



## BALTIC JOURNAL OF LAW & POLITICS

A Journal of Vytautas Magnus University  
VOLUME 17, NUMBER 1 (2024)  
ISSN 2029-0454



Cit.: *Baltic Journal of Law & Politics* 17:1 (2024): 21–45  
[https://content.sciendo.com/view/journals/bjlp/  
bjlp-overview.xml](https://content.sciendo.com/view/journals/bjlp/bjlp-overview.xml)  
DOI: 10.2478/bjlp-2024-0002

### VIRTUAL CRIMINAL PROCEEDINGS: THE LITHUANIAN EXPERIENCE

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Received: October 1, 2023; reviews: 2; accepted: January 31, 2024.

#### ABSTRACT

Although remote criminal proceedings have existed in Lithuania for some time, they have never been used as extensively as during the COVID-19 pandemic. The pandemic demonstrated that remote criminal proceedings could help prevent the spread of infectious diseases and at the same time facilitate the criminal justice process by eliminating, for example, the need to spend time travelling to the location of the proceedings or wasting other resources. For this reason, even after the COVID-19 pandemic, remote criminal proceedings remained popular. However, the remote criminal process is not a neutral substitute for the in-person criminal proceedings. It has an impact on the traditional paradigm of criminal proceedings that is not always positive. This article discusses the regulation of remote criminal proceedings in Lithuania by presenting the findings of an empirical study of Lithuanian lawyers' perspectives on the remote criminal process which surveyed more than 100 Lithuanian lawyers (judges, prosecutors, lawyers, and pre-trial investigation officers). The article discusses the main advantages and disadvantages of remote criminal proceedings noted by the professionals and identifies legal problems caused by such mode of proceedings. The paper seeks to demonstrate that the development of remote criminal proceedings should be carried out with caution, taking into account its impact on the quality of criminal proceedings and the rights of the participants.

#### KEYWORDS

Virtual criminal proceedings, remote criminal proceedings, remote criminal justice, virtual criminal justice, videoconferencing, e-justice, COVID-19.

## INTRODUCTION

The COVID-19 pandemic forced state institutions to implement physical distancing as one of the tools to manage the pandemic. However, this tool had its downsides, especially within the criminal justice system. As it was necessary to ensure that criminal proceedings would keep going, courts and law enforcement institutions had to find alternatives for in-person interrogations or court hearings. All around the world, videoconferences (or even audioconferences) have become this alternative. Lithuania was not an exception.

At the beginning of the pandemic, Lithuanian lawyers were skeptical about virtual criminal proceedings. However, as time passed, some Lithuanian lawyers got used to it and even started to see it as a proper substitute for the ordinary post-pandemic court. According to them, virtual legal proceedings are more efficient by helping to save time and financial resources. However, virtual proceedings also pose many risks, such as unjustified restriction of procedural rights and reduced quality of legal proceedings. On a Lithuanian professional website, this debate was even summarized by raising a question whether the remote criminal procedure leads to “progress” or “procedural hooliganism”<sup>1</sup>. The high importance of this issue is also demonstrated by the fact that in 2022, the Research Council of Lithuania (public institution funding and promoting national researcher) decided to allocate funding for the research project that seeks to analyze whether the remote criminal proceedings allows for fair and just proceedings.<sup>2</sup>

There is no apparent answer to the question whether the remote criminal procedure is “hooliganism” or inevitable “progress”. The European legal literature on the subject in English is limited<sup>3</sup>. Meanwhile, the topic has received more attention in the United States, especially after the COVID-19 pandemic had started. Several publications deserve special mention, such as “Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court”<sup>4</sup> by Stanford University researchers and “Remote Criminal Justice”<sup>5</sup> by Jenia I. Turner, professor at Dedman School of Law. Both studies have noted that virtual proceedings have certain benefits. However, at the same time,

<sup>1</sup> Mindaugas Povilanskas, „Nuotolinis teisiamašis posėdis: pažanga ar „procesinis chuliganizmas“, *Teisė.pro* (05 January 2021) // <https://www.teise.pro/index.php/2021/01/05/m-povilanskas-nuotolinis-teisiama-sis-posedis-pazanga-ar-procesinis-chuliganizmas/>

<sup>2</sup> The Research Council of Lithuania, “Podoktorantūros stažuocių 2022 m. kvietimo finansuojamų projektų sąrašas (po apeliacijų išnagrinėjimo),” *The Research Council of Lithuania* (2022): 4 // <https://www.lmt.lt/lt/doclib/ywhyzdzf0kwuszue83dztp6c27qc4bap>

<sup>3</sup> Evert-Jan van der Vlis, “Videoconferencing in Criminal Proceedings,” *Ministry of Security and Justice* (2011) // [www.videoconference-interpreting.net/wp-content/uploads/2014/04/02\\_vanderVlis.pdf](http://www.videoconference-interpreting.net/wp-content/uploads/2014/04/02_vanderVlis.pdf); Penelope Gibs, “Defendants on video – conveyor belt justice or a revolution in access?” *Transform Justice* (October 2017) // <https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>; Giulia Angiolini, “Remote Participation in Criminal Proceedings: Does the Reformed Italian Regulation Represent an Application Extension Able to Conflict with the Right to a Fair Trial?” *European Criminal Law Review* 9(2) (2019): 187–201; Serena Quattrocchio, “Participatory Rights in Comparative Criminal Justice. Similarities and Divergences Within the Framework of the European Law”: 449–509; in: Serena Quattrocchio, Stefano Ruggeri (eds.), *Personal Participation in Criminal Proceedings, A Comparative Study of Participatory Safeguards and in absentia Trials in Europe* (Springer, Cham, Switzerland, 2019); Fair Trials, “Justice under lockdown in Europe: a survey on the impact of COVID-19 on defence rights in Europe,” *Fair Trials* (25 November 2020) // <https://www.fairtrials.org/app/uploads/2021/11/justice-under-lockdown.pdf>; Laura Hoyano, “Postage Stamp Justice? Virtual Trials in the Crown Courts under the Police, Crime, Sentencing and Courts Bill,” *Criminal Law Review* 12 (2021): 1029–1050; Vânia Costa Ramos, Alexis Anagnostakis, Amedeo Barletta, Jaanus Tehver, Nicola Canestrini, “European Criminal Bar Association statement of principles on the use of video-conferencing in criminal cases in a Post-Covid-19 World,” *New Journal of European Criminal Law* 12(3) (2021): 476–493.

<sup>4</sup> Taylor Benninger, Courtney Colwell, Debbie Mukamal, Leah Plachinski, “Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court,” *Stanford Criminal Justice Center* (August 2021) // <https://law.stanford.edu/publications/virtual-justice-a-national-study-analyzing-the-transition-to-remote-criminal-court/>

<sup>5</sup> Jenia Iontcheva Turner, “Remote Criminal Justice,” *Texas Tech Law Review* 53 (2021): 197–271.

they raise concerns about a negative impact on the fairness of proceedings and emphasized the need for further research (especially empirical) on this topic before using it more widely in the criminal justice system.

This article does not aim to be an in-depth analysis of virtual legal proceedings, providing definitive answers. Instead, it seeks to contribute to the ongoing debate at the European level by presenting the empirical study conducted in Lithuania and exploring Lithuanian legal professionals' approach towards this legal phenomenon.

## 1. THE LEGAL FRAMEWORK OF REMOTE CRIMINAL PROCEEDINGS IN LITHUANIA

To understand the approach of Lithuanian lawyers towards remote criminal proceedings, it is essential to introduce legal rules which regulate the phenomenon and context of their adoption. In Lithuania, legal rules regulating remote criminal proceedings have existed since January 15, 2000. On this day, legislators adopted amendments to the Code of Criminal Procedure of the Republic of Lithuania<sup>6</sup> (the Lithuanian Code of Criminal Procedure), which allowed for a person accused of genocide or war crimes at the court of the first instance to be present remotely (via videoconference) on condition that the accused is unable to appear before the court physically due to his health condition.

The second development was introduced on May 1, 2003, when the new Lithuanian Code of Criminal Procedure<sup>7</sup> entered into force. At first, it allowed examining remotely two types of witnesses: an anonymous witness and a witness subject to witness protection. Over time, the legislator has expanded the possibilities of remote criminal proceedings. First, it allowed certain persons to participate remotely in the proceedings: a translator (Art. 43 CCP), a detained suspect or accused at the court hearing on certain detention matters (Art. 127, 130, 233 CCP), an accused who cannot come to a court hearing physically or is in detention (Art. 246 CCP), an accused at a hearing of court of cassation (Art. 375 CCP). Second, it provided more opportunities to hear witnesses remotely in both the pre-trial and trial phases. Besides anonymous witnesses and witnesses subject to witness protection, it allowed examining a witness or a suspect who, due to important reasons, cannot come to a hearing physically (Art. 183, 188-189, 279 CCP), a suspect who is under arrest at the pre-trial stage (Art. 188-189 CCP), an expert (Art. 258-286 CCP).

However, until the COVID-19 pandemic status quo remained unchanged – the Lithuanian Code of Criminal Procedure provided a *numerus clausus* list of situations when it is possible to conduct legal proceedings via videoconference. For example, lawyers (judges, prosecutors, attorneys) could not participate in the proceedings remotely.

The pandemic changed the situation. Nobody wanted to risk the lives and health of the people or shut down courts. Nevertheless, the legislator was slow to adopt the necessary amendments to expand opportunities for videoconferencing in criminal proceedings. However, the main stakeholders in the criminal proceedings (law enforcement institutions, courts) had nowhere else to go but to organize the proceedings remotely, even if the necessary legislation did not exist. This omission received criticism from practitioners and legal scholars<sup>8</sup>. However, this has not led to significant legal disputes because usually

<sup>6</sup> „Lietuvos Respublikos baudžiamojo proceso kodeksas,“ *Valstybės žinios* (1961): 18–148.

<sup>7</sup> „Lietuvos Respublikos baudžiamojo proceso kodeksas,“ *Valstybės žinios* (2000): 37–1341.

<sup>8</sup> Remigijus Merkevičius, „Suėmimo skyrimas Lietuvoje COVID-19 sąlygomis. Ar tikrai galime sau leisti baksnoti į A. Navalno „teismo procesą“ Rusijoje?“ *Teise.pro* (01 February 2021) // <https://www.teise.pro>

the proceedings were organized remotely only with a consensus of all participants. Decision makers (usually judges) did not want to risk infringing the rights of the participants in the proceedings, thus, avoided organizing remote hearings without mutual consent.

The legal vacuum was filled on June 1, 2021, when the legislator adopted a new Article 8<sup>2</sup> of the Lithuanian Code of Criminal Procedure. In essence, under certain conditions, this article allows conducting fully remote criminal proceedings. The first part of Article 8<sup>2</sup> provides conditions under which it allows to conduct of any part of criminal proceedings in the pre-trial stage (pre-trial investigation) remotely: 1) it is an exceptional case; 2) it is not possible to ensure that this part of the pre-trial investigation can be carried out in a usual way; 3) there are adequate technical capabilities for doing so; 4) it is reasonably believed that the pre-trial investigation can be carried out more quickly this way. If a participant in this part of a pre-trial investigation (for example, a witness) reasonably does not agree with a remote method, this part of the procedure cannot be conducted remotely.

The second part provides conditions for the court proceedings. Four of them match pre-trial phase conditions. And there are two additional ones: 5) it will not prevent a complete and objective examination of all the circumstances of the case; 6) the rights of the participants of the procedure will be safeguarded. Contrary to the pre-trial investigation, if a participant in the court proceedings disagrees with a remote method, it cannot be carried out remotely.

## 2. RESEARCH METHODOLOGY

The research consists of three parts: 1) literature and case law review; 2) qualitative interviews with Lithuanian lawyers; and 3) a quantitative survey of Lithuanian lawyers.

The research begins with a literature and case law review, which provides helpful information about lawyers' experience in remote criminal proceedings and the legal problems they encountered. It was largely American literature, as this phenomenon has been studied the most there. In addition to the studies already brought up, the following research is also worth mentioning: "Court Appearances in Criminal Proceedings Through Telepresence. Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology" (2020) by RAND corporation, an American non-profit global policy think tank<sup>9</sup>, "How Video Changes the Conversation: Social Science Research on Communication Over Video and Implications for the Criminal Courtroom" by Lisa Bailey Vavonese, Elizabeth Ling, Rosalie Joy, Samantha Kobor<sup>10</sup>, and "Criminal Justice and Videoconferencing Technology: The Remote Defendant" (2004) by professor Anne Bowen Poulin<sup>11</sup>. Several European sources were also helpful (see note 3).

The literature review helped to come up with questions for the second phase of the research – semi-structured qualitative interviews. It involved oral interviews with 3 judges, 3 prosecutors, 2 defense attorneys, and 3 pre-trial investigation officers

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<sup>9</sup> Camille Gourdet, Amanda R. Witwer, Lynn Langton, Duren Banks, Michael G. Planty, Dulani Woods, Brian A. Jackson, "Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology," *RAND Corporation* (2020) // [https://www.rand.org/pubs/research\\_reports/RR3222.html](https://www.rand.org/pubs/research_reports/RR3222.html)

<sup>10</sup> Lisa Bailey Vavonese, Elizabeth Ling, Rosalie Joy, Samantha Kobor, "How Video Changes the Conversation: Social Science Research on Communication Over Video and Implications for the Criminal Courtroom," *Center for Court Innovation* (2020) // <https://www.innovatingjustice.org/publications/video-changes-conversation-social-science-research-communication>

<sup>11</sup> Anne Bowen Poulin, "Criminal Justice and Videoconferencing Technology: the Remote Defendant," *Tulane Law Review* 78(4) (2004): 1089–1168.

(investigators) in February-March 2022. Each took 30–60 minutes. Given the number of respondents, this part of the study aimed not to collect representative statistics on remote criminal proceedings but to gain a deeper insight into the researched phenomenon in Lithuania and to define further research directions.

The questions included demographic questions, questions on the organization of remote criminal proceedings during the pandemic, legal regulation, the possibilities (technical, etc.) for the participants in the proceedings to take part in the process remotely, remote criminal proceedings during the pre-trial investigation and the trial, the attorney-client communication, and the assessment of the remote criminal proceedings.

The last step of the research was a quantitative survey of Lithuanian judges, prosecutors, and criminal law attorneys. 32 judges of criminal cases have responded to the survey, which is ~4,5% of the 721 Lithuanian judges on duty in Lithuanian courts in 2021<sup>12</sup>. However, only a small part of these 721 judges hears criminal cases. Therefore, it is reasonable to assume that about 10% of Lithuanian judges who hear criminal cases were interviewed during the survey. 41 prosecutors responded to the survey, which is ~6,6% of the 621 prosecutors on duty in Lithuanian prosecutor's offices in 2021<sup>13</sup>. 28 criminal law attorneys have responded to the survey. Lithuania has around 3 000 attorneys and assistant attorneys. However, it is complicated to determine how many participate in criminal proceedings regularly.

The quantitative survey questionnaire consisted of 10 questions (3 demographic questions and 7 substantive questions). Close-ended and open-ended substantive questions focused on the advantages and disadvantages of remote criminal proceedings and the possibilities of these proceedings after the pandemic.

Almost all the respondents were highly experienced in criminal proceedings (*Table 1*). And nearly all respondents have participated in remote criminal proceedings (99%) (*Table 2*).

*Table 1. How many years of experience do you have practicing in criminal proceedings?*

Period (years)	ALL	JUDGES	PROSECUTORS <sup>14</sup>	ATTORNEYS
0–5	8.9% (9)	28.1% (9)	0	0
6–10	12.9% (13)	15.6% (5)	0	28.6% (8)
11–15	7.9% (8)	12.5% (4)	2.4% (1)	10.7% (3)
16–20	14.9% (15)	9.4% (3)	12.2% (5)	25% (7)
20 <	55.4% (56)	34.4% (11)	85.4% (35)	35.7% (10)

*Table 2. Have you ever been involved in remote criminal proceedings?\**

Answer	ALL	JUDGES	PROSECUTORS	ATTORNEYS
Yes	99% (100)	100% (32)	100% (41)	96.4% (27)
No	1% (1)	0	0	3.6% (1)
Did not answer	0	0	0	0

\* Remote criminal proceedings are defined as criminal proceedings (pre-trial investigation and court proceedings) conducted remotely via video or audio conferencing using applications such as Teams, Zoom, etc.

<sup>12</sup> Lietuvos teismai, "Lietuvos teismai: veiklos rezultatai," *Lietuvos teismai* (2022): 6 // <https://www.teismai.lt/data/public/uploads/2022/03/teismai2022.pdf>

<sup>13</sup> Lietuvos Respublikos prokuratūra, "Lietuvos Respublikos prokuratūros veiklos 2021 metais ataskaita," *Lietuvos Respublikos prokuratūra* (2022): 30 // <https://www.prokuraturos.lt/data/public/uploads/2022/03/2021-m.-ataskaita-2022-03-01-nr.-17.9.-222803.21.pdf>

<sup>14</sup> This statistic is explained by the fact that the average age of prosecutors in the Republic of Lithuania is very high. For example, in 2021, prosecutors aged 61 and over accounted for 6.2% of all prosecutors, 31.9% aged 51–60, 55% aged 41–50, 6.8% aged 31–40 and 0% aged under 30 (see *Ibid.*, 31).



### 3. RESEARCH RESULTS

The research results will be presented by starting with the advantages and disadvantages of remote criminal proceedings, followed by a discussion about the legal problems caused by remote criminal proceedings.

#### 3.1. The Advantages and Disadvantages of Remote Criminal Proceedings

Remote criminal proceedings are popular for their efficiency. It helps to save time, money, and other resources. However, it comes with a cost. In some cases, it can hamper the quality of the proceedings and the essential procedural rights of the participants. To properly balance the different interests at stake in criminal proceedings and to correctly address the issue of videoconferencing (for example, to use it or not, and if so, how), it is important to be familiar with the advantages and disadvantages of remote criminal proceedings.

In this section, the overview of the advantages and disadvantages is based mainly on the responses of Lithuanian lawyers. However, studies of foreign literature and Lithuanian lawyers' opinion on remote criminal proceedings have shown that most of the advantages and disadvantages of remote criminal proceedings in Lithuania and other jurisdictions overlap. Therefore, the responses of Lithuanian lawyers will be supplemented by the insights of foreign researchers to give a more complete picture.

##### 3.1.1. Advantages

The most frequently mentioned advantage of remote criminal proceedings is saving time, money, and other resources, mainly due to the reduced need to travel. Lawyers and other participants of the proceedings do not need to go to courts or law enforcement institutions. Lawyers also points out that it is not only the participants in the proceedings who experience it. For example, as there is no need to transport an arrested suspect or accused to the place of proceedings, time and other resources are saved by those responsible for the transportation.

The quantitative study also whether remote criminal proceedings save time for the different participants in the proceedings (*Tables 3–8*). Respondents believe that *witnesses/experts* are the most likely to enjoy this advantage. Witnesses/experts are followed by attorneys, victims, prosecutors, and suspects/accused. A court (a judge) is the least likely to experience this advantage. Prosecutors and attorneys were the most optimistic about this advantage, while judges were the least.

*Table 3. Do remote criminal proceedings save time and other resources for a court (judge)?*

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	25% (8)	28.1% (9)	28.1% (9)	12.5% (4)	6.2% (2)	0
Prosecutors	29.3% (12)	26.8% (11)	34.1% (14)	4.9% (2)	0	4.9% (2)
Attorneys	48.1% (13)	29.6% (8)	7.4% (2)	11.1% (3)	3.7% (1)	0
All	32.7% (33)	27.7% (28)	24.8% (25)	8.9% (9)	3% (3)	2% (2)

*Table 4. Do remote criminal proceedings save time and other resources for a prosecutor?*

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	35.5% (11)	38.7% (12)	12.9% (4)	3.2% (1)	0	9.7% (3)
Prosecutors	51.2% (21)	24.4% (10)	22% (9)	2.4% (1)	0	0
Attorneys	57.7% (15)	19.2% (5)	3.8% (1)	3.8% (1)	0	15.4% (4)

All	46.5% (47)	26.7% (27)	13.9% (14)	3% (3)	0	6.9% (7)
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Table 5. Do remote criminal proceedings save time and other resources for an attorney?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	37.5% (12)	40.6% (13)	9.4% (3)	6.2% (2)	0	6.2% (2)
Prosecutors	43.9% (18)	36.6% (15)	7.3% (3)	0	0	12.2% (5)
Attorneys	44.4% (12)	44.4% (12)	3.7% (1)	3.7% (1)	3.7% (1)	0
All	41.6% (42)	39.6% (40)	6.9% (7)	3% (3)	1% (1)	6.9% (7)

Table 6. Do remote criminal proceedings save time and other resources for a suspected/accused?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	18.8% (6)	56.2% (18)	12.5% (4)	6.2% (2)	3.1% (1)	3.1% (1)
Prosecutors	43.9% (18)	36.6% (15)	7.3% (3)	12.2% (5)	0	7.3% (3)
Attorneys	33.3% (9)	40.7% (11)	11.1% (3)	7.4% (2)	0	7.4% (2)
All	32.7% (33)	43.6% (44)	9.9% (10)	8.9% (5)	1% (1)	5.9% (6)

Table 7. Do remote criminal proceedings save time and other resources for a victim?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	21.9% (7)	56.2% (18)	12.5% (4)	6.2% (2)	0	3.1% (1)
Prosecutors	43.9% (18)	36.6% (15)	14.6% (6)	4.9% (2)	0	7.3% (3)
Attorneys	37% (10)	33.3% (9)	14,8% (4)	0	0	14,8% (4)
All	34.7% (35)	41.6% (42)	13.9% (14)	4% (4)	0	7.9% (8)

Table 8. Do remote criminal proceedings save time and other resources for a witness/expert?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	28.1% (9)	59.4% (19)	9.4% (3)	3.1% (1)	0	0
Prosecutors	46.3% (19)	34.1% (14)	7.3% (3)	4.9% (2)	0	7.3% (3)
Attorneys	53.8% (14)	30.8% (8)	3.8% (1)	0	0	11.5% (3)
All	41.6% (42)	40.6% (41)	6.9% (7)	3% (3)	0	5.9% (6)

It is widely believed that video conferencing makes criminal proceedings more expeditious and efficient. This can either expedite the whole proceedings or a specific stage of it. This advantage was particularly pronounced during the COVID-19 pandemic, as it was the sole option to ensure the continuity of criminal proceedings.

However, Lithuanian lawyers believe that videoconferencing expedites the proceedings not only during the COVID-19 pandemic. Lithuania has high emigration rates – many Lithuanians live abroad. Lawyers mentioned that videoconferencing particularly speeds up criminal proceedings in cases involving people either living abroad or far from the venue of the proceedings. Some lawyers even believe that current practice of videoconferencing allows them to avoid formal international mutual legal assistance requirements what helps saving time (this issue will be discussed in more detail in part 3.2.3).

One judge also pointed out that remote criminal proceedings provide organizational and technical flexibility. For example, you can immediately call someone and ask them to attend a hearing remotely; it is possible to access the case file more quickly, add evidence to the case, examine electronic evidence (video, audio recordings, or other data). Another attorney noticed that it should facilitate formalization and fixation of the process (for example, by recording a court hearing).

The quantitative study also included the question about this advantage (Table 9). Prosecutors are the most likely to experience this advantage, while attorneys are the least likely.

Table 9. Do remote criminal proceedings help expedite pre-trial investigations court proceedings?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	15.6% (5)	31.2% (10)	31.2% (10)	15.6% (5)	0	6.2% (2)
Prosecutors	22% (9)	29.3% (12)	26.8% (11)	17.1% (7)	4.9% (2)	0
Attorneys	14.8% (4)	33.3% (9)	33.3% (9)	3.7% (1)	14.8% (4)	0
All	17.8% (18)	30.7% (31)	29.7% (30)	12.9% (13)	5.9% (6)	2% (2)

Video conferencing sometimes can also make the process more comprehensive by allowing one to examine more witnesses. For example, those witnesses living abroad or far from the court or law enforcement institution who otherwise could not be heard in a case. One Lithuanian judge shared about how he avoids physically summoning witnesses who live in remote areas, because the lack of public transport makes it difficult for such witnesses to come to a court hearing and go back after. He addresses this problem by hearing such witnesses remotely. Participants of the quantitative survey were also asked about this advantage (Table 10). Attorneys capture this advantage the most often, while judges are the least likely. It is also notable that this advantage is seen by lawyers much less often than previous ones (saving resources and expediting the process).

Table 10. Do remote criminal proceedings help the pre-trial investigation and court proceedings to be more comprehensive?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	6.2% (2)	6.2% (2)	21.9% (7)	18.8% (6)	40.6% (13)	6.2% (2)
Prosecutors	0	12.2% (5)	24.4% (10)	19.5% (8)	36.6% (15)	7.3% (3)
Attorneys	7.4% (2)	0	33.3% (9)	33.3% (9)	22.2% (6)	3.7% (1)
All	4% (4)	6.9% (7)	25.7% (26)	22.8% (23)	33.7% (34)	5.9% (6)

Sometimes it helps to increase access to justice. For example, it allows people who live far away from the place where the proceedings are taking place and would otherwise be unable to attend. One judge mentioned a case where he during a trial heard a victim living abroad remotely, who otherwise would not have been able to attend the trial because she had to care for a seriously ill family member. Witnesses living in remote areas, as discussed above, should also be mentioned. Lawyers who participated in the quantitative survey were also asked about this advantage (Table 11). Judges capture this advantage the most often, while attorneys are the least likely.

Table 11. Do remote criminal proceedings increase access to justice?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	3.1% (1)	9.4% (3)	28.1% (9)	12.5% (4)	34.4% (11)	12.5% (4)
Prosecutors	2.6% (1)	12.8% (5)	12.8% (5)	15.4% (6)	33.3% (13)	23.1% (9)
Attorneys	3.7% (1)	0	18.5% (5)	40.7% (11)	18.5% (5)	18.5% (5)
All	3% (3)	7.9% (8)	18.8% (19)	20.8% (21)	28.7% (29)	17.8% (18)



Many lawyers also mentioned comfort as an advantage. For example, it is unnecessary to look so formal, to use energy physically going to the place of the proceedings, etc. One attorney pointed out that some clients prefer to attend the proceedings remotely because it is less stressful. It also facilitates communication between the attorney and the defendant during the hearing when they are in the same room (e. g. a law firm). Another judge pointed out that in cases where the detained defendant participates in the proceedings remotely, he does not experience discomfort caused by his transportation to the proceedings (body searches, handcuffs, long waiting, etc.).

Another important advantage of remote criminal proceedings is the protection of the physical and mental health of the participants. This advantage was particularly pronounced during the COVID-19 pandemic, as it helped to protect participants of criminal proceedings from COVID-19 disease. It also helps protect the victims' mental health, as confronting the perpetrator can often be very stressful. For example, one attorney shared about a case where he recommended for his client, who was accused of recklessly taking a life in a car accident, to attend court hearings remotely, as attending in person would be very stressful for the relatives of the victim.

Finally, the literature identifies many other advantages of remote criminal proceedings that Lithuanian lawyers have not mentioned or elaborated on, such as that it: reduces detention time for defendants;<sup>15</sup> increases access to translation services<sup>16</sup> and legal aid;<sup>17</sup> and improves safety.<sup>18</sup>

### 3.1.2. Disadvantages

There are a number of disadvantages to remote criminal proceedings. The most mentioned are technical difficulties, the negative impact on the relationship between the defendant and the defense attorney, and the risk of less comprehensive and credible testimony. Many issues are not only technical but also raise critical legal issues. For this reason, most of the disadvantages will be presented only briefly in this section. Essential ones will be discussed in more detail in the next section on the legal challenges of remote criminal proceedings.

The negative impact on the relationship between the defendant and the defense attorney takes two main forms: the negative impact on the confidentiality of their communication and the effectiveness of the defense in general. In a specific case nature of the issues depend on the location of the defense council and the defendant during the process<sup>19</sup>. If a defense attorney is not present in person in the proceedings (e. g. in a courtroom), his communication with the other participants to the proceedings is hampered, making it more difficult for him to represent the defendant's interests effectively. If the defendant and the defense attorney are in different locations during the proceedings, their communication becomes more complicated. According to one attorney, this makes it particularly difficult to build trust between the defendant and the defense attorney if they do not have the opportunity to talk face-to-face. If the attorney is present in the proceedings in person, but his defendant is detained and participates in the proceedings remotely, there are issues with ensuring the confidentiality

<sup>15</sup> Camille Gourdet, Amanda R. Witwer, Lynn Langton, Duren Banks, Michael G. Planty, Dulani Woods, Brian A. Jackson, *supra* note 9, 5.

<sup>16</sup> Mike L. Bridenback, "Study of State Trial Courts Use of Remote Technology," *National Association for Presiding Judges and Court Executive Officers* (2016): 8 // <https://napco4courtleaders.org/wp-content/uploads/2016/08/Remote-Technology-Report-April-2016.pdf>

<sup>17</sup> Turner, *supra* note 5, 212–213.

<sup>18</sup> Citizens' Economy Efficiency Commission, "Video Arraignment 2.0: Streaming Justice," (2019): 11.

<sup>19</sup> See more in Bowen, *supra* note 11, 1128–1133.

of his communication with his defense attorney. Those cannot be solved without special technical measures. Respondents to the quantitative survey were also asked about the confidentiality issue (Table 12). And whether the remote proceedings prejudice the rights of the suspect/accused and the defense in general (Table 13). Evidently, these shortcomings are most often perceived by attorneys and least often by their procedural opponents – prosecutors.

Table 12. Do remote criminal proceedings undermine attorney-client privilege?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	6.2% (2)	18.8% (6)	37.5% (12)	15.6% (5)	9.4% (3)	12.5% (4)
Prosecutors	5% (2)	10% (4)	15% (6)	15% (6)	32.5% (13)	22.5% (9)
Attorneys	22.2% (6)	25.9% (7)	37% (10)	3.7% (1)	11.1% (3)	0
All	9.9% (10)	16.8% (17)	27.7% (28)	11.9% (12)	18.8% (19)	12.9% (13)

Table 13. Whether remote criminal proceedings prejudice the rights of the suspect/accused and the defense?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	9.7% (3)	9.7% (3)	35.5% (11)	19.4% (6)	19.4% (6)	6.5% (2)
Prosecutors	2.4% (1)	0	14.6% (6)	17.1% (7)	61% (25)	4.9% (2)
Attorneys	14.8% (4)	25.9% (7)	18.5% (5)	18.5% (5)	18.5% (5)	3.7% (1)
All	7.9% (8)	9.9% (10)	21.8% (22)	17.8% (18)	35.6% (36)	5% (5)

Another issue often mentioned is the risk of less comprehensive and credible (reliable) witness testimony. Less comprehensive indicates that it is less accurate and detailed. It is less credible because lying or concealing information during a remote hearing is simpler. Three causes of this disadvantage can be distinguished.

First, the evaluator of testimony (e.g. a judge) loses the opportunity to evaluate some of the information that does not reach him because of the remote way the testimony is given (e.g., body language, voice tone). According to one judge, when a witness testifies in person, it is possible to “scan” and “get to know” him, which “allows you to assess his sincerity.” This can be judged, for example, by his “conclusory actions,” whether the witness “throws himself around [i. e. testifies nervously].”

Second, it is impossible to ensure that a witness being heard is not subjected to undue influence or uses forbidden instruments (e.g., notes). For example, one surveyed attorney claimed to have given unauthorized instructions to his client during a remote hearing. The attorney used a piece of paper and the fact that they were both in the same room (a law firm) and that the camera only showed the upper part of their bodies. Another judge told about the case where, during remote witness examinations, several witnesses who were employees of the same company testified remotely from the same office at their workplace, even though the Lithuanian Code of Criminal Procedure forbids a witness who has not yet been heard in the case from taking part in the hearing of other witnesses.

Third, the courtroom provides greater sincerity and concentration for the examined person. For example, one judge noticed that “a witness in the courtroom is, on the one hand, more focused and on the other hand more structured. There is a greater risk of lying. He tries to be more sincere.” Lithuanian lawyers also point out that witnesses sometimes testify remotely without proper concentration while doing something else, such as driving or walking the dog (examples are real).

Lithuanian lawyers have also been asked whether remote testimony is less comprehensive and authentic.<sup>20</sup> (Tables 14–15). Attorneys are the most concerned about the comprehensiveness and authenticity of remote testimony, while prosecutors are least concerned. This is also reflected in the interviews. Because of the credibility risk, several attorneys said that they have objected to remote hearings of prosecution witnesses. Meanwhile, some lawyers (especially prosecutors) pointed out that it is possible to ensure the reliability of the remote testimony in other ways. For example, remote testimony is usually recorded, thus, after the hearing it is possible to rewatch it and reevaluate the witness. Also, since in Lithuania most of the witnesses are usually interrogated during the pre-trial stage by investigation officers, it is possible to compare this testimony to the one given in court.

Table 14. Do remote criminal proceedings create risks to the authenticity of witness testimony?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	12.5% (4)	25% (8)	25% (8)	15.6% (5)	15.6% (5)	6.2% (2)
Prosecutors	10% (4)	12.5% (5)	22.5% (9)	25% (10)	27.5% (11)	2.5% (1)
Attorneys	25.9% (7)	33.3% (9)	11.1% (3)	25.9% (7)	3.7% (1)	0
All	14.9% (15)	21.8% (22)	19.8% (20)	21.8% (22)	16.8% (17)	3% (3)

Table 15. Is remote testimony less comprehensive?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	6.2% (2)	9.4% (3)	31.2% (10)	34.4% (11)	15.6% (5)	3.1% (1)
Prosecutors	5% (2)	20% (8)	22.5% (9)	20% (8)	32.5% (13)	0
Attorneys	11.1% (3)	33.3% (9)	33.3% (9)	14.8% (4)	7.4% (2)	0
All	6.9% (7)	19.8% (20)	28.7% (29)	22.8% (23)	19.8% (20)	1% (1)

Lawyers have also pointed out that remote criminal proceedings are less solemn and cause problems maintaining discipline. For example, one judge pointed out that “<...> there are also odd situations when people are fixing their dentures or drinking alcoholic beverages during the proceedings without realizing that the other participants are seeing them”. The same judge points out that discipline problems arise when a court hearing is attended by many participants. Another judge remarked on the less solemn nature of the proceedings: “<...> when a participant speaks and looks at the monitor, the importance of the proceedings “fades”; it can seem like an ordinary remote meeting of the members of a garden community.” Some foreign researchers believe that this can undermine confidence in the justice system and even cast doubt on its legitimacy.<sup>21</sup> The quantitative survey also asked about this disadvantage (Table 16). Judges and attorneys are the most concerned about this disadvantage.

Table 16. Do remote criminal proceedings reduce the solemnity of court proceedings and make it more difficult to maintain discipline?

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	21.9% (7)	21.9% (7)	25% (8)	15.6% (5)	9.4% (3)	6.2% (2)
Prosecutors	14.6% (6)	12.2% (5)	9.8% (4)	26.8% (11)	29.3% (12)	7.3% (3)
Attorneys	32.1% (9)	7.1% (2)	28.6% (8)	21.4% (6)	10.7% (3)	0
All	21.8% (22)	13.9% (14)	19.8% (20)	21.8% (22)	17.8% (18)	5% (5)

<sup>20</sup> Authenticity marks testimony’s correspondence to reality.

<sup>21</sup> Taylor Benninger, Courtney Colwell, Debbie Mukamal, Leah Plachinski, *supra* note 4, 163.

It is also noted that remote criminal proceedings reduce the level of engagement in the proceedings. Remote participation makes the process more difficult to understand, and technical problems can lead to fatigue, reducing the participants' engagement in the proceedings.<sup>22</sup> A study in the UK found that defendants in remote proceedings were less likely to have a defense council, although it was free of charge.<sup>23</sup> One Lithuanian judge also stated that "the remote process is more time-consuming, more effort-consuming and more frustrating than the live process. You must constantly check that everyone is online and can hear and see. We are watching the person on the screen much more closely because we do not see, we do not feel the other non-verbal information that we are used to seeing naturally in a live hearing; it is much more tiring". This was also asked in the quantitative survey (*Table 17*). Attorneys are the most likely to notice this disadvantage, prosecutors the least.

*Table 17. Do remote criminal proceedings lead to a lower level of activity (involvement) of the participants in the proceedings?*

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	13.3% (4)	3.3% (1)	40% (12)	23.3% (7)	10% (3)	10% (3)
Prosecutors	4.9% (2)	14.6% (6)	22% (9)	22% (9)	31.7% (13)	4.9% (2)
Attorneys	14.8% (4)	22.2% (6)	29.6% (8)	14.8% (4)	14.8% (4)	3.7% (1)
All	9.9% (10)	12.9% (13)	28.7% (29)	19.8% (20)	19.8% (20)	5.9% (6)

Lawyers also frequently mention technical issues that complicate remote criminal proceedings. Especially public actors (courts, prosecutors, and law enforcement institutions, such as police) complain about the lack of technical facilities (both software and hardware). Lawyers also point out that the participants in the proceedings do not always have adequate technical capabilities to participate in the process remotely (especially elderly and socially vulnerable persons). Technical difficulties sometimes expand hearings in time and even makes to postpone them. Technical problems distract and undermines the concentration, continuity of the proceedings, and quality of communication with participants of the proceedings. Sometimes it is more difficult to submit and assess evidence (e. g. documents). Solving technical problems is very tiring, making remote hearings more exhausting than in-person hearings. Technical difficulties are particularly acute when the court hearing is only partly remote (i. e. some of the participants in the proceedings are present in person). The issue of technical problems were also raised in the quantitative survey (*Table 18*).

*Table 18. Are there technical difficulties with remote criminal proceedings?*

	Always	Often	Sometimes	Rarely	Never	No opinion
Judges	12.5% (4)	21.9% (7)	34.4% (11)	21.9% (7)	9.4% (3)	0
Prosecutors	9.8% (4)	7.3% (3)	29.3% (12)	26.8% (11)	24.4% (10)	2.4% (1)
Attorneys	11.1% (3)	22.2% (6)	25.9% (7)	33.3% (9)	7.4% (2)	0
All	9.9% (10)	15.8% (16)	29.7% (30)	26.7% (27)	14.9% (15)	1% (1)

<sup>22</sup> Fair Trials, *supra* note 3, 11.

<sup>23</sup> Matthew Terry, Dr. Steve Johnson, Peter Thompson, "Virtual Court pilot: Outcome evaluation," *Ministry of Justice* (2010): 26 // <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

The results show that judges are the most likely to see this as a disadvantage, while prosecutors are the least likely. This can be explained by the fact that it is the judges who have the duty to ensure that hearings run smoothly.

The dehumanization caused by remote criminal proceedings is also widely mentioned<sup>24</sup>. One judge said: “[t]he face-to-face proceedings, when you can clearly see the emotion of the participant, is essential, it makes the proceedings more “alive,” more real... <...>”. One prosecutor also stated, “[a]s a prosecutor, I want to communicate live with the accused and witnesses.” In the article about the impact of COVID-19 on the Lithuanian criminal proceedings, which has received a lot of attention in Lithuania, attorney and legal scholar Remigijus Merkevičius writes that the “remote” investigation of criminal offences and the “remote” procedural/investigative actions are another new procedural paradigm, which is a continuation of the trends of strengthening the power of the criminal authorities, expanding institutional comfort, distancing themselves from the human being, ignoring the “private interest”, etc.<sup>25</sup>

Remote criminal proceedings can have a negative impact on the outcome of the proceedings. Specifically, it is sometimes perceived that suspects/accused are judged more harshly in remote proceedings. On this topic one Lithuanian attorney noticed that decisions on the arrest of defendants are being taken even more “automatic” (e.g., without due consideration) when using videoconferencing.

### 3.2. Legal challenges Created by Remote Criminal Proceedings

The research has demonstrated that remote criminal proceedings not only alter the form of the proceedings, but also raise significant legal issues concerning the procedural rights of the participants and the quality of the proceedings. Due to the limited scope of the article, it is difficult to discuss all these issues in detail and offer solutions for them. Therefore, this section will only discuss the essence of the most important problems, leaving their solution to further research.

#### 3.2.1. Attorney-client Communication

The most significant issue is to ensure the private communication of the defendant in custody with his defense attorney. In Lithuania, several lawyers have stressed that confidential communication with a defendant in custody is not possible at all. In a few cases, the European Court of Human Rights (ECtHR) has found a violation of the right to effective legal assistance because a state failed to allow the defendant in custody and his defense counsel to confer privately during remote criminal proceedings.

According to the ECtHR case law, an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) of the European Convention on Human Rights<sup>26</sup> (ECHR)<sup>27</sup>. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance

<sup>24</sup> For example, see Taylor Benninger, Courtney Colwell, Debbie Mukamal, Leah Plachinski, *supra* note 4, 84–93.

<sup>25</sup> Remigijus Merkevičius, “Lietuvos baudžiamojo proceso diagnozė: COVID-19 pasitikome turėdami prastą savijautą, minorines emocijas ir nuslopintą imunitetą, o kokie išliksime po jo?” *Teise.pro* (25 November 2020) // <https://www.teise.pro/index.php/2020/11/25/r-merkevicius-lietuvos-baudziamojo-proceso-diagnoze-covid-19-pasitikome-turedami-prasta-savijauta-minorines-emocijas-ir-nuslopinta-imuniteta-o-kokie-isliksime-po-jo/>

<sup>26</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, *ETS* 5.

<sup>27</sup> ECtHR, *S. v. Switzerland*, ECtHR Judgement (28 November 1991), App No. 13965, para 48.



would lose much of its usefulness, whereas the ECHR is intended to guarantee rights that are practical and effective. Only in exceptional circumstances may a state restrict confidential contact between a person in detention and his defense counsel.<sup>28</sup>

During remote criminal proceedings this issue of private communication is less acute when the accused (or suspect) is out of custody, as the burden of private communication then falls on him and his defense counsel. For example, they may attend the hearing together from the same room or, if separately, confer by telephone. However, issues arise when a defendant is in custody. As mentioned, in several cases, the ECtHR has found violations of the defendant's right to confer privately with his defense attorney during remote criminal proceedings. In *Zagaría v. Italy* (2008)<sup>29</sup>, the ECtHR found that Italy had violated this right when a prison warden eavesdropped on a telephone conversation between the accused, who was remotely present at the hearing from the prison, and his lawyer during the court hearing. In *Sakhanovskiy v. Russia*, the ECtHR found a violation of the right to effective legal assistance, as the defendant, who had participated in the trial remotely, was only allowed to communicate remotely and for only 15 minutes, with his newly appointed lawyer just before the court hearing. In the reasoning, the ECtHR noted that the applicant might legitimately have felt ill at ease when he discussed his case with his lawyer because the applicant had to use the video-conferencing system installed and operated by the State. The ECtHR issued a similar decision in *Gorbunov and Gorbachev v. Russia* (2016)<sup>30</sup>.

In *Marcello Viola v. Italy* (2006)<sup>31</sup>, the ECtHR has drawn attention to a positive example of how the accused's right to communicate privately with his lawyer can be ensured during remote criminal proceedings. In this case, it was guaranteed that the accused in detention could confer privately with his counsel, present in the courtroom, by a special telephone secured against any attempt at interception. The European Association of Criminal Lawyers also agrees that this method provides sufficient privacy<sup>32</sup>. A similar guarantee is enshrined in French Criminal Code as well (Article 706-1)<sup>33</sup>.

It is worth discussing how Lithuanian lawyers address the problem of private communication between the defense counsel and the defendant in custody. Unfortunately, their experience is not inspiring. First, it should be noted that, at least publicly, no Lithuanian institution has directly addressed this issue. Thus, practitioners deal with the issue *ad hoc*. The author of the research has identified three methods applied in practice. First, before a remote hearing, a judge suggests that the defense counsel can attend the hearing together with his defendant from the same location (e. g., a detention facility). Second, if the defense needed to confer privately during the hearing, a judge would take a break in the hearing and either suggest that the defense counsel go to the detention facility and continue his participation in the hearing from there or suggest that the hearing be continued at another time. Third, a judge would offer the defense to consult via video conference (for example, using Zoom's "breakout rooms").

However, none of these methods sufficiently guarantee the right of defense counsel and the defendant to confer in private. The first approach (the defense council and the defendant in the same room) does not adequately balance the rights of the

<sup>28</sup> ECtHR, *Sakhanovskiy v. Russia*, ECtHR Judgement (2 November 2010), App. No. 21272, para 102.

<sup>29</sup> ECtHR, *Zagaría v. Italy*, ECtHR Judgement (27 November 2007), App. No. 58295.

<sup>30</sup> ECtHR, *Gorbunov and Gorbachev v. Russia*, ECtHR Judgement (1 March 2016), App. No. 43183, 27412.

<sup>31</sup> ECtHR, *Marcello Viola v. Italy*, ECtHR Judgement (5 October 2006), App. No. 45106.

<sup>32</sup> Vânia Costa Ramos, Alexis Anagnostakis, Amedeo Barletta, Jaanus Tehver, Nicola Canestrini, *supra* note 3, 490–491.

<sup>33</sup> "Code de procédure pénale," *Légifrance* (1959) // <https://www.legifrance.gouv.fr/codes/id/LEGIT-EXT000006071154/>



prosecution and the defense, as defense counsel cannot participate in the proceedings remotely as effectively as in person. For example, it is believed that examining a prosecution witness in person is more effective than remote examination. Certainly, this is less of a problem when the hearing is entirely remote (no one participates in person). But even then, there is a widespread perception among Lithuanian lawyers that in places of detention or in prisons communication between defense councils and their defendants is controlled, thus, they cannot confer in private anyways. The second approach (taking a break) is also not an option, as this inconvenience may discourage the defense from a consultation that is needed<sup>34</sup>.

The third solution – video conference consultation using “breakout rooms” - is worth discussing in more detail. Lithuanian defense attorneys have a mixed view towards privacy provided by this method – some of them trust it, while others do not. The ECtHR, in cases *Sakhanovskiy v. Russia*<sup>35</sup> and *Gorbunov and Gorbachev v. Russia*<sup>36</sup>, concluded that the accused might legitimately feel ill at ease when he discusses his case with his lawyer via video-conferencing system installed and operated by the State. Therefore, it seems that ECtHR would not consider that Zoom’s “breakout rooms” ensures sufficient confidentiality. Thus, looking at these three approaches, it seems that Lithuania has not yet found a way to guarantee the right of a defendant in custody to communicate with his defense counsel in private.

Thus, to conclude, during remote criminal proceedings it is especially difficult to ensure private communication between the defense counsel and the defendant in custody, when both attend it from different locations (e. g., defendant in jail, defense council in his office). Perhaps the only remedy is special technical means. This is less of an issue when the defendant is out of custody, as he has more opportunities to confer privately with his defense counsel.

### **3.2.2. The Right of a Criminal Defendant to be Present in the Courtroom and to Participate Effectively in a Criminal Trial**

The duty to guarantee the right of a criminal defendant to be present in the courtroom is one of the essential requirements of Article 6 of the ECHR. Without being present, it is difficult to see how the defendant could exercise the specific rights set out in Article 6 of the ECHR.<sup>37</sup> Article 6 also guarantees the right of an accused to participate effectively in a criminal trial<sup>38</sup>. In general, this includes, *inter alia*, not only their right to be present but also to hear and follow the proceedings.<sup>39</sup>

The remote participation of an accused person in criminal proceedings is different from participation in person. First, it has an impact on the relationship between the defense counsel and the defendant and the effectiveness of the defense in general. Second, it negatively affects a defendant’s experience in the proceedings. Third, it can hurt the outcome of the proceedings (the defendant’s evaluation).<sup>40</sup>

As regards videoconferencing ECtHR has held that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing. However, recourse to this measure in any given case must serve a legitimate aim, and

<sup>34</sup> Turner, *supra* note 5, 217.

<sup>35</sup> *Sakhanovskiy v. Russia*, *supra* note 25, para 104.

<sup>36</sup> *Gorbunov and Gorbachev v. Russia*, *supra* note 27, para 37.

<sup>37</sup> ECtHR, *Arps v. Croatia*, ECtHR Judgement (25 October 2016), App. No. 23444, para 28.

<sup>38</sup> ECtHR, *Murtazaliyeva v. Russia*, ECtHR Judgement (18 December 2018), App. No. 36658, para 91.

<sup>39</sup> ECtHR, *Stanford v. the United Kingdom*, ECtHR Judgement (23 February 1994), App. No. 16757, para 26.

<sup>40</sup> See more in Poulin, *supra* note 11, 1090.

the arrangements for giving evidence must be compatible with the requirements of respect for due process, as laid down in Article 6. In particular, it must be ensured that the applicant can follow the proceedings and be heard without technical impediments and that effective and confidential communication with a lawyer is provided.<sup>41</sup> In *Marcello Viola v. Italy* and *Asciutto v. Italy*, the ECtHR considered these legitimate aims to be the protection of public order, the prevention of crime, the rights of witnesses and the rights to life, liberty and security of witnesses and victims, and the observance of the requirement of a "reasonable length of time for proceedings."

According to Article 246(1) of the Lithuanian Code of Criminal Procedure, if an accused person cannot attend the court where his case is being heard or if an accused is in custody, his participation at the hearing may be ensured using an audio and visual transmission. The rule does not require the accused's consent or any other conditions. Lithuanian case law does not provide for any additional conditions for this as well. The Supreme Court of Lithuania, in one of its cases has ruled that the court of the first instance has reasonably ensured the accused's participation in court hearings remotely, solely because the accused was in custody<sup>42</sup>. In the present case, neither the Supreme Court nor the lower courts followed the case law of the ECtHR, which states that the presence of an accused person in court via video conference can only be ensured if such a measure serves a legitimate aim. Thus, it is highly doubtful whether Lithuanian laws and case law are in line with the ECHR and ECtHR jurisprudence.

This ruling of the Supreme Court of Lithuania, Lithuanian legislation, and surveys reveal a worrying trend about ensuring the participation of a detained accused/suspect in criminal proceedings remotely. Public authorities are especially incentivized to ensure the participation of such an accused/suspect in criminal proceedings remotely, as transporting him to the place of the proceedings is costly in terms of money, time, human resources, etc. For example, in one case in a federal court in New Jersey, the cost of transporting a defendant was around \$30,000, while using videoconferencing to interview a defendant cost only \$45.<sup>43</sup> This trend is also confirmed by Lithuanian lawyers - many of them (especially prosecutors) have a very positive view about the possibility to ensure the participation of detained suspect/accused in proceedings remotely. This trend is worrying as suspects/accused in custody are the most vulnerable to remote criminal proceedings. They face difficulties in communicating with their defense counsel, in exercising their right to an effective legal defense, in taking part in the proceedings, and may even end up facing harsher sentences as a result of participating in this way. Meanwhile, Lithuanian legislation and case law say that being in custody is a sufficient reason to ensure the participation of such a suspect/accused person in the proceedings remotely. Such a provision is incompatible with a person's right to a fair trial as guaranteed by Article 6 of the ECHR. When considering whether to ensure the participation of a detained suspected/accused remotely, it is necessary to make a very careful and thorough assessment as to whether such participation would not undermine the fundamental procedural rights and guarantees of that person.

The remote participation of the accused in criminal proceedings usually restricts his procedural rights, as it is more difficult for the accused to exercise them. Therefore, in line with the case law of the ECtHR, such a restriction must have a legitimate aim

<sup>41</sup> *Sakhnovskiy v. Russia*, *supra* note 25, para 98.

<sup>42</sup> Ruling of the Supreme Court of Lithuania of 21 November 2019 in Criminal Case No 2K-266-719/2019.

<sup>43</sup> Michael D. Roth, "Videoconferencing: Remote Witness Testimony and Adversarial Truth," *UCLA Law Review* 48(1) (2000): 185-219, at 190-191.

and be compatible with the accused's right to a fair trial; namely, the restriction of his procedural rights must be compensated by other means.

### 3.2.3. Avoidance of Mutual Legal Assistance Requests (or European Investigation Orders) for Cross-border Hearings

Normally, cross-border hearings should be carried out by issuing a formal request for international mutual legal assistance (or European investigation order), where the requesting state seeks the assistance of a foreign State in examining a witness who reside abroad via video conference. However, during the research a few respondents mentioned that the increased use of videoconferencing in criminal proceedings during the COVID-19 pandemic has shown that such cross-border hearings can be carried out without mutual legal assistance requests (or European investigation orders). When a witness is cooperative, testifies voluntarily, and the other participants in the proceedings do not object, there is no practical need for the authorities to make an international mutual legal assistance request which requires a lot of paperwork. As a result, a witness in one state is questioned by the authorities of another state without the knowledge of the local authorities. There are legal issues about their legality, and thus their admissibility as evidence. First, does not such a cross-border hearing violate the sovereignty of a local state? Second, under which state's laws is such a witness liable for perjury? And is he liable at all?

Turning to the first issue on sovereignty, one state cannot exercise its authority on the territory of another state without proper authorization. For example, Article 271 of the Swiss Criminal Code<sup>44</sup> stipulates *inter alia* that any person who carries out activities on behalf of a foreign State on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, shall be liable to a custodial sentence up to three years or a to a monetary penalty. Thus, imagine, does a Lithuanian judge remotely examining a witness residing in Switzerland in criminal proceedings in Lithuania, without a mutual legal assistance request to the Swiss authorities, commit an offence under Article 271 of the Swiss Criminal Code?

States have conflicting views on whether cross-border witness hearings without issuing a formal mutual legal assistance request can violate the sovereignty of the local state of the witness. The Upper Tribunal of the United Kingdom in the immigration case of *Agbabiaka*<sup>45</sup> concluded that it is accordingly necessary for there to be permission from such a foreign State (whether on an individual or general basis) before oral evidence can be taken from that State by a court or tribunal in the United Kingdom. On the contrary, the Federal Court of Australia, in the case *Joyce v Sunland Waterfront* (2011),<sup>46</sup> decided that where the Federal Court proposes to take evidence of a witness in a foreign country by video link, the court's discretion is not hampered by any need to consider questions of sovereignty or comity between nations, such as whether the foreign government consents, at least absent any law of the foreign country forbidding the procedure.<sup>47</sup> On top of that, the Australian government has explicitly stated that "a foreign court can take evidence from a witness in Australia using video or audio link.

<sup>44</sup> "Schweizerisches Strafgesetzbuch," *Die Publikationsplattform des Bundesrechts* (1937) // [https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/de](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/de)

<sup>45</sup> *Agbabiaka* (evidence from abroad: Nare guidance) [2021] UKUT 286 (IAC).

<sup>46</sup> *Joyce v Sunland Waterfront* (BVI) Ltd [2011] FCAFC 95; (2011) 195 FCR 213.

<sup>47</sup> Perry Herzfeld, "Video link evidence and foreign government consent," Summer 2011–2012, *Bar News* (2012): 29–31, at 29.

Australia does not consider this to be an incursion on its territorial sovereignty.<sup>48</sup> Thus, to sum up, there is still no clear answer to whether a cross-border witness hearing without mutual legal assistance request violates the sovereignty of a state where a witness physically reside during a remote hearing.

Another problem with cross-border hearings without a mutual legal assistance request is the issue of criminal liability for perjury. The possibility of prosecuting a witness for perjury is an important guarantee to ensure credible testimony. When a cross-border hearing is carried out with a formal mutual legal assistance request, the issue of criminal liability for perjury is usually addressed in the international instrument on mutual legal assistance. Generally, a witness would be prosecuted for perjury under the law of the local (executing) state<sup>49</sup>, since it is the law of that state that imposes the obligation to testify.<sup>50</sup>

However, when a cross-border hearing is carried out without a mutual legal assistance request, the issue of criminal liability for perjury is not specifically regulated. Under which state's laws would a witness be liable for perjury? And would he be liable at all? The witness should not be liable under local law if his hearing took place without a mutual legal assistance request. In that case, he would not have received the mandatory summons to appear for the hearing, nor would he have been warned of the criminal liability for perjury under local law.

Thus, in such a case, the examining state must ensure that the witness can be effectively prosecuted for perjury under its law. Otherwise, such testimony could be unreliable, therefore, inadmissible as evidence. To achieve this, first, the perjury must fall under the criminal jurisdiction of the examining state. For example, this should not be an issue in Lithuania, given the traditional territorial principle of criminal jurisdiction enshrined in Article 4(1) of Lithuanian Criminal Code. Under this provision, the place of commission of a criminal act shall be, *inter alia*, the place in which the consequences provided for by a criminal law occurred. As perjury results in negative consequences to the criminal proceedings in Lithuania, this offense would fall under Lithuanian criminal jurisdiction under the principle of territorial jurisdiction.

Moreover, it should be ensured that the possibility of perjury is not an empty threat for those witnesses that testify remotely. Namely, it shall be established that there is a real possibility of extradition (or surrender) of the offender. It means that an extradition treaty or other relevant instrument between the witness's country and the examining state exists, and such a treaty permits extradition for the crime of perjury.<sup>51</sup> Unfortunately, this leads to another issue: how can a court or law enforcement institution know from which state a witness is testifying if there are no foreign officials near the witness? To conclude, the research shows that when conducting a remote witness hearing without mutual legal assistance request, it is crucial to ensure that the witness would be liable for perjury.

<sup>48</sup> Australian Government Attorney-General Department, "Taking evidence in Australia for Foreign Court Proceedings," *aga.gov.au* (23 October 2020) // <https://www.ag.gov.au/international-relations/publications/taking-evidence-australia-foreign-court-proceedings>

<sup>49</sup> For example, see Council of Europe, Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 8 November 2001, *ETS* 82, Art. 7.

<sup>50</sup> Explanatory Report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, 30 November 2000, *Official Journal of the European Communities* C 37/9/7, Art. 10.

<sup>51</sup> This approach was introduced by the Florida Supreme Court in the case *Harrell v. State*, 709 So.2d 1364, 1368-69 (Fla. 1998).

During the surveys, several Lithuanian lawyers highlighted the issue of admissibility as evidence of cross-border testimony obtained without mutual legal assistance request. However, the author could not find any discussions on this issue in Lithuania. This should receive more attention, as the high mobility of people and the use of video-conferencing mean that testimony in criminal cases is given remotely from abroad much more often than before. For example, states could express their views on this issue at the government level or through case law, as Australia and the United Kingdom have done respectively.

#### 3.2.4. Admissibility of Remote Testimony as Evidence

The most negative attention from lawyers in the context of remote criminal proceedings is focused on remote witness hearings. According to most, witness hearings in criminal proceedings, especially if a witness is important for the case, should only take place in person. Lawyers are concerned about the reliability of remote testimonies mainly because it is not possible to read body language or respond to nonverbal cues, to know if a witness was being coached and due to lack of testimonial formality and interpersonal pressure to be truthful<sup>52</sup> (on the reasons see more in part 4.1.2). On the other hand, the same lawyers believe that remote witness hearings should be possible in certain cases. For example, when a witness is not essential to the case or lives abroad remote hearing is more convenient than a live hearing. Against this backdrop, this subsection aims to provide a deeper insight on how to decide whether a remote examination is a proper choice.

According to literature and a case law, remote witness examination may be in conflict with the accused's right to examine or have examined prosecution witnesses against him. The question is whether this confrontation right of the accused is equally effective when a witness is examined remotely. For much of Europe, the accused's right to examine or have examined witnesses against him is enshrined in Article 6(3)(d) ECHR. The possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial<sup>53</sup> as it saves the accused from hearsay evidence.<sup>54</sup>

However, the accused's right to examine or have examined witnesses against him has exceptions. These exceptions must not infringe upon the rights of the defense, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings<sup>55</sup>. One of the exceptions – non-attendance of witnesses at trial<sup>56</sup>. The author considers that cases of non-attendance of witnesses at trial are a good starting point for assessing the possibility of remote examination as well, as this is the most restrictive measure on the accused's confrontation right.

In *Al-Khawaja and Tahery v. the United Kingdom* (2011) the Court clarified the principles to be applied when a witness does not attend a public trial<sup>57</sup> which were further

<sup>52</sup> Taylor Benninger, Courtney Colwell, Debbie Mukamal, Leah Plachinski, *supra* note 4, 95.

<sup>53</sup> ECtHR, *Tarău v. Romania*, ECtHR Judgement (24 February 2009), App. No. 3584, para 74.

<sup>54</sup> ECtHR, *Thomas v. The United Kingdom*, ECtHR Judgement (10 May 2005), App. No. 19354.

<sup>55</sup> ECtHR, *Al-Khawaja and Tahery v. The United Kingdom*, ECtHR Judgement (15 December 2011), App. No. 26766, 22228, para 118.

<sup>56</sup> For example, see ECtHR, *Van Mechelen and Others v. the Netherlands*, ECtHR Judgement (23 April 1997), App. No. 21363, 21364, 21427, para 58.

<sup>57</sup> "Guide on Article 6 of the European Convention on Human Rights," *Council of Europe/European Court of Human Rights* (last updated 31 August 2022) // [https://www.echr.coe.int/documents/guide\\_art\\_6\\_criminal\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf)



clarified in another important case *Schatschaschwili v. Germany* (2015)<sup>58</sup>. According to the principles developed in *Al-Khawaja and Tahery*, it is necessary to examine in three steps the compatibility with Article 6(1) and Article 6(3)d of the ECHR of proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence. The Court must examine: (1) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence; (2) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (3) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defense as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.<sup>59</sup>

Two-way video link testimony does not restrict the accused's right to examine a witness to the same extent as the admission of the testimony of a witness who did not attend a public trial at all. For example, in the case *W. S. v. Poland* (2007) the ECHR concluded that live direct examination of a witness who have not been examined at a public trial could have been replaced by video-link examination<sup>60</sup>. It is, therefore, reasonable to assume that, under the ECHR, remote testimony is much more likely to meet the requirements of the right to a fair trial than the testimony of a witness whom the accused did not have the opportunity to examine at all. In the author's view, a similar test could be applied to the issue of remote examination but with lower requirements for "passing" it.

Meanwhile, the Lithuanian Code of Criminal Procedure provides more detailed guidance on the conditions for remote witness examination. A witness may be examined remotely during both pre-trial investigation and court proceedings in two cases: (1) when he is subject to witness protection; (2) when he is unable to attend an examination for important reasons. An anonymous witness may also be examined remotely, using acoustic and visual barriers. The so-called one-way videoconferencing (where the witness is seen and heard by other participants of examination, but they are neither seen nor heard by the witness) also allows for the examination of a minor witness or a victim, where this is necessary because of his special protection needs (for example, if it is necessary to protect his mental health).

Lithuanian case law on the abstract ground for remote examination "when the witness is unable to appear in court (examination) for important reasons" is scarce. The Court of Appeal of Lithuania in one case has ruled<sup>61</sup> that the aim to protect the victim of exploitation for forced labor, especially considering the nature of the offenses committed against the victim, the physical and mental violence used, was a sufficiently important reason to examine the victim remotely. Interestingly, in this case, the court relied on the ECtHR's case law on the admission of the testimony of a witness who had not attended trial (*Al-Khawaja and Tahery v. the United Kingdom*). The Supreme Court of Lithuania upheld this decision.<sup>62</sup> The Court of Appeal of Lithuania has also issued a similar decision in another similar case.<sup>63</sup> There are some similar decisions of lower instance courts.

<sup>58</sup> ECtHR, *Schatschaschwili v. Germany*, ECtHR Judgement (15 December 2015), App. No. 9154.

<sup>59</sup> *Ibid.*, para 107.

<sup>60</sup> ECtHR, *W. S. v. Poland*, ECtHR Judgement (19 June 2007), App. No. 21508, para 61.

<sup>61</sup> Ruling of the Court of Appeal of Lithuania of 6 December 2019 in Criminal Case No. 1A-110-318/2019.

<sup>62</sup> Ruling of the Supreme Court of Lithuania of 6 January 2021 in Criminal Case No. 2K-7-73-511/2021.

<sup>63</sup> Ruling of the Court of Appeal of Lithuania of 31 October 2017 in Criminal Case No. 1A-437-518/2017.



Courts have yet to develop a tailored approach to this issue and rather have dealt with it *ad hoc*. Given the increasing number of remote witness examinations and the fact that disputes sometimes arise as to their admissibility as evidence, it would be beneficial if the Supreme Court of Lithuania, which is the court that forms uniform case law, were to analyze this issue conceptually and comprehensively, providing guidance to lower courts on how to deal with the issue of admissibility in future.

This research showed that in practice there is a consensus among Lithuanian lawyers that remote hearings should not become the general rule in criminal proceedings due to such testimony credibility issues. However, there is also a consensus that remote hearing can be possible and even desirable in some instances. For example, when participants in the proceedings do not object to such examination, when the witness is not material to the case or resides abroad. On these occasions, remote hearings allow to examine of more witnesses, do it more quickly and flexibly. However, neither legislation nor a case law has yet sufficiently clarified when remote examination of a witness is lawful. In the author's view, this problem could be addressed by the courts in the same way as another similar challenge, where a witness cannot be examined by the accused at trial at all. Namely, when a court assesses the possibility of remote examination, it should consider the reason for the witness's absence, the importance of the witness in the proceedings, and the procedural safeguards that will be afforded to the accused.

## DISCUSSION AND CONCLUDING REMARKS

Remote criminal proceedings are a controversial topic among Lithuanian lawyers. Some are very optimistic about it. For example, one prosecutor said that "<...>[w]ith a generation that is mastering information technology before it can walk, it is certain that remote criminal proceedings will soon become the rule, and in-person proceedings the rare exception. In principle, the remote process has no disadvantages but only advantages." Meanwhile, others are very pessimistic. According to one attorney, "[u]nder no circumstances and in no form should this imitation of the process be used after the end of COVID-19. Very rare exceptions are possible for persons abroad, <...>". Another attorney said that remote criminal proceedings are "[a] sad thing of the present and one that will probably remain in the works of legal historians." However, most lawyers take a middle position and believe that, although not always, remote criminal proceedings should be possible. When - opinions vary widely. Some believe that all criminal proceedings can be conducted remotely as long as the quality of the proceedings and the rights of the participants are not violated. Others believe that remote criminal proceedings are only possible with the consent of all participants. A third group says that remote criminal proceedings should be an exception and identifies specific stages of criminal proceedings that can be carried out using videoconferencing. Certain witnesses/victims could be examined remotely, such as expert witnesses, non-essential witnesses, witnesses who are abroad or far away from the place of the hearing, ill, unable to attend a hearing in person for other important reasons, has an increased risk of psychological trauma. Lawyers also believe that it is possible to ensure the presence of a suspect or accused in detention via videoconference. The accused could also participate remotely in multi-episode cases, where evidence unrelated to his charged crimes is examined. Certain court hearings could also be conducted remotely: an examination of procedural requests and complaints during pre-trial investigations, application of preventive measures, when the accused pleads guilty, the pronouncement of judgments, appeal (if no

evidence needs to be examined) or cassation proceedings, which deal only with questions of law, and probation proceedings. Even certain trial stages can be carried out remotely, such as organizational hearings, formal reading of the indictment, publication of the case file, and even closing arguments.

In the author's opinion, when deciding on the possibilities of remote criminal proceedings, each situation (interrogation, hearing, etc.) must be assessed individually, considering the fundamental principles of criminal procedure. It is not possible to define precisely in advance by law the specific situations when remote criminal proceedings are possible and when they are not.

The qualitative survey showed that, statistically, Lithuanian prosecutors have the most favorable opinion of remote criminal proceedings. They most often see the advantages of remote criminal proceedings and the least frequently see the disadvantages. Accordingly, attorneys in Lithuania have the least favorable view. Judges are somewhere in the middle.

The study also showed that in Lithuania legal disputes on the issues directly related to remote criminal proceedings are not common. The author believes in several plausible reasons. First, as remote criminal proceedings are a novelty and the regulations and case law are scarce, judges are reluctant to organize proceedings remotely without the consent of all the participants to the proceedings because they do not want to risk breaching laws of criminal procedure. Second, even if disputes arise, they are not of such procedural significance as to affect the outcome of the proceedings; therefore, the participants in the proceedings accept and do not contest them.

Many Lithuanian lawyers complained about various technical problems during remote criminal proceedings, which harm the quality of such proceedings. Both lack of technological literacy and lack of finances causes the issues. Therefore, to further develop remote criminal proceedings in Lithuania, the state shall invest in technological literacy and technical tools.

When remote criminal proceedings involve vulnerable persons, it requires more careful assessment. Particular attention should be paid to suspects or accused persons in detention. Courts and law enforcement authorities have a particular incentive to ensure their participation in the proceedings remotely, as this helps to avoid bringing them to the place of the proceedings, thus avoiding financial costs and other inconveniences. According to the Lithuanian Code of Criminal Procedure, being a detainee is even a ground *per se* to ensure the participation of a suspected or accused person in proceedings remotely. However, the study shows that detained suspects or accused suffer the most restrictions on their procedural rights during remote criminal proceedings. In this context, the author considers that being in detention should not be a sufficient ground for ensuring the participation of such a suspect or accused in the proceedings remotely. At least not at the critical stages of the proceedings, such as the trial.

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