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Coherence Between the Model of Remote Criminal Proceedings and the Standards Under Article 6 of the European Convention on Human Rights: The Reality of Threats to a Fair Trial

General Remarks

The focus on the person in criminal proceedings has traditionally been linked to respect for the physical presence of the parties in the proceedings. Given the exponential growth of scientific and technological progress, an inevitable person-centered approach means the need for a legislative policy that can in any case enable the application of unprecedented fact-checking methodologies and the possibility of achieving a (higher) level of safeguards (Galgani 2023). In other words, the intervention of technological progress in criminal proceedings brings about the need for a cultural approach in which technological transition, development, and diffusion are based on the typical needs of the criminal justice area rather than, conversely, being dictated by the technocratic tendencies of the market economy.

The most relevant technological intervention in proceedings in recent years concerns participation in criminal proceedings through the use of technology that transmits a person's existence or an element of it (otherwise referred to as remote participation, remote proceedings, or online proceedings). The understanding of remote criminal proceedings, as a general category, can be very broad and multi-layered – from individual examinations of witnesses, experts or accused persons by means of videoconference to a full case hearing online. Exposure to and appreciation of the increasingly expanding possibilities of remote participation in certain procedural actions and in the entire trial lead to the question of whether it is not fatal that technological innovation comes along with the identifying features of an axiologically oriented ritual, or whether it is nonetheless possible that there is a hendiadic (Galgani 2023) relationship between the two phenomena.

Discussions in academic doctrine on the impact of technological interventions on proceedings as such or on the limits of such interventions refer to the principles of criminal procedure as a point of reference. However, the notion of fair criminal

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proceedings – which means, *inter alia*, compliance with the law, the adversarial principle, the impartiality of the judge, the equality of arms and the reasonable length of the proceedings – is more than just a set of these principles. The *logos* of proceedings is linked to the philosophical concept of ideal justice, which predates the law and is in direct relation to the inviolable, inalienable human rights of the person involved in the proceedings, which the State recognizes and undertakes to protect. Therefore, it may not be allowed for preconditions to be set in for the exercise of decision-making authority, which does not tolerate any barriers and favors the simplification of proceedings (Mazza 2020, p.80), as well as satisfies the most convenient discretion of the decision-making authority. It must not be forgotten that the equality of arms in criminal proceedings means a balance of powers rather than their equivalence (Tonini and Conti 2022, p.10).

Although active discussions on remote criminal proceedings began in the context of the COVID-19 pandemic, it should be noted that, historically, the possibilities of partial remote criminal proceedings (mostly of individual steps) have long been established in the regulation of the EU Member States and have been discussed many times in the scholarly literature for at least 30 years.

One of the first EU Member States, Italy, sought effective solutions in the trials of Mafia members to ensure the safety of both the proceedings and the public. It was on the basis of these cases that the development of the jurisprudence of the European Court of Human Rights (ECtHR) began in the context of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The Convention is the main instrument for the protection of fundamental rights in Europe to which all Member States have acceded, although the accession of the EU to the Convention is still in the negotiation phase. Article 52(3) of the EU Charter of Fundamental Rights (the Charter) confirms that, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same, although more extensive protection may be provided. This means that the case law of the ECtHR is relevant for the interpretation of rights provided for in the Charter where these rights match, in particular in areas where it has already laid the foundations for the interpretation of the content of fundamental human rights. In the context of this topic, it should be noted that the right to justice encompasses a wide range of fundamental human rights, such as the right to a fair trial established in Article 6 of the Convention and in Article 47 of the Charter, and that the rights set out in Article 48 of the Charter correspond to the content of the rights provided for in Article 6(2) and (3) of the Convention (Explanations (*) relating to the Charter 2007). Thus, although the EU has not acceded to the Convention the doctrine of fundamental human rights in the

field of criminal justice, as well as the development of standards of procedural safeguards for EU Member States, remains the task of the ECtHR, thus creating preconditions for the creation of a coherent and harmonious legal area among the EU Member States.

The development of the possibilities of remote criminal proceedings during the COVID-19 pandemic was accepted as an unavoidable necessity in the EU Member States. However, there were concerns that it would become an element of ordinary proceedings once this emergency was over. The reaction of Italian scholars to this issue was particularly sensitive (Ceresa-Gastaldo *et al.* 2023, pp.216–219). Thus, despite the experience verified by the ECtHR of the application of modifications to remote proceedings, practitioners, and scholars hold rather traditional views on the integration of technologies into criminal procedure in non-emergency situations. It should be noted that there was no development in remote procedure rules in Italy until 2022 when the justice reform, which received extensive criticism, was adopted (Dei-Cas 2023). Despite much criticism (Mazza 2023), one of the topics during the implementation of this reform (known as "*la riforma Cartabia*"), which was mostly geared toward the introduction of e-justice procedures in the post-pandemic period, was the legitimization of remote participation in criminal procedural actions and case hearings (Castronuovo *et al.* 2023, pp.86–101).

The example of this country shows, on the one hand, that criminal procedure based on orality and immediacy does not lend itself to easy modifications that pose even a slight threat of the devaluation of these principles in a society with well-established traditions of this procedure. On the other hand, such strong opposition and criticism makes us question whether we are facing the possibility of rethinking the traditional ways of understanding these safeguards in order to preserve their essence without devaluing their traditional package, or looking for new components to replace or compensate for their so-called "loss" (Corso and Peroni 2010; Chiavario 2010, pp.98, 109). The issue of the balance between safeguards is in particular distinct in the face of technological modifications or in the context of integration. Thus, reflection on technological progress in the field of criminal procedural law indicates the need to rethink, on the basis of fundamental procedural principles, the safeguards that can replace or compensate for those that are in crisis as a result of the intervention of technological progress.

In the context of the inferiority of technology, scholarly debate still addresses the issue of whether the court will not gradually become a mere site for the exercise of penal power with the resultant consequences – the deformation of the procedure itself as a physical ritual. The answer to this question is sought by exploring and discussing how the new technological instruments that litigants

can use to exercise their procedural rights are compatible with the very substance, principles and purpose of criminal procedure.

In this context, the aim of this paper is to assess the challenges posed for legal regulation by the interaction of technological progress with the principles of criminal procedure. In order to achieve this goal, the following tasks are set: to identify the international human rights standards developed by the ECtHR, without which a fair trial is not possible; to analyze the main aspects of the model of regulation of remote criminal proceedings based on the example of Lithuania; and, on the basis of this analysis, to identify the directions of potential regulation by the EU Member States. For this purpose, the systematic analysis of legal acts and jurisprudence is employed, alongside the teleological and comparative methods of research.

The Interaction Between Strict Procedural Rules and the Changing Context of Technological Progress

On the one hand, judicial procedure should be regarded as a polymorphic formation with its forms adapted as far as possible to the specific subject matter entrusted to the court's appreciation, and the assumption of a uniform procedure designed to deal with all criminal offenses in an undifferentiated manner does not conform to reality (Piziali 2000, p.975). On the other hand, any criminal procedure is based on the fundamental principles of a fair trial: orality, an adversarial nature and immediacy – i.e., on the stringent procedural rules that are implemented in practice and serve as safeguards of fundamental human rights. Recent years have made it particularly clear how new technological advances have expanded the scope of procedural actions and added much relevance to the question of whether and how technological process can change the content of the fundamental criminal justice principles.

Orality is interpreted as the communication of thought through the utterance of words that are intended to be heard. The antithesis of this is the written form, which refers to communication in words using visible alphabetic signs or ideograms. Although what has been written can be read and thus expressed orally, this would be a fictional verbalism. The listener can hear, but cannot be part of the process and, most importantly, cannot ask questions or hear clarifying answers from the person questioned. As a result, orality is real and complete only when the parties are able to ask questions and receive answers from the subject with whom they are dialoguing in the present tense, with the intervention of a live voice. This ensures the right of an accused to participate directly in their own trial (Tonini and Conti 2022, pp.160, 164).

Adversarial proceedings mean the dialectical participation of the parties in the proceedings. This is a game of alternative or contextual interventions, the insertion of questions and answers, assertions, and rebuttals, which leads judicial proceedings toward an outcome (Ferrua 2012, p.100). The climate of the courtroom integrates the assumption of the potential for dialectical contestation. Adversarial proceedings can only be effective if there is a dialectical dispute between the parties who have equal rights before a third and impartial judge; therefore, the realization of a full dialectic in front of a computer raises some doubts, since it creates an intermediate link between the parties and the judge.

Creating a procedure where each of the actors participates remotely means virtualizing the communicative context, which, owing to its specific epistemic capacities, is a privileged instrument for a reliable reconstruction of facts and for a useful comparison of antagonistic theses. Radical critics of remote proceedings argue that the rituals of the adversarial principle are the backbone of evidence production in adversarial proceedings, and that this calls for a courtroom "theatre" because, as Franco Cordero has written, they "require perfect acoustics and optics" (Maiello 2020).

Such an atmosphere requires certain conditions: that the person questioned is able to sit in a place where they can easily be seen by the parties and the judge; and that the persons involved in the proceedings (witnesses, the accused, the prosecutor, the defense counsel and the judge) are able to observe and appreciate the extra-linguistic circumstances that shape non-verbal forms of communication. The tone of voice, facial expression and/or discomfort of answering, perhaps also embarrassment, are usually huge indicators of the authenticity of the source, just as a continuous sequence of questions accompanied by a glance from a witness can lead to a higher truthfulness rate or a fruitful confrontation of antagonistic theses. Therefore, according to some scholars, these are not, by any means, marginal aspects that can be attributed to the aesthetic and symbolic features of judicial activity, but rather configurations that are intertwined with the main issues of criminal court judgments (Maiello 2020). This also involves the principle of immediacy, which is treated as difficult to reconcile with remote proceedings as it is argued that even the most sophisticated videoconferencing software will never be able to reproduce the optimal immediacy of judicial proceedings required for the trial and to ensure the effectiveness of questioning.

Despite the arguments justifying the legal preference for face-to-face and physical contact in court due to considerations related to better verbal and non-verbal observation of a person, as well as better control of the person questioned, the use of videoconferencing in criminal proceedings is gradually gaining more and more supporters in an attempt to reconcile such use in criminal proceedings

with the fundamental basis of the principle of immediacy (Morão and Tavares da Silva 2023, p.134). It can be noted that science is looking for arguments to develop the content of the principle of immediacy. The interaction of procedure with technology means that the key elements of immediacy – physical presence and participation – are interpreted separately, i.e., "physical presence" and "participation" are no longer elements of two poles. According to researchers, the essential element is the "participation" pole (Curtotti Nappi 2006, p.296). Physical presence is not a value in itself, but has the instrumental nature of participation, which suggests that if means can be found to ensure participation in the present tense in other ways, the element of physicality is no longer necessary. This hypothesis tends to be confirmed in sociological studies which show that younger witnesses are less stressed and less uncomfortable when giving evidence via video link. In the UK and Australia, there has been a number of pilot projects conducted in youth detention and correctional facilities where juveniles and young adults claimed that they felt more familiar, confident, and at ease when using video link (Walsh 2018). Moreover, research shows that people's habits and relation to technologies are changing quite rapidly. A testimony given through video link may even be regarded as more reliable because it offers witnesses a safer environment, which can reduce emotions and stress and thus allow them to reconstruct the facts more accurately (de Vocht 2022).

One of the most prominent progressivists in the integration of technology in legal proceedings, Richard Susskind, was overwhelmed by the outraged criticism from the English Bar Association when he wrote, back in 1990, that, in the future, lawyers would use e-mail as the main means of communication with their clients (Susskind 2019, pp.2–3). Today, this researcher makes intensive efforts to prove that the courts of the future will be virtual (Susskind 2023). Despite the fulfilment of certain predictions, such a progressive approach is viewed with a great deal of caution both in policy decisions and in the works of researchers. An analysis of the regulation of remote proceedings and the scholarly debate gives the impression that there is a reluctance to succumb to the widespread enthusiasm concerning the impact of technological innovation on the efficiency (speed) of proceedings. "The prevailing rhetoric about smart work, the digital age, about 'life 2.0' or beyond, risks overwhelming criminal procedure and turning it into a dystopian near future, a brave new world where everything is sacrificed to a misunderstood myth of progress" (Mazza 2020, p.73). "The legacy of the modernity *nomos* (Cacciari and Irti, 2019) for the storms of populist impulses and misunderstood bureaucratic-corporate demands for effective justice practice, which the frustrations of emergencies and their management threaten to make even

more aggressive, may well lead to the decline of Western civilisation, if ethical indifference and witty silence prevail" (Maiello 2020).

The axioms underlying the discussions on the use of audio-visual communication in various procedural actions have always been, and still are, in practice characterized by the argument of the "inferiority of evidence." In the anticipation of future empirical and multidisciplinary research, scholars continue to rely heavily on the postulate that only the physical presence of all the different litigants in a tangible courtroom can ensure the "constitutionally required standard for both participation in the trial and the evidentiary activity" (Galgani 2023). The fact that remote proceedings are restrictive to the full participation of a person in proceedings and thus imply quality risks of evidence-taking is recognized not only by criminal procedure scholarship, but also by the ECtHR.

Thus, as criminal proceedings are faced with the inevitable challenge of integrating technology, the key issue is finding a balance. Balance in this context should be understood as the sacrifice of one right or principle for another. For legal regulation, this means the task of inputting parameters to assess the legitimacy of the sacrifice. Such an assessment could include three different elements: necessity, sufficiency, and proportionality (Morrone 2008, p.185; Alexy 2012). In this respect, it is indeed common to argue that the weakening of safeguards can only be justified if balanced against an equally ranking constitutional interest, seen as the prevailing historical-political-legal moment.

In the pandemic period, the main concern in terms of regulatory coherence was the lack of legitimization. The criminal procedure law did not contain provisions legitimizing the possibility of remote proceedings in general. Therefore, the main task was to decide and create general norms legitimizing the possibility of such proceedings because "the first error of approach is to assume that there is no need to regulate by law the conditions for the conduct of proceedings which are technological in nature" (Mazza 2020, p.75). However, it would be a mistake to assume that balance will be ensured once the foundation has been laid, and that remote proceedings can be effectively applied solely on the basis of rules governing the technology used. Neglect of the right to participation in the examination and production of evidence in order to consolidate dematerialized proceedings would be a serious betrayal of the adversarial procedure. For example, the promptness of proceedings in itself may not be considered equivalent to the interest of the right to defense. The promptness of proceedings must be linked to the reasonable length of a fair trial; therefore, the former can never lead to the abrogation of the latter interest (Dei-Cas 2022). All of this leads to the conclusion that the main challenge of the current period is the search for specific

ways to guarantee procedural safeguards (both in terms of legal regulation and practical guidelines).

Encouragements, Warnings, and Boundaries Set by the European Court of Human Rights

On the assumption that EU law is in the line with the case law of the ECtHR, unless explicitly stated otherwise, the ECtHR – which substantiates its judgments in light of human rights violations rather than normative regulation cases, as derived from the general history of the case, and allows for the assessment of damage through the paradigm of proportionality in particular (Maggio 2023, p.181) – remains the guarantor of the principle of the coherence of legal regulation in the EU Member States on the subject at issue.

Although Article 6(1) of the Convention does not mention it explicitly, the established case law of the ECtHR on the object and purpose of this Article show that a person "charged with a criminal offence" has the right to be present at their trial. Moreover, paragraph 3(c), (d) and (e) guarantee "everyone charged with a criminal offence" the right to "defend himself in person", to "examine or have examined witnesses" and to "to have the free assistance of an interpreter if he cannot understand or speak the language used in court," and it is difficult to see how a person could exercise these rights without being present at their trial (*Sejdovic v. Italy* 2006, § 81; *Colozza v. Italy* 1985 § 27; *Hokkeling v. the Netherlands* 2017, § 57). Indeed, the ECtHR has recognized in a number of cases on the basis of the principles of a fair and just criminal procedure that it is of capital importance that the accused should appear at their trial and that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 of the Convention (*Hermi v. Italy* 2006, § 58; *Dijkhuizen v. the Netherlands* 2021, § 59). Hence, the principle of adversarial proceedings is understood in the case law of the ECtHR as a requisite of the subjective right of the accused to be present and defend themselves in their proceedings.

The ECtHR cases which laid the foundations for the assessment of the right of the accused to participate in proceedings by means of remote procedure and established the principles for the application of such a form, as well as the safeguards necessary, can be divided into several groups: 1) cases against Italy concerning the management of mafia trials where remote proceedings were treated as an exceptional measure justified in order to protect other public security goods; 2) cases against Russia where the remote proceedings used, in principle, against the will of the accused in order to speed up case hearings were

considered a repressive measure of the state, enabling the state authorities to exercise arbitrariness and the unjustified restriction of rights, starting with the right to defense; and 3) cases where it was recognized that participation in the trial by remote means (videoconferencing) could be a measure to ensure effective participation of the accused in the proceedings (*Dijkhuizen v. the Netherlands*, 2021, § 56).

The scrutiny carried out by the ECtHR is focused on the overall fairness of the proceedings. This is why the analysis of the case law developments shows that, first of all, it was necessary to express a principled position on the compatibility of remote forms of proceedings *per se* with the principles of Article 6 of the Convention. In 2006, the ECtHR confirmed that, from the perspective of the principles ensuring human rights in the proceedings, remote procedure does not violate the provisions of the Convention. The ECtHR held that the participation of an accused in a hearing by videoconferencing is not in itself contrary to the provisions of the Convention. The ECtHR also noted that though the physical presence of an accused in the courtroom is highly desirable, it is not an end (*Golubev v. Russia* 2006).

To reveal the topic under analysis, three cases against Italy stand out. Although the outcomes of the judgments in these cases were not the same as far as the violation of the Convention was concerned, the ECtHR maintained the consistent development of its reasoning. Guided by the principle of fairness, the Court set the direction by stating that recourse to remote proceedings in any given case must serve a legitimate aim and that the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention (*Marcello Viola v. Italy* 2006, § 67; *Zagaria v. Italy* 2007*; Asciutto v. Italy* 2007).

The case law on the interpretation of "legitimate aims" to justify remote proceedings was developed by the ECtHR in 2006 in a case where the accused, who was a member of the Mafia, participated in an appeal hearing by videoconference, as ordered by the court, because of a restricted prison regime. The ECtHR held that the participation of the accused in the appeal hearings by videoconference pursued the protection of public order, the prevention of crime, and the protection of witnesses and victims of offenses in respect of their rights to life, freedom and security (*Marcello Viola v. Italy* 2006, § 72). The Court considered the abovementioned circumstances concerning the legal status of the accused from the perspective of the aims that were essentially directed toward the security of the public and its individual members and held that the decision of the State not to bring the accused to a hearing room was justified.

The ECtHR has gone beyond this in its jurisprudence and, in the abovementioned and other cases, has singled out the requirement of a reasonable time in judicial proceedings as a criterion for a legitimate aim (*Asciutto v. Italy* 2007). Thus, it is seen from the case law of the ECtHR that the format of videoconferencing can be considered as an appropriate measure to reduce delays caused by the transport of the accused, thereby simplifying and speeding up the criminal proceedings. Although the Court has expanded the scope of a legitimate aim to include the principle of promptness of proceedings, cases against Russia show that the mere promptness of proceedings as a justification for the use of videoconferencing under any circumstances is not compatible with the standards of Article 6 of the Convention. The weakest argument for justifying remote proceedings by a unilateral judgment of the court is, under the case law of the ECtHR, the speed of proceedings.

The jurisprudence of the ECtHR establishes the doctrine that remote proceedings are more vulnerable in terms of the use of procedural safeguards, and that this format is considered as a measure that can be applicable in exceptional cases. This means that it is not videoconferencing *per se*, but the conditions of its use that may lead to a deviation from the components of a fair trial (Corso and Peroni 2010). Therefore, the case law of the ECtHR is developed not only from the point of view of the assessment of the aims pursued, but also in terms of the compliance of the entirety of the specific conditions in which the remote proceedings were implemented with the requirements of Article 6 of the Convention.

The case law of the ECtHR expresses the position that the State cannot interpret legitimate aims narrowly in its decisions, i.e., only relying on the aims of prevention and security, all the more on promptness. In the case of the regulation of remote participation, the restriction of the inviolable right of defense must be necessary in order to ensure the legal goods of particular (constitutional) importance, but this circumstance should not apply to the principle of reasonable time as it is not comparable to the right of defense (Nappi 2006, p.104). The Court has developed case law which requires the existence of a set of conditions, i.e., in addition to legitimate aims, the relevant procedural safeguards relating to ensuring of the right of defense must be guaranteed. The ECtHR has set the requirement that the accused must be able to follow the proceedings and be heard without technical impediments, as well as communicate effectively and confidentially with a lawyer (*Grigoryevskikh v. Russia* 2009, § 83).

It is important to note that, in interpreting the rights guaranteed to the accused under Article 6 of the Convention, the case law of the ECtHR emphasizes the need to ensure effective participation in a criminal trial (*Murtazaliyeva v. Russia* [GC] 2018, § 91), which includes both the technical, organizational

aspects of participation and ensuring effective representation by a defense counsel. Effective participation includes not only the right to be physically present, but also the right to hear and follow the proceedings directly through participation. Accordingly, this means that poor acoustics in the courtroom or difficulties in hearing what is going on may raise issues of a breach of Article 6 of the Convention (*Stanford v. the United Kingdom* 1994, §§ 26, 29).

According to the case law of the ECtHR, the interests of justice require that, in order to ensure a fair hearing, an applicant who appears before the court by videoconference must be represented by a lawyer, in particular when a representative of the public prosecutor is present (*Shulepov v. Russia* 2008, §§ 34–36; *Slashchev v. Russia* 2012; *Grigoryevskikh v. Russia* 2009). The ECtHR has reiterated a number of times that the exercise of the right to legal aid is of particular importance when the applicant communicates with the courtroom by video link. Moreover, the Court imposes an obligation on courts hearing cases by videoconference to verify the reasons for the absence of the defendant's counsel (*Grigoryevskikh v. Russia* 2009, § 92), and warns that failure to comply with this obligation may lead to a decision on a violation of Article 6(1) and (3)(c) of the Convention.

Thus, the case law not only emphasizes the right of an accused to communicate with a lawyer, but also highlights that unilateral decisions by authorities concerning the remote participation of an accused in a hearing should be restricted if the individual situation of the accused has not been taken into account. For example, in *Medvedev v. Russia* (2017, § 30), after finding that the applicant had been imprisoned in Moscow but had not been physically brought to a trial in Moscow by the decision of the court, and that the Government had not explained why it had been impossible to provide for different arrangements for the conduct of the appeal, the ECtHR considered that the applicant could legitimately feel ill-treated when communicating with the State-appointed counsel by video link. The ECtHR did not discern any compelling reasons to justify the authorities' decision to arrange for the applicant's participation in the appeal hearing via video link rather than ensuring his presence in the courtroom, in particular considering that both the accused and his counsel were located in the same city in which the hearing was held.

In developing its case law on ensuring the presence of a defense counsel when proceedings are organized by videoconferencing, the ECtHR draws strict limits for the formal representation of the accused. According to the Court's jurisprudence, the appointment of a defense counsel does not in itself guarantee the effectiveness of the aid that they can provide to the accused, which is why it emphasizes the need to ensure adequate facilities and time for consultations

with the defense counsel (*Sakhnovskiy v. Russia* [GC] 2010). In this context, another requirement identified in the cases heard by the ECtHR is also relevant. The right of an accused to communicate with their lawyer without any risk of being monitored by a third party is regarded as one of the fundamental requirements for a fair trial under Article 6 of the Convention. The Court considers that, if a lawyer is unable to confer with their client and receive confidential instructions, their assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (*Sakhnovskiy v. Russia* [GC] 2010, §§ 97, 102 and 104; *Medvedev v. Russia* 2017, § 30; *Zagaria v. Italy* 2007).

In conclusion, the jurisprudence of the ECtHR dues not rule out the development of the use of technology in criminal proceedings. However, the search for balance should be chosen as a way forward. The Court treats remote proceedings as a means for creating preconditions for the restriction of procedural rights. Therefore, it imposes an obligation to apply strict standards of effective defense. Any safeguard that is restricted must be absolutely necessary, and where a less restrictive measure may suffice, the latter must be applied.

The Example of Lithuania: Coherence Between Regulation and Practice

The *logos* of the adversarial procedure is based on the opposite principle than authority (Filippini 2022, p.19), i.e., a dialectical opposition between the parties (prosecution and defense) based on equal rights and possibilities, where the judge is a third and impartial arbiter. According to this principle, the more the subjects with antagonistic interests share functions and are directly involved in the proceedings, the better the truth is achieved. The lack of normative typicality and the expected variations in application do not, in fact, rule out the risk that the remote procedure could turn into a formal virtual procedure or a simulacrum of a court, thus succumbing to the dangerous tendency to regard the methodological expediency of ritual forms as a mere obstacle to be removed in the interests of procedural promptness. "The step that separates the dematerialized court from the virtual court is a small one, thus, the technological monster, today welcomed by passionate futurologists, may soon turn against the very proponents of modernity" (Mazza 2020). Thus, once the emergency is over and the practice of using the remote form of criminal proceedings has been developed over almost 3 years, it is necessary to consider whether this ominous prediction is actually likely to come true, and whether there are any signs that criminal procedure is facing a technological monster that threatens its very *logos*.

The example of Lithuania is unique because, unlike in the case of Italy, the use of remote proceedings (mixed and full) has been accepted in practice without much doctrinal debate. In 2021 in Lithuania, the legislator adopted amendments to the criminal procedure law in response to the need to legalize the new practices introduced in criminal proceedings during the pandemic when some procedural steps or entire proceedings were carried out using technical equipment. With the active participation of representatives of the Bar Association, the Prosecutor General's Office and the judiciary in the legislative debate, amendments to the Code of Criminal Procedure were adopted, and the very first Chapter of the Code on the "Purpose of Criminal Procedure and the Main Rules" established new legal regulation on the "Use of information and electronic communications technologies in criminal proceedings" (Law No. XIV-270, 2021).

These provisions of the law have developed a concept of remote proceedings that is favorable for the ensuring of the rights of defense. The regulation emphasizes *expresis verbis* that remote proceedings (incidentally, the law itself does not refer to this concept, but rather uses the term "ensuring procedural actions and the participation of parties to proceedings in case hearings using information and electronic communications technologies") are only possible in exceptional cases. This means a rule of exceptional rather than ordinary procedure. This implies that the legislator does not recognize that remote procedure can be treated as a fully-fledged analogue of ordinary procedure, which is based on the principles of adversarial procedure, orality and immediacy. In light of the ECtHR's standards on compliance with the requirement of a legitimate aim, it should be noted that the criminal procedure law refers only to "reasonable grounds for believing that this will speed up the hearing of the case" as such an aim.

Despite the fact that the legitimacy of the new regulation is supported by the principle of the speed (promptness) of a case hearing, the law identifies the conditions necessary for a decision on the organization of the procedure, thus amortizing the fact that only the promptness of a case hearing is indicated as the reason for such a procedure. The legislator sets out the requirements for this set of conditions as follows: 1) such a form will not prejudice a full and objective investigation of all the circumstances of the case; and 2) this form will safeguard the rights of the parties to the proceedings. Thus, from the point of view of the ECtHR's standards, the model being developed in Lithuania is aimed not only at fast, but also at effective participation of the parties in criminal proceedings.

The main procedural safeguard of the parties is the part of the law which unequivocally obliges remote proceedings not to be applied when at least one of the parties to the proceedings objects to it (the provisions of this paragraph do not apply when the prosecutor, the victim and/or their representative, the

accused, their legal representative and/or their defense counsel, the civil claimant, the civil defendant and/or their representatives object to the case hearing by means of information and electronic communication technologies – i.e., videoconferences). It should be noted that such an objection may be raised not only by the accused, their defense counsel and the prosecutor, but also by the victim, their representative, or even by the civil claimant and the defendant. The flexibility of the law and its caution with regard to remote proceedings are also confirmed by the provisions according to which, even if it becomes apparent during a hearing held using information and electronic communication technologies (via videoconferencing) that the direct participation of the parties, a witness, an expert, a specialist, an interpreter, and other persons involved in the proceedings is necessary for a particular procedural step to enable them to exercise their procedural rights in a proper manner or to have a complete and objective examination of the case circumstances, arrangements are made for the procedural step or the hearing to take place in person. Thus, it can be said that the regulation model established in the CCP does not leave any room at all for a unilateral decision of the court to organize the hearing or the procedural step remotely. Although the description of the Procedure for the Use of Videoconferencing Technologies in Criminal Proceedings states that a case heard by means of videoconference shall be organized on the court's initiative or at the request of a party to the proceedings (Order No. 1R-183, 2021), the provisions of the law which allow the vetoing of such a decision at any time without even requiring the person objecting to state their reasons confirm the supremacy of the principle of the general consensus of the parties concerning the decision to conduct the proceedings remotely. On the other hand, the question is then whether it is entirely reasonable to leave no scope for the court to take a unilateral decision on the organization of proceedings under a mixed or fully remote procedure. Such a need could be justified by the prevention of abuse of procedural rights to delay proceedings.

In view of the fact that the remote form of procedure has been established as exceptional, the provision providing that such a decision shall normally be taken by a court ruling is logical and reasonable. However, the law does not detail what "normally" includes, which brings a number of risks inherent in the interpretation and application of the practice of law. In fact, this provision is interpreted and applied in practice in a wide variety of ways, ranging from the view that a separate ruling setting out the reasons justifying exceptionality is necessary to a protocol ruling without any additional explanations of the decision. Such trends in the practice show that the "exceptionality" established by the legislator has been devalued in reality, and that the form of remote procedure (whether hybrid

or full) is increasingly becoming a routine procedural decision based on the parties' agreement, rather than on the grounds of exceptionality.

In terms of procedural safeguards, several shortcomings in the regulation should be noted which threaten the right to an effective defense from the perspective of the standards established by the ECtHR. The law does not regulate cases where a defense counsel and an accused are in different places (e.g., in prison) when they connect to a hearing remotely. Neither the law nor the implementing legal act lays down rules on how confidential and effective communication between the defense counsel and the defendant is to be ensured in such cases. When the law was adopted, it was not considered that it should be possible to extend the list of cases when the participation of a defense counsel has to be mandatory by establishing that a defense counsel is required to be present when an accused participates in proceedings by videoconference.

From the perspective of the standards set in the provisions of Article 6 of the Convention, the requirement established at the level of the law that remote proceedings may be arranged only when there are appropriate technical possibilities is to be assessed positively. On the other hand, neither the law nor the implementing legal act details how the conditions of appropriateness are to be understood and what circumstances satisfy them. The statutory provision which refers to the implementing legal act where specific rules are laid down – although it requires that the reliable identification of the parties to the proceedings, the objective recording and presentation of data and evidence, access to procedural rights and the publicity of a hearing at court be ensured – is questionable (the procedure defined by the Minister of Justice has been agreed with the Judicial Council, the Prosecutor General's Office of the Republic of Lithuania and the Council of the Lithuanian Bar, and the procedure defined by the Prosecutor General of the Republic of Lithuania has been agreed with the Judicial Council and the Council of the Lithuanian Bar (Article 82(5) of the Code of Criminal Procedure)). In addition, it is questionable whether a legal act at this level can regulate legal relations of this kind which relate to the proper taking of evidence that is the first and most indispensable prerequisite for a fair trial. An analysis of the abovementioned description makes it clear that, apart from the formal declaration, there is no procedure to ensure these safeguards – even in this legal act.

Despite the safeguards relating to the regulation created by the CCP, the legal model of remote procedure where issues of considerable significance for ensuring the procedural rights of the parties are either defined in an implementing legal act or simply left to the discretion of the decision-maker can be seen as creating legal preconditions for the formation of divergent case law and for a deviation from the fundamental principles of criminal procedure. An empirical study

involving interview with judges, attorneys at law and prosecutors did not confirm that the implementation of remote proceedings in practice had very negative consequences for the rights of the defense, or created negative preconditions for the principle of adversarial proceedings (the study results were presented at the international conference "European and National Criminal Policy Trends and Challenges" held in Vilnius on April 28, 2023). This is supported by the fact that, in 3 years of experience, not a single complaint concerning a procedural violation in this respect has reached the court of cassation.

In summary, it can be stated that, despite the shortcomings of regulation, legislation, and practice in Lithuania have not gone down the path of abuse of power and have chosen to seek consensus between the parties to the proceedings while maintaining respect for the importance of the adversarial procedure. The regulatory shortcomings that have been identified suggest that it is necessary to remain vigilant and not to be under the illusion that the rationality of the subjects involved in proceedings and respect for human rights alone can be a sufficient safeguard for a fair trial in the truth-seeking process.

Interim Findings

The integration of new instruments in criminal proceedings, although based on the premise of procedural efficiency, must, in light of the fundamental principles of criminal procedure, be understood first and foremost as a guarantee of fair proceedings.

Remote criminal proceedings, which do not *per se* conflict with the *logos* of criminal procedure, remain an exceptional form of organization of proceedings which may not be applied as a judicial imperative that is justified solely on the grounds of procedural promptness.

The speed of proceedings, understood only in the formal sense of procedural simplification, may not be regarded as a legitimate aim, sacrificing the safeguards of one or another party to the proceedings and paying the price for the quality of the procedural path to the truth.

The legislator's commitment to providing the best functionality to criminal proceedings through the appropriate integration of technological tools must be based on the principle of balance, where such enabling should not create preconditions for arbitrariness on the part of the decision-making body and unjustified restrictions on the rights of the parties to the proceedings.

Although remote criminal proceedings are seen as a threat to the fundamental safeguards of a fair adversarial procedure and treated as an exception in the doctrine, empirical studies show that, in the judicial practice of Lithuania, this

has become a routine procedural decision of the court predetermined by an agreement reached between the parties involved in the proceedings.

The analysis of the Lithuanian case shows that the regulation model – where remote criminal procedure has been legitimized in the law but the legislator does not assume the responsibility of establishing the standards developed by the ECtHR's jurisprudence with regard to the means of safeguarding individual rights of defense at the level of a law and transfers this obligation to implementing legal acts or simply to the emerging case law – is flawed and poses risks to the safeguards of a fair trial.

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Contents

Rima Ažubalytė, Oleg Fedosiuk, Jolanta Zajančkauskienė | MRU
Preface xiii

Jolanta Zajančkauskienė | MRU
Introduction: What is the Role of Coherence in Criminal Justice?
The Characterization of Coherence in Law 1
Coherence Between National, International, and EU Law 4
Challenges to the Coherence of Criminal Law in the EU 6
Research Object 10
Research Aim and Objectives 10
Research Methodology 11
Limitations 12
The Structure of the Book 12
References 12

Part I
The Search for Coherence in Substantive Criminal Law

Oleg Fedosiuk | MRU
The Gray Area in the Concept of Human Trafficking: Between the Text of the Law and the Purpose of Criminalization
Human Trafficking as a Legal Concept 19
The Problem of Defining the Content of Exploitation 22
The Limitlessness of the Concept of Abuse of a Position of Vulnerability 29
Interim Findings 32
References 33

Linas Žalnieriūnas | *MRU*

The Search for Legal Coherence in the Criminalization or Decriminalization of Drug Possession

Factors Influencing Drug Use 37

Causes of Drug Criminalization 41

A Brief History of Drug Prohibition 42

Factors Influencing Drug Categorization and Quantification in Europe 45

Consequences of the Criminalization of Narcotic Drugs 48

The Health-Oriented Decriminalization of Drugs 50

Interim Findings 54

References 55

Tomas Girdenis | *MRU*

Coherence in Criminal Policy for Offenses Against Justice That Obstruct the Investigation of a Case

The System of Offenses against Justice in the Criminal Code of the Republic of Lithuania and Its Coherence 65

Criminal Liability for Offenses against Justice in the United Kingdom and the United States of America 68

Punishing Crimes of Perverting the Course of Justice in the UK 68

Punishing Obstruction of Justice Crimes in the USA 70

Sentencing for Crimes Against Justice in Lithuanian Case Law 73

Sentencing for Separate Crimes Against Justice 75

The Impact of the Process of Combining Sentences on Punishing Crimes Against Justice 77

Interim Findings 82

References 83

Jolita Šukytė | MRU
The Unlawful Stalking of a Person

Stalking as a Dangerous Form of Human Behavior and the Justification for Its Criminalization 87

Indications of Stalking 90

Types of Definitions of Stalking 93

The Regulation of Stalking Actions in Lithuania 95

Interim Findings 101

References 102

Eglė Bilevičiūtė | MRU
Administrative and Criminal Liability: Toward Sustainability

Administrative Liability as a Separate Type of Responsibility 105

Administrative Liability in Different European Countries 107

Administrative and Criminal Liability According to Lithuania's Regulations 109

Researchers' Opinions on the Difference Between Criminal and Administrative Sanctions 110

The Criteria for Determining Administrative and Criminal Liability in the Case Law of Various Courts 112

The Relevance of the Application of the *non bis in idem* Principle for the Qualification of Administrative and Criminal Liability 115

Interim Findings 118

References 119

Andrius Nevera | MRU
Standards for the Coherent Application of the Principles of Criminal Jurisdiction in Relation to Criminal Acts Committed by Lithuanian Citizens and Persons Permanently Resident in Lithuania Outside the Territory of Lithuania

General Remarks 125

The Place of Commission of a Criminal Act and Its Relevance for the Coherent Application of the Principles of Criminal Jurisdiction 126

The Concept of the Flag Principle and the Possibilities of Its Application to Criminal Acts Committed Abroad by Lithuanian Citizens and Persons Permanently Resident in Lithuania 133

The Content and Possibilities of the Application of the Universal Principle in Relation to Criminal Acts Committed Abroad by Lithuanian Citizens and Persons Permanently Resident in Lithuania. Guidelines for the Coherence of the Universal Principle with the Flag Principle and the Active Personality Principle 137

Problems and Solutions for the Application of the Dual Criminality Clause to Criminal Offenses Committed Abroad by Lithuanian Citizens and Persons Permanently Resident in Lithuania 147

Interim Findings 150

References 152

Part II
The Transformation of Criminal Procedure Law in the Context of Coherence

Raimundas Jurka | MRU
The E-Evidence "Movement" in European Union Criminal Justice: Toward or Beyond Coherence?

Cross-Border Access to Electronic Evidence Within the European Union: Reasons and Regulatory Background 162

The Relationship Between the European Investigation Order and the Regulation on Electronic Evidence 167

The Issue of the Admissibility of Electronic Evidence 173

Interim Findings 177

References 178

Renata Marcinauskaitė | MRU
Electronic Evidence in Criminal Proceedings

General Remarks 183

The Concept of Proof-Taking Activity and the Assessment of Evidence in Criminal Proceedings 184

The Concept of Evidence: The Identification of Electronic Evidence 186

The Requirements Applicable to Evidence 192

The Specifics of Electronic Evidence: The Justification of the Reliability of Electronic Evidence 193

Interim Findings 197

References 198

Rima Ažubalytė | MRU
Evidence in a Non-Conviction-Based Confiscation Procedure

General Remarks 203

General Requirements for the Process of Proof of NCB Confiscation 206

The Lower Standard of Proof in the Application of NCB Confiscation: A Balance of Probabilities and/or a Reversed Burden of Proof 213

Interim Findings 222

References 223

Rasa Žibaitė - Neliubšienė | MRU
Subjective Threats to the Free Evaluation of Evidence: Toward a More Coherent Legal Regulation

Manifestations of Intuitive Factors in the Process of Free Evaluation of Evidence 232

Confirmation Bias 235

Hindsight Bias 238

Availability Heuristic 241

Possibilities to Minimize Biases 242

Interim Findings 244

References 245

Sandra Kaija | Riga Stradiņš University Latvia

The Trial of a Criminal Case in an Appellate Court Hearing: A Written or Oral Procedure in the Context of the Right to a Fair Trial

The Right to a Fair Trial and the Choice of Procedure 252

The Possibilities of a Written Procedure in Criminal Proceedings in the Appellate Court 258

Interim Findings 263

References 264

Inga Žukovaitė | MRU

Coherence Between the Model of Remote Criminal Proceedings and the Standards Under Article 6 of the European Convention on Human Rights: The Reality of Threats to a Fair Trial

General Remarks 267

The Interaction Between Strict Procedural Rules and the Changing Context of Technological Progress 270

Encouragements, Warnings, and Boundaries Set by the European Court of Human Rights 274

The Example of Lithuania: Coherence Between Regulation and Practice 278

Interim Findings 282

References 283

Jolanta Zajančkauskienė, Rima Ažubalytė, Oleg Fedosiuk | MRU

Conclusions

Part I. The Search for Coherence in Substantive Criminal Law 287

Part II. The Transformation of Criminal Procedure Law in Context of Coherence 291

Jolanta Zajančkauskienė | MRU
Summary 297

Index 305