, namely the provisions of art. 106 para. (3) CPP shall be applicable if the person deprived of liberty finds himself/herself in one of the situations regulated by art. 90 CPP. Therefore, the hearing of the detainee may take place only in the presence of the lawyer chosen or publicly appointed and present at the place of detention. In practice, there may be difficulties in securing the defense, particularly when the publicly

[10] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român (European protection of human rights and the Romanian criminal process),* C.H. Beck Publishing House, Bucharest, 2008, p. 720.

appointed lawyer is a member of the bar of the court before which the case is pending and the place of detention is in another locality, sometimes at a considerable distance from the locality where the court has its office.

The solution of appointing a public lawyer from the bar of the locality where the prison is located is not without inconvenience either, since the appointed lawyer can only study the case file by travelling a considerable distance.

The right of defense is, of course, better assured in this situation when the detainee has a chosen lawyer, as the possibilities for the lawyer to exercise his/her rights and obligations in relation to the client are wider.

In court practice, in particular, publicly appointed lawyers are present, not at the place of detention, but in the courtroom, and before the start of the hearing, they are given the opportunity to make audio-video contact with the detainee by videoconference, in conditions of confidentiality. In our opinion, this is likely to affect the rights of the defense, given that the defendant could exercise under difficult conditions the rights recognized by law concerning the right to remain silent on all or certain aspects of the case and the right to consult his/her lawyer before and during the hearing .

Another important drawback is that, when the lawyer of the person being heard is next to him/her at the place of detention, he/she should, for a good defense, be in the courtroom at the same time, since during the hearing incidents may occur which require contradictory debates, difficult to sustain from another location.

With regard to the publicity of the court hearing, according to the provisions of principle contained in art. 127 of the Constitution of Romania, court hearings shall be public and the exceptions shall be provided by the law. The same provision is also contained by art. 14 of Law no. 304/2022 on judicial organisation. According to art. 14 of the Law on the judicial organisation, court hearings shall be public, except the cases provided by the law. The judgments shall be delivered in open court, except in the cases provided by the law. In the cases and under the conditions laid down by law, proceedings conducted by remote technical means of communication shall be considered public.

Furthermore, according to the provisions of art. 352 CPP, the court hearings shall be public, except the cases provided by the law. The hearings held in the council chamber shall not be public.

Publicity of the court hearing means that any person who does not have the capacity to pursue the proceedings in a particular case is guaranteed free access to the courtroom. The essence of this principle is precisely to create the conditions to ensure that everyone can participate in the administration of justice. In this respect, it is irrelevant whether no person was in the courtroom, when access was unrestricted.

The doctrine emphasised that the presence of the public enables it to be informed of the manner in which the act of justice is carried out and also ensures that the public or the press can control the manner in which the act of justice is carried out[11]. Italian illuminist Cesare Beccaria, in the context of the struggle against the inquisitorial system, pointed out that trials must be public, evidence in defense must also be public, so that public opinion can curb the force and passions that might exist in those charged with the instruction and judgment[12].

The public nature of the hearing is not absolute, there being special circumstances justifying the hearing of the case in a non-public session.

The Constitutional Court of Romania, in its case law[13], held that compliance with the requirement of publicity of court hearings imposed by art. 127 of the Constitution of Romania is not absolute and the legislator may derogate from it. The Code of Criminal Procedure provides for several exceptional situations in which the court, in accordance with the legal procedure, may declare the hearing not public, *i.e.*, if the trial of the case in a non-public hearing would be prejudicial to the interests of the state, morals, dignity or privacy of a person; the interests of minors or of justice; the safety, dignity or privacy of a witness or members of his/her family; the injured party is a minor, in case of offences specifically provided for by law-rape of a minor, sexual assault of a minor, sexual corruption of minors, child pornography, solicitation of minors for sexual purposes etc. (art. 352 CPP).

With reference to ensuring the publicity of the court hearing when the hearing of the detainee is carried out by videoconference, we consider that this principle is not undermined in its substance as long as the general public can follow the defendant's statements made through the audio-video system, can follow the proceedings taking place in the courtroom, and the defendant, in turn, maintains audio-visual contact with the courtroom.

[11] M. Udroiu, *Procedură penală., Partea generală. Partea specială (Criminal Procedure. General Part. Special Part)*, C.H. Beck Publishing House, 2010, p. 315.

[12] C. Beccaria, *Despre infracțiuni și pedepse (On crime and punishment)*, Scientific Publishing House, Bucharest, 1965, p. 22.

[13] CCR dec. no. 1668/15.12.2009.

Although the ECtHR case law does not contain specific reference to the issued under consideration, namely whether the hearing of the detainee would in any way violate the public nature of the hearing, the Court, nevertheless examined whether this procedure is compatible with the right to a fair trial, in its whole, stating that, as shown above, the detainee's participation in the trial in this manner is not in itself incompatible with the right to a fair trial. The right to a fair trial, as provided by art. 6 ECHR, refers to the right of any person to a fair and public hearing within a reasonable time. Therefore, the fairness of the procedure also relates to its publicity.

As shown above, in case Marcello Viola v. Italy, the Court assessed that the trial, in its entirety, was a fair one, noting that one of the aspects subsumed by fairness was the fact that the defendant and the other participants in the trial had an audio-visual connection during the hearing.

With regard to the principle of immediacy, which requires the court to carry out directly all steps in the proceedings and procedural steps and to come into direct contact with the evidence, the question that arises is to what extent compliance with this principle is ensured in the case of participation in the trial by videoconference.

The judge's production of the evidence, likely to clarify the factual circumstances, will give him/her the opportunity to note contradictions between the information emerging from the evidence and to complete the evidentiary material. When hearing the parties and witnesses, the members of the panel may intervene in order to clarify what is unclear, to complete and clarify all the facts and circumstances of the case. The judge's direct production of evidence will give the judge the opportunity to observe the behavioral manifestations of individuals and the court's observations on the credibility of witnesses can have very important consequences for the outcome of the trial.

Immediacy shall mean establishing the facts using primary sources of evidence, removing intermediate links that can gradually distort the information.

To what extent would the production of evidence in a mediated manner, by videoconference, prejudice the principle of immediacy? We consider that the evidence which could be misinterpreted as a result of its production by videoconference is that relating to the hearing of persons, irrespective of their capacity in the proceedings. As one author noted[14], in the procedure of hearing people, not only the content of their story itself is important for the formation of conviction, but also the observation of the psychological, behavioral and educational characteristics of the person listened to, the observation of the non-verbal language that validates sincerity or betrays the concealment of the truth. The probative value of such statements cannot be dissociated from the psychological characteristics of the person listened to unless they concern matters which are unanimously recognized or matters of fact already convincingly proved by other evidence.

The hearing by videoconference does not ensure the possibility for the judge, nor for other participants - prosecutor, lawyers, injured person - to observe with their own senses the verisimilitude of the statement given in this way. This leads to the consequence that some statements will be evaluated in a wrong light, it may be omitted to ask relevant questions for clarification or to establish the sincerity of the person, which means that there will be the risk of wrongly establishing the state of facts, which may be equivalent to a miscarriage of justice.

The right to be heard and the right to ask questions may be limited as long as the exercise of these rights necessarily implies being aware of the circumstances which need to be clarified.

4. Conclusions

The hearing of detainees by videoconference is useful in certain special situations, as it is a tool that facilitates cross-border procedures but also domestic procedures in emergency situations.

Although the hearing of detainees is not in itself incompatible with the right to a fair trial, especially when it is accompanied by the necessary safeguards, nevertheless, in relation to the inconveniences that may arise, it is possible to some extent to affect the right of defense as well as the principles governing the trial. That is why we believe that this working tool should remain exceptional, for exceptional situations.

[14] T.V. Gheorghe, *Beneficiile și limitele folosirii tehnologiei informației în judecata cauzelor penale (The benefits and limitations of using information technology in criminal trials)*, U.J. Premium no. 5/2023.

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