

THE ADVERSARIAL PRINCIPLE IN CRIMINAL PROCEEDINGS IN THE DIGITAL FORMAT UNDER THE SANITARY AND EPIDEMIOLOGIC REGULATIONS (COVID-19)

O PRINCÍPIO DO CONTRADITÓRIO NOS PROCESSOS PENAIS EM FORMATO DIGITAL SOB A REGULAMENTAÇÃO SANITÁRIA E EPIDEMIOLÓGICA (COVID-19)*

Dmitriy Aleksandrovich Ivanov
Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation (MGIMO-University), Moscow, Russia
dmitriy.a.ivanov@bk.ru

Anna Victorovna Polyakova
Orel Law Institute Ministry of Internal Affairs of Russia named after V.V. Lukyanov, Orel, Russia
avopolyakova@yandex.ru

Viktor Victorovich Pushkarev
Plekhanov Russian University of Economics, Moscow, Russia
pushkarev.v.v@bk.ru

Pavel Vladimirovich Fadeev
Moscow University of the Ministry of Internal Affairs of Russia named by V.Ya. Kikot, Moscow, Russia
fadeev.p.v@bk.ru

Olga Georgievna Chasovnikova
State Institute of Economics, Finance, Law and Technology, St. Petersburg, Russia
olga.g.chasovnikova@yandex.ru

Anna Vladilenovna Skachko
Academy of management of the Ministry of internal Affairs of Russia, Moscow, Russia
skachko.a.v@yandex.ru

Abstract: This article focuses on the issues in the implementation of digital technologies under the adversarial principle during pre-trial proceedings under the sanitary and epidemiologic restrictions imposed due to the COVID-19. We highlight the active use of digital technology during the trial stage and its detailed legal regulation stipulated in the Criminal Procedure Code of the Russian Federation, as compared with the pre-trial proceedings. We suggest possible solutions through the implementation of digital technology in pre-trial proceedings as in the trial stage. We discuss the advantages of the electronic format of criminal case files that will be beneficial for the realization of the adversarial principle in the pre-trial proceedings.

Keywords: Pre-trial proceedings. Court proceedings. Digital technology. Criminal case in electronic form. Videoconference.

* Artigo recebido em 23/09/2022 e aprovado para publicação pelo Conselho Editorial em 18/12/2022.

Resumo: Este artigo enfoca as questões na implementação de tecnologias digitais sob o princípio do contraditório durante os procedimentos de pré-julgamento sob as restrições sanitárias e epidemiológicas impostas devido à COVID-19. Destacamos o uso ativo da tecnologia digital durante a fase de julgamento e sua regulamentação legal detalhada estipulada no Código de Processo Penal da Federação Russa, em comparação com os procedimentos de pré-julgamento. Sugerimos possíveis soluções através da implementação da tecnologia digital nos procedimentos de pré-julgamento, como na fase de julgamento. Discutimos as vantagens do formato eletrônico dos arquivos de casos criminais que serão benéficas para a realização do princípio do contraditório nos procedimentos prévios ao julgamento.

Palavras-chave: Procedimento de pré-julgamento. Procedimentos judiciais. Tecnologia digital. Caso criminal em formato eletrônico. Videoconferência.

1. INTRODUCTION

Not only in Russia but around the globe as well were years of 2019 and 2020 critical due to the outbreak and spread of the new coronavirus disease COVID-19. The risk of numerous deaths demanded the imposition of sanitary and epidemiologic restrictions, the most strict being lockdowns. Since March 28, 2020, the majority of businesses stopped working while the public authorities and municipal government shifted to remote work in Russia.

2. MATERIALS AND METHODS

The methodological basis of this research is comprised of the general scientific systematic method that allowed a comprehensive analysis of the realization of the adversarial principle in criminal proceedings with special attention to digital technology and sanitary and epidemiologic restrictions.

The systematic approach helps analyze the procedure of the preliminary investigation and the realization of the adversarial principle in criminal proceedings with special attention to digital technology and sanitary and epidemiologic restrictions as a holistic and multidimensional complex of interconnected elements as well as study their functional and structural connections.

The comparative legal method helps analyze the current legislation, particularly those criminal justice procedures that cover the adversarial principle in criminal proceedings given the digital format and sanitary and epidemiologic restrictions due to the COVID-19 pandemic. This method allows identifying problems in the given area, justifying

the author's point of view, and suggesting solutions, particularly to improve the current criminal procedure legislation.

The formal judicial method helps analyze the current criminal procedure regulations that cover the adversarial principle for both parties and characterize the current issue of inequality of the defense and prosecution. It also regards the digital format of criminal proceedings under sanitary and epidemiologic restrictions due to the COVID-19 pandemic.

The sociological method helps obtain empirical data as well as analyze and systemize them.

This methodology helps obtain new insights into the realization of the adversarial principle in criminal proceedings as it regards the digital format under sanitary and epidemiologic restrictions due to the COVID-19 pandemic.

3. RESULTS ANALYSIS

The question of whether to withdraw COVID-19 regulations depended on the epidemiologic situation in a particular region of Russia, and in some regions they are still functioning. However, the government assured that the public administration would continue operating, and that included the judicial system as well.

The given situation has dramatically affected the performance of the law enforcement authorities and made it necessary to incorporate new types of criminal procedure activities. Criminal justice, as an important part of maintaining the security of all legal entities, is also affected by modern reality. The preliminary investigation bodies and judicial authorities have faced such a situation when they have to perform their duties effectively without impeding citizens' rights to health and wellbeing under the risks of infection. It is also necessary to ensure the epidemiologic safety of the staff of the aforementioned bodies.

The imposition of restrictive measures in every region of the Russian Federation, which was aimed at reducing contact with other people (including lockdowns), prevented the parties from being present for investigative actions at investigative units and at court. Also, it was impossible to involve in investigative actions those persons who are held in temporary detention facilities or remand centers since they were under quarantine.

In spite of the negative effect of sanitary and epidemiologic restrictions on social life, the COVID-19 realia are a unique opportunity for the online realization of different

stages of criminal proceedings. This situation helped assess whether the criminal justice system is ready for the use of technological advancements and digitalization of information to optimize criminal proceedings.

Over the recent decades, scholars have been studying the issue of the digitalization of criminal proceedings. Theoretical grounds for transforming certain aspects of criminal proceedings into a digital form are discussed in the works of E.V. Markovicheva (2020, pp. 215-216), S.V. Zuev (2018, pp. 7-8), A.A. Usachev (2019, p. 100). The assumptions and results in the works of A.V. Pobedkin (2020, p. 53), L.N. Maslennikova (2020, p. 34), A.A. Grigoriev (2020, p. 250) were of significant importance.

In recent years, new regulations have been introduced in the legislation of the Russian Federation that could foster the digitalization of the trial stage of criminal proceedings.

The Federal Law of June 23, 2016 No. 220-FZ “On introduction of amendments to certain legislative acts of the Russian Federation with respect to the application of electronic documents in the activities of judicial authorities” (State Duma of the Federal Assembly of the Russian Federation, 2016) introduced Art. 474.1 to the Criminal Procedure Code (State Duma of the Federal Assembly of the Russian Federation, 2001) “The procedures of application of electronic documents criminal proceedings” that stipulates that an application, claim, complaint, petition can be filed according to procedures and dates that are laid down by this Code in a form of an electronic document signed with an electronic signature of a person filing the document through a form from the official website of the court. The materials attached to the application, claim, complaint, petition, are also submitted electronically. The legislation of the Russian Federation determines the procedure of signing with an electronic signature the electronic documents prepared in an established or free form by other persons and bodies.

In addition, the Federal Law of March 20, 2011 No. 39-FZ “On amending the Criminal Procedure Code of the Russian Federation” (State Duma of the Federal Assembly of the Russian Federation, 2011) stipulates that it is possible to examine a witness and a complainant by court by way of using videoconferencing systems (Art. 240 Part 4 of the Criminal Procedure Code). Also, there is Art. 278.1 “The Specifics of an Examination of a Witness by Way of Using Videoconferencing Systems”.

As it regards the sanitary and epidemiologic restrictions, on April 30, 2020, the Presidium of the Supreme Court of the Russian Federation approved the “Review of Certain Issues of Judicial Practice pertaining to the Application of Legislation and Measures

Aimed at Preventing the Spread of the Novel Coronavirus Infection (COVID-19) in the Russian Federation, No. 2” (Presidium of the Supreme Court of the Russian Federation, 2020) that helped optimize judicial practice through remote servicing under the current restrictions.

As a result, the judicial system of the Russian Federation performed effectively in the realization of citizens’ right to a fair trial. The courts did not stop operating due to the opportunity of remote servicing. On February 9, 2021, during the meeting of judges of courts of general jurisdiction and arbitration courts, which was held online and was devoted to the 2020 results and plans for 2021, the President of the Russian Federation V.V. Putin commended the performance of the judicial system. The President highlighted that the judicial system managed to adjust to new realia brought about by the pandemic. Russian courts’ performance was among the best from the European Council countries. The European Commission experts considered the Russian judicial system to be the most responsive, technologically advanced, and least costly to citizens (Meeting of judges of courts of general jurisdiction and courts of arbitration, 2021).

In spite of accomplishments, the experience in the implementation of digital proceedings under sanitary and epidemiologic restrictions has revealed serious problems. For example, there is little regulation of using digital format at the pre-trial stage of proceedings. The legislation does not settle the use of digital technology in case investigation. There is only one article, namely Art. 166 of the Criminal Procedure Code, which stipulates the possibility to use video or audio technology and it refers only to capturing certain investigative actions with electronic devices.

As for the procedures for using digital technology in investigative actions, which could facilitate the work of preliminary investigation bodies especially under COVID-19 restrictions, there are many peculiarities that are not resolved yet.

The aforementioned problem has had a negative impact on the realization of the adversarial principle in criminal proceedings. In terms of sanitary and epidemiologic restrictions and the lack of digitalization mechanisms for the pre-trial stage of criminal proceedings, the adversarial principle could not be fully exercised. The sanitary and epidemiologic restrictions helped reveal those problems. Under the implementation of a digital format, there were numerous legal issues that inhibit the realization of the adversarial principle under COVID-19 restrictions.

There are emerging problems as it refers to adherence to criminal procedures by law enforcement authorities under lockdowns and other restrictive measures. In this case,

we refer to complying with the time limits of case investigation, carrying out urgent investigative actions, guaranteeing the basic rights of citizens, and complying with the basic principle of criminal procedures.

Many advocacy groups prioritized their health and wellbeing as well as the health and wellbeing of their relatives and trustees. For example, in the Kirov region, there was the Order issued on March 31, 2020 No. 130-P “On amending the Order of the Kirov region of March 25, 2020 No. 122-P” (Government of the Kirov region, 2020) that imposed additional restrictive measures and special working conditions for advocacy groups. This document stipulates that lawyers have to guarantee the protection of their trustees in the preliminary investigation bodies and at courts under urgent investigative activities that require the presence of parties. It refers to such actions as detention, arrest, the extension of detention, etc. Also, the Chamber of Advocates in the Kirov region prepared a detailed draft of a motion to postpone investigative actions due to the coronavirus pandemic. These restrictions can be regarded as a means to prevent its spreading. Thus, these recommendations exacerbate the realization of the adversarial principle at the pre-trial stage (The Law Chamber of the Kirov region, 2020).

Such restrictions have aggravated criminal proceedings, particularly the pre-trial stage of criminal proceedings. Especially, it has affected the realization of the adversarial principle. Thus, lawyers could not file motions and claims, postpone investigative actions, consult their clients in remand centers. In its turn, the prosecution also faced difficulties. It was impossible to subpoena the defense counsel representing the suspect (the accused) who was self-isolated; it was recommended not to perform any investigative actions unless they were urgent (and it is still debatable what actions are considered to be urgent); it was impossible to adjourn proceedings under Art. 208, Part 1, Para. 4 of the Criminal Procedure Code of the Russian Federation.

Nowadays, the criminal procedure legislation lacks regulations that would facilitate the preliminary investigation procedures in the given pandemic realia. Also, the Criminal Procedure Code does not stipulate any exceptions for the performance of investigative or other procedural actions which means that they could not be postponed but their performance was more complicated. Thus, it was impossible to ensure all functions of the pre-trial proceedings under given circumstances. It was also difficult to guarantee the adversarial principle as a basic principle of criminal justice.

The aforementioned review of the Presidium of the Supreme Court of the Russian Federation (2020) approved the “Review of Certain Issues of Judicial Practice pertaining to

the Application of Legislation and Measures Aimed at Preventing the Spread of the Novel Coronavirus Infection (COVID-19) in the Russian Federation, No. 2” of April 30, 2020 did not focus on the actions of the preliminary investigation bodies at the pre-trial stage, though they are crucial in criminal proceedings.

Thus, there is a great imbalance in the way different stages of criminal proceedings are elaborated in a digital format. While the implementation of digital technology at the trial stage has proved effective, its implementation in the preliminary investigation is still underdeveloped. These days, it is only possible to use technical devices to record investigative activities during the pre-trial stage.

Nevertheless, such a state of affairs lags behind a feasible level of implementation. For example, it is possible to file motions, claims, and complaints through telecommunication technologies which will ensure the realization of the adversarial principle at the pre-trial stage. It also includes the performance of investigative actions through videoconference calls. If necessary, the attorney, the suspect, or the accused may take part online. However, the inability to perform these procedures online not only inhibits the uninterrupted operation of justice but also violates the adversarial principle.

Under modern digitalization tendencies, there is an ongoing debate among procedural law scientists on the introduction of an electronic form of a criminal case that will facilitate many procedures of the pre-trial proceedings and decrease the risk of evidence falsification. If it was possible to have cases in a digital form, it would minimize the restrictions placed on the participants’ rights, secure their legal interests, and guarantee the realization of the adversarial principle.

It is during the pre-trial stage when the responsible parties perform the bulk of the work relating to the identification of persons involved in the offense and to the gathering of evidence. That is why it is crucial to improve the use of digital technology at this stage of proceedings since it would facilitate the process of securing citizens’ rights for fair justice. All the actions during the preliminary investigation as well as every step of the decision-making process are to be documented in a proper way. Thus, the introduction of a digital form of criminal cases is crucial for the realization of the adversarial principle at the pre-trial stage of proceedings since it will facilitate access to case files for the participants.

The analysis of the pre-trial practices under the sanitary and epidemiologic restrictions helps determine the scientific issue of the digitalization of the pre-trial proceedings. It is not possible to ensure further development of the procedural law science in terms of digital development without resolving the issue of the need to stipulate special

terms of prosecution's and defense's participation in the realization of the adversarial principle in the criminal procedure legislation.

Undoubtedly, digital technology can play an important role in complying with criminal procedure regulations during criminal proceedings. Only properly elaborated digitalization regulations will help realize the adversarial principle to its fullest and prevent the violation of citizens' rights and freedoms. It can be considered an important improvement in crime investigation during the pre-trial stage.

The successful practices of using digital technologies by courts should be adjusted to the needs of preliminary investigation bodies. There are several aspects in the implementation of a digital workflow that could facilitate the realization of the adversarial principle at the pre-trial stage, namely filing documents to preliminary investigation bodies through the Internet, using videoconference calls for investigative and other actions at the pre-trial stage, and the introduction of a digital criminal case.

4. CONCLUSIONS

To conclude, the authors support the idea that under the given pandemic restrictions, the trial stage of proceedings was the most digital-friendly and ready to implement advanced technology contrary to the pre-trial stage. As for the pre-trial stage of proceedings, there are considerable legal issues in the implementation of digital technology for the criminal investigation that are still to be solved. It is not possible to realize the adversarial principle to its fullest and to ensure fair criminal justice unless these problems are solved.

REFERENCES

- Government of the Kirov region. (2020). *Order of the Government of the Kirov Region of March 31, 2020 No. 130-P "On amending the Order of the Kirov region of March 25, 2020 No. 122-P"*. <http://publication.pravo.gov.ru/Document/View/4300202003310001> (access date: September 18, 2021).
- Grigoriev, A. A. (2020). Digitalization of criminal proceedings: development prospects. In B. M. Magomedov (Ed.), *Actual problems of economics and law. Collection of scientific articles based on the materials of the international scientific and practical conference. In 2 parts* (pp. 248-251). Rostov-on-Don: Rostov Institute (branch) of the Federal State Budgetary Educational Institution of Higher Education "All-Russian State University of Justice (RPA of the Ministry of Justice of Russia)" in Rostov-on-Don.
- The Law Chamber of the Kirov region. (2020, April 3). *Investigative actions in a pandemic*. https://apkirov.fparf.ru/news/all_news/detail/75497/ (access date: March 15, 2021).
- Markovicheva, E. V. (2020). Digitalization of the criminal process: Myths and reality. In V. A. Sementsov (Ed.), *Judicial reform in modern Russia: Results, problems, prospects. Materials of the International scientific and practical conference dedicated to the 100th anniversary of the Kuban State University* (pp. 213-217). Krasnodar: Kuban State University.
- Maslennikova, L. N. (2020). On the question of the political significance of digitalization of pre-trial proceedings in criminal proceedings. *Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia*, 3, 34-36. <https://doi.org/10.24411/2073-0454-2020-10127>
- Meeting of judges of courts of general jurisdiction and courts of arbitration. (2021, February 9). *Vladimir Putin took part by video conference in a meeting of judges of courts of general jurisdiction and arbitration courts of the Russian Federation on the results of work in 2020 and tasks for 2021*. <http://www.kremlin.ru/events/president/transcripts/64980> (access date: September 14, 2021).
- Pobedkin, A. V. (2020). Ethical and axiological risks of the fashion for digitalization for criminal proceedings (on the fallacy of the technological approach to the criminal process. *Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia*, 3, 50-55. <https://doi.org/10.24411/2073-0454-2020-10132>
- Presidium of the Supreme Court of the Russian Federation. (2020). *Review on certain issues of judicial practice related to the application of legislation and measures to counteract the spread of a new coronavirus infection (COVID-19) No. 2 on the territory of the Russian Federation"* (approved by the Presidium of the Supreme Court of the Russian Federation on 30.04.2020). <https://www.vsrfr.ru/documents/all/28882/> (access date: September 18, 2021).
- State Duma of the Federal Assembly of the Russian Federation. (2001). *Criminal Procedure Code of the Russian Federation of December 18, 2001 No. 174-FZ* (as amended on 30 December 2021). Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Collection of Legislation of the RF] 24.12.2001, No. 52 (Part 1), Item 4921.
- State Duma of the Federal Assembly of the Russian Federation. (2011). *Federal Law of March 20, 2011 No. 39-FZ "On amending the Criminal Procedure Code of the Russian Federation"*. <http://www.kremlin.ru/acts/bank/32823> (access date: September 18, 2021).
- State Duma of the Federal Assembly of the Russian Federation. (2016). *Federal Law of June 23, 2016 No. 220-FZ "On introduction of amendments to certain legislative acts of the Russian*

Federation with respect to the application of electronic documents in the activities of judicial authorities".
<http://www.kremlin.ru/acts/bank/40933> (access date: September 18, 2021).

Usachev, A. A. (2019). Digitalization of the initial stage of pre-trial proceedings and legal certainty of the Russian criminal process. *Bulletin of the O.E. Kutafin University*, 8, 100-111.

Zuev, S. V. (2018). Electronic criminal case: Pros and cons. *Law and Order: History, Theory, Practice*, 4(19), 6-12.