

# DIGITIZATION OF JUSTICE IN THE CONTEXT OF THE COVID-19 PANDEMIC AND THE IMPLICATIONS OF DIGITALIZATION ON CONSTITUTIONAL RIGHTS

DOI:10.47743/rdc-2020-2-0001

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## Abstract

*The article aims to generate a preliminary radiography on the actual stage of digitalization of justice in Romania, offering a perspective on its evolution both domestically and internationally, a development forced, at least in appearance, by the COVID-19 pandemic and restrictions imposed by it. The electronic file, the usual use of electronic signatures in trials, as well as the multitude of information provided in the virtual environment by public judicial institutions are some essential aspects that define the beginnings of this deeply restructuring process. The most important question, on which no rigorous analysis has been carried out so far, remains the following: how does this process impact the constitutional rights of citizens? In the chase after the alignment to the European approaches, to the evolution and speed of the digital age in which we live, we lose sight of the fact that the Romanian citizens may not be prepared for this process. The human component fades in front of the benefits of artificial intelligence, adaptation at any cost is required by society, and indirectly, by the state, without providing the necessary resources in this regard. We propose a necessary reading from the perspective of affecting some rights guaranteed by the Constitution through digitization, aspects worthy of consideration.*

**Keywords:** digitization; free access to justice; telework; electronic file

## I. Introduction

The digitalization of justice is perhaps the greatest challenge today, which can be translated into finding appropriate technical solutions to be applied and to facilitate the implementation of justice systems, so that the best interest of finding the truth and the underlying principles of law to be safeguarded. In the context of the COVID-19 pandemic and the restrictions it imposed, the problem worsened, additional

development pressures arose and the digitalization of justice became stringent, although it was necessary even without the influence of this effects of the pandemic.

Finding out the truth, protecting the constitutional rights and the freedoms gained so hard over the last 20 years, and crystallizing legislative systems and policies as a result of thinking, grinding and enforcing them over the years are today exposed to the inevitable process of digitization. While this process creates new ways of exercising fundamental rights and freedoms, which can be considered as an extension of their scope, paradoxically, it can also bring limitations or even restrictions of rights, when its application is defective.

In this sense, there is a dynamic evolution of plans and strategies to improve digitization, with various initiatives from a multitude of institutions in Romania. However, the initiatives reflect the early stages of digitization, focusing for the time being on formal issues related to the implementation of technical solutions to ensure efficient distance and speed communication, and less substantive issues to analyze the profound effects that digitization can have on the effective observance of the constitutional rights of citizens and, *in extenso*, of human rights.

Preliminarily, we note the outline of some clear benefits that the digitalization of justice brings so far, as well as of some obstacles present from the first timid steps taken towards digitalization. Regarding the major advantages that digitalization brings in court, we mention the following:

- facilitating access to information;
- increasing the speed in carrying out the act of justice, leading to obtaining a quick retribution for the litigants;
- optimizing the use of resources, in the sense of reducing the material resources used (paper, storage space for existing files in the archive) and the costs involved in the process.

We do not consider that the digitization process should bring disadvantages, it represents a natural evolution of humanity in the stages of quality of life development and must be integrated as such. Thus, we believe that justice should be no exception, overcoming the potential challenges it may face in the transition process from exclusively physical environment to discovering the usefulness of digitalization and its benefits and how they translate into the virtual environment.

We would prefer that any existing disadvantages at this time be translated into challenges and overcome from year to year, in order to fully integrate digitization in this area. So far, we mention the following challenges observed:

- increasing the quality of justice in the virtual environment requires the extension of the training of magistrates and other workers in the justice fields accordingly, in order to make appropriate use of technology in courts, as well as experts who need specialized training on innovative aspects of evidence (*e.g.*, forgery of an electronic signature);
- finding a balance in order to preserve the principle of orality and publicity of the processes;

## ***Digitization of justice in the context of the COVID-19 pandemic...***

- the emergence of new risks in the process, which involves increased vigilance by the court, for example, the risk of falsification of data in cases;
- adapting the evidence system so that evidence can be administered as much as possible in the virtual environment or rethinking it on anachronistic and non-adaptable issues.

Sensing the growing importance of the digitalization of justice, the European Commission has published two studies<sup>1</sup> on this issue, as follows:

### ***a) Study on the use of innovative technologies in the justice field***

In the context of the implementation of the 2019-2023 e-Justice Action Plan, the Commission carried out a “Study on the use of innovative technologies in the justice field”. The study explores existing policies, strategies and legislation at national and European level, and takes stock of the current use of Artificial Intelligence and Blockchain technology tools in the justice field. The stakeholders consulted in the framework of the study are EU institutions and agencies, Member States’ public authorities and the judiciary, legal professional organizations and ICT companies.

Following the consultations, the study identified 130 projects that use AI and Blockchain technologies: 93 projects of Member State authorities and the judiciary, 8 projects of legal professional organizations and 29 projects (products and/or services) of private companies.

### ***b) Digital criminal justice study***

Following discussions of the concept of Digital Criminal Justice at the Justice and Home Affairs Council in December 2018, the Commission carried out, in close collaboration with Eurojust, the “Digital Criminal Justice” study. An extensive research and consultations with various stakeholders (national prosecutors and investigative judges, representatives of the Member States, JHA agencies and EU bodies) allowed to identify the needs and challenges to communicate and exchange case-related data in a digital and secure way when cooperating in cross-border cases. To this end, in its outcomes, the study recommends seven solutions to address the above business needs:

- A Secure Communication Channel;
- A Communication Tool;
- Redesigned Eurojust Case Management System;
- The JIT Collaboration Platform;
- Exchange of data between the JHA agencies and EU bodies;
- Judicial Cases Cross-Check;
- Large Files Solution.

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<sup>1</sup> Relevant studies by European Commission – [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice/relevant-studies\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice/relevant-studies_en).

Next, we propose a journey into the realm of digitization initiatives in the field of justice both nationally and internationally, in order to discover the need behind digitalization and how this is reflected in the exercise of constitutional rights and freedoms at this time.

## II. Digitization of justice as an approach at European level

The digitalization of justice appears imminent in the context of the expansion of the use of artificial intelligence in the last decade by more and more fields, a process accelerated in the last year by the COVID-19 pandemic, which forced the use of technological means of communication and remote activities.

Initiatives to regulate and organize the future digitalization of justice took shape at European level 10 years ago, during which a number of international organizations launched analyzes on the subject and vehemently supported the adoption of acts on the use of technology in the judicial system. Among the first initiatives that are important regarding the analysis carried out in this article, we mention the opinion no. 14 of 09.11.2011 of the Consultative Council of Judges of Europe (CCJE), entitled *Justice and information technologies (IT-IT)*, which addresses the usefulness of technological issues, while setting a number of limits and values that must be constantly protected in this evolutionary process. Thus, the CCJE states that *information technology (IT) must be useful and effective for improving the administration of justice, facilitating access to justice, impartiality, independence of the judiciary, fairness and reasonable time of proceedings, and their introduction in European courts should not be to compromise the human and symbolic aspects of justice.*

On the same line, an approach that strengthens the perspective on the problems that can be generated by the digitalization of the judiciary is found in the context of the adoption by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe<sup>2</sup> on the use of artificial intelligence in the judiciary adopted in December 2018. This document sets out the ethical principles on the use of artificial intelligence (AI) in judicial systems.

CEPEJ has identified the following basic principles to be observed in the field of AI (Artificial Intelligence) used in justice:

1. The principle of respect for fundamental rights: ensuring the compatibility of the design and implementation of artificial intelligence tools and services with fundamental rights;
2. The principle of non-discrimination: the specific prevention of the development or intensification of any discrimination between individuals or groups of persons;

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<sup>2</sup> European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment – <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>.

### ***Digitization of justice in the context of the COVID-19 pandemic...***

3. The principle of quality and security: with regard to the processing of judicial decisions and data, the use of certified sources and intangible data with models designed in a multidisciplinary manner, in a secure technological environment;
4. The principle of transparency, impartiality and fairness: facilitating the accessibility and understanding of data processing methods, authorizing external audits;
5. The "user-controlled" principle: the exclusion of a prescriptive approach and ensuring that users are informed actors and that they control their choices<sup>3</sup>.

Last but not least, the combination of efforts to integrate technology into European justice systems has matured through the adoption of the first e-Justice Strategy (a concept dedicated to the digitalization of justice) for the period 2014-2018<sup>4</sup>, followed by the new 2019-2023<sup>5</sup>, as well as the related plan<sup>6</sup>.

The EU e-Justice Strategy for 2014-2018 highlighted the growing importance of information and communication technology (ICT) as a means of improving the efficiency of legal processes and authorities among EU countries and stressed the need for further development:

- the e-Justice portal (including the content of EU law and the national law of EU countries);
- interoperability (links between authorities, professionals, the general public and relevant companies);
- using ICT in a way that is consistent with new EU legislation;
- protection of personal data;
- interconnection of national registers;
- cooperation with legal professionals;
- mechanisms for providing translations.

Continuing the pioneering strategy in the field, this EU e-Justice Strategy for 2019-2023 strengthens the perspective on the importance of using technology in the justice system, focusing on access to information, electronic communications in the field of justice and interoperability.

The related action plan also brings innovative aspects, promoting, among other things:

- Improving the software provided for the creation of national repertoires of lawyers and bailiffs / enforcement authorities;
- Facilitate access to legal information, share and interconnect legal information published through national, European and global legal information systems;
- Anonymization and pseudonymization of court decisions for the use of open data.

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<sup>3</sup> *Idem*, <http://cpescmdlib.blogspot.com/2019/01/coe-e-publicatii-carta-etica-europeana.html>.

<sup>4</sup> The strategy on e-Justice for the period 2014-2018, as well as the related action plan – [https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM:230206\\_1](https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM:230206_1).

<sup>5</sup> The strategy on e-Justice for the period 2019-2023 – [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313\(01\)&rid=7](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(01)&rid=7).

<sup>6</sup> The action plan related to the strategy 2019-2023 – [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313\(02\)&rid=6](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(02)&rid=6).

### III. The stage of digitalization of justice in Romania

Community initiatives have also been reflected at national level, drawing attention to both the need and the imminent use of technology in the field of justice. Thus, in Romania there were a series of initiatives in this regard, initiatives quickly accentuated by the context created by the COVID-19 pandemic, which forced the use of means of communication and remote transmission in the field. What do the most important initiatives in the field involve and which constitutional rights they facilitate the exercise of?

#### **a) Introduction of the electronic file – facilitation of the right to defense (art. 24 of the Romanian Constitution)**

The appearance and use of the electronic file represents the first and most important step taken in Romania towards the digitalization of the justice system and act. *“If this first step is taken in general, the other movements of modernization and digitalization of justice will come naturally and inevitably. The signals are clear in this direction, the ICCJ recently taking a decision that can be called historic: Decision no. 520/2019 pronounced in the public hearing of March 7, 2019 by which the ICCJ ruled that, if one of the parties in the process sends to the court applications in electronic format 'the existence of the scanned signature of the signatory is not sufficient', the qualified electronic signature 'connects the electronic identity of the signatory with the digital document and it cannot be copied from one digital document to another, which gives the document authenticity, providing the court with a guarantee that the message or digital document is created by the person who signed it and the content the digital message or document has not been modified since the date of issue'. Thus, the premises for the real digitization of justice were created, the practitioners being encouraged to use the electronic means of signing and communicating the documents within the judicial procedure. As a result, the consequences will also occur in courts which, in turn, will have to accept digitization and adapt to the electronic management of the act of justice”<sup>7</sup>.*

The application form is incipient at this moment, the electronic file consisting of an application developed by the IT departments within the courts, through which the pending files can be accessed by the parties, in order to view and download the procedural documents from the file. However, there is a lack of coordination in this approach. There is not a single application developed and used at national level, but a multitude of applications, each court implementing this concept according to its own vision of IT specialists within it, thus giving rise to disproportionate situations regarding the type of acts and documents that litigants can access or request.

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<sup>7</sup> M. Voicu, *Cyberjustice. Some considerations on the digitalization of judicial procedures*, <https://www.juridice.ro/essentials/4273/cyberjustitia-unele-consideratii-asupra-digitalizarii-procedurilor-judiciare>.

### ***Digitization of justice in the context of the COVID-19 pandemic...***

In this regard, we mention a number of differences existing so far between applications developed by national courts:

- visualization in real time of the information regarding the conduct of the court hearings, implemented at the Bucharest Tribunal;
- the possibility of submitting online requests, for example the legalization of court decisions, implemented at the Bucharest Tribunal;
- the possibility of submitting any procedural documents regarding a registered file using an online form, a solution implemented at the level of the Iași Court of Appeal;
- the possibility of requesting online access to the electronic file, without physically requesting in court this aspect in advance, implemented at the Constanța Court of Appeal.

In addition, the lack of coordination calls reduces the reliability of this much-needed tool for digitization. We refer here to the delays in making available all the documents in the file by scanning, these being produced by the lack of sufficient staff in the courts, as well as the possibility of omitting or missing from the file the existing documents in physical format by manual processing.

Given the exceptional situation created by the COVID-19 pandemic, which hastened the development and implementation of these solutions in order to respect constitutional rights related to, for example, the provision of a fair trial independent of external conditions, it is understandable that the process is still in its infancy and does not provide integrated access to the concept of electronic file. It needs a maturation that can be generated by a consolidated analysis of the state of the resources used at the moment in the process, their optimal management or their possible extension, as well as the understanding of the shortcomings claimed so far.

Along the same lines, the doctrine in the field notes: *Aware of the complexity and difficulty of making applications and categorizing as beneficial any individual approach to digitizing the work of justice, without criticizing the developers of these solutions, it should be noted that the main effect of these states of things characterized by the lack of coordination at the central level is the creation of applications, in parallel, with many similarities between them, which translates, in essence, by a waste of resources.*

*In addition, this lack of coordination also has a negative impact on the ease of access of the parties and lawyers to these solutions, given that each of them has a different user interface<sup>8</sup>.*

Noticing the need for existing coordination in the field, the Ministry of Justice is developing a contract for consulting and expertise services and software and hardware for the pilot module, necessary for macro analysis to develop the new electronic management system ECRIS causes in the project "Development and

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<sup>8</sup> *Electronic file – analysis of the present in terms of necessity, utility and difficulties*, Judge Cosmin Sterea-Grossu, Judge Claudiu Dragusin, president of the Civil Section – <https://www.juridice.ro/680166/dosarul-electronic-analiza-prezentului-prin-prisma-necesitatii-utilitatii-si-dificultatilor.html>.

implementation of an integrated strategic management system at the level of the judicial system”<sup>9</sup>.

While the standardization of nomenclatures is a prelude to a more efficient management of ECRIS cases, we believe that this is not enough in the context of the broad process of transposition of justice in the virtual environment, requiring effective coordination with the Higher Council of Magistracy for offering unitary IT solutions in courts.

***b) Use of digital signature – facilitating free access to justice (art. 21 of the Romanian Constitution)***

Romanian legislation allows participants in civil proceedings since 2001 to use electronic means of communication in the exercise of procedural rights, a consolidated aspect of the entry into force of the Code of Civil Procedure in 2010 offering the same degree of recognition and veracity compared to physical means that tend to supplement them.

Thus, art. 148 in conjunction with art. 149 and art. 150 of the Code of Civil Procedure highlights the possibility of formulating applications in court in an electronic form, noting that the formulation of an application in this way does not exempt the party from the obligation to submit the application on paper, in sufficient copies for communication. Thus, it should be pointed out that, at present, electronic communication has hardly acquired the validity of the written procedure, since the legislature did not presume an equivalence between procedural documents subject to communication transmitted in physical form, on paper, and those transmitted electronically.

Moreover, both art. 148, as well as art. 154 of the Code of Civil Procedure also impose the obligation for the transmitted document to be signed with an electronic signature, according to the provisions of Law 455/2001.

Within the meaning of art. 4, para. (2) of Law 455/2001, the document in electronic form represents a collection of data between which there are logical and functional relations and which render letters, numbers or any other characters with intelligible meaning, intended to be read through a program computer software or other similar procedure, and in accordance with para. (3) of the same Article, electronic signature represents data in electronic form, which are attached or logically associated with other data in electronic form and which serve as a method of identification.

The electronic signature has both the role of securing the content of the document and to identify the person or entity making the communication<sup>10</sup>.

We support the evolution of the digitization process regarding this aspect, *de lege ferenda* we propose offering an option for the parties in order to use the virtual

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<sup>9</sup> <http://e-licitatie.ro/pub/notices/c-notice/v2/view/100021726>.

<sup>10</sup> L.-G. Bistreanu, *Electronic communication in court. Digital court and electronic file* – [https://www.unbr.ro/wp-content/uploads/2020/09/10\\_Lucian-Gabriel-Bistreanu\\_Concurs-2020\\_Corectat\\_CM.pdf](https://www.unbr.ro/wp-content/uploads/2020/09/10_Lucian-Gabriel-Bistreanu_Concurs-2020_Corectat_CM.pdf).



or physical way, without requesting doubling of the effort. We specify this aspect because the electronic communication keeps and reflects correctly the data, as well as the moment in which the document is transmitted.

***c) Generalization of the application of the concept of telework and work from home, including in the system of the public sector – implications on the right to work (art. 41 Romanian Constitution)***

The legislative framework in Romania regarding telework has materialized relatively recently by Law no. 81/2018 on the regulation of telework activity. Thus, art. 2 of the law provides in letter a) as a definition: the form of work organization through which the employee, regularly and voluntarily, fulfills his duties specific to the position, occupation or profession he holds, other than the workplace organized by the employer, at least one day a month, using information and communication technology. According to art. 3 of the above-mentioned law, telework is based on the agreement of the parties and is expressly provided in the individual employment contract.

At the same time, working from home is a distinct concept. Article no. 108 of Law no. 53/2003 regarding the Labor Code stipulates that the employees at home fulfill, at their home, the attributions specific to the position they hold. Conducting work at home is not conditioned by the use of information and communication technology. Regarding the program, the person working from home makes his own program, while, according to the legal provisions, telework must respect the time interval agreed with the employer.

Also, while working from home is permanent, telework refers only to a certain period, but the duration can be extended with the agreement of both parties.

The use of the concept of telework and work at home has been done without problems in the private sector since previous years, an aspect that has highlighted over time the benefits of working from home, both for the employer and the employee.

With regard to the employer, he may benefit from a reduction in the cost of maintaining the workplace in respect of employees, for example, electricity costs, as the work is no longer performed at the premises. At the same time, in the context of the current pandemic, telework offered a solution to reduce the presence of employees in the office in order to comply with health rules.

Regarding the employee, he benefits from an efficiency of his time, by the fact that he no longer travels to work, as well as a low level of stress due to the flexible schedule, according to the studies carried out in the field<sup>11</sup>.

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<sup>11</sup> E.J. Hill, J.I. Jacob, L.L. Shannon, R.T. Brennan, *Exploring the relationship of workplace flexibility, gender, and life stage to family-to-work conflict, and stress and burnout* – [https://www.researchgate.net/publication/232549857\\_Exploring\\_the\\_relationship\\_of\\_workplace\\_flexibility\\_gender\\_and\\_life\\_stage\\_to\\_family-to-work\\_conflict\\_and\\_stress\\_and\\_burnout](https://www.researchgate.net/publication/232549857_Exploring_the_relationship_of_workplace_flexibility_gender_and_life_stage_to_family-to-work_conflict_and_stress_and_burnout).

In the context of the COVID-19 pandemic, the exploration of the possibility of the usual application of telework (and less of work at home, given its continuity) in the public sector and the use of this concept appeared necessary and the justice sector was no exception. This may seem incompatible, given that one of the features of the public sector involves the permanence of the public service, so that the possibility of a flexible program or the absence of the personnel from the institution's headquarters seems difficult to fill. While the primary criterion in the private sector is performance, irrespective of the place where the work is done, the public sector is characterized by ensuring its functioning on a permanent basis, or within a timeframe already announced to the public, so as to meet the needs of citizens.

In this regard, various institutions of the judiciary have tried to find solutions in a constant effort to find a balance between the best interests of society to ensure at least one form of public service operation despite the exceptional conditions generated by the COVID-19 pandemic and the health of its employees.

Thus, we mention the following measures chosen to manage the situation and to integrate technology to meet the needs of the judiciary in this crisis situation:

- The Ministry of Justice (MoJ) has chosen primarily to carry out the activity of working with the public exclusively by sending requests and documents by mail, in electronic form by e-mail or by other means of distance communication. In addition, in order to ensure the continuity of the ministerial activity, but also to ensure a reduced presence that would allow the observance of the sanitary rules, it implemented telework and work at home, according to the Order of the Minister of Justice no. 1917 / C / 2020<sup>12</sup>. In parallel, the Ministry of Justice drafted a law on some measures in the field of justice in the context of the COVID-19 pandemic, currently under parliamentary debate in the Chamber of Deputies<sup>13</sup>. Among the measures, the draft law provides for the possibility of conducting hearings in both criminal and civil cases through audiovisual telecommunications that allow verification of the identity of the parties and ensure security, integrity, confidentiality and quality of transmission, providing the necessary measures for this purpose. At the same time, the draft law encourages the use of electronic signature and electronic file, where this application is implemented;
- The Superior Council of Magistracy (SCM) has also taken the approach of working with the public exclusively in online or remote format, continuing by applying a differentiated program, as well as postponing any work that does not require urgency. Regarding the activity of the courts, the SCM adopted for the first time a decision that reduces the cases by the competence of the courts

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<sup>12</sup> <http://www.just.ro/wp-content/uploads/2020/05/OMJ-1917-din-15-mai-2020.pdf>.

<sup>13</sup> [http://www.cdep.ro/pls/proiecte/upl\\_pck2015.proiect?idp=19028](http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=19028).

### ***Digitization of justice in the context of the COVID-19 pandemic...***

to judge during the state of emergency<sup>14</sup>. Subsequently, with the cessation of the state of emergency and the entry into the state of alert, the measures relating to competence were relaxed in this regard, while maintaining the recommendation to work online with the public, to transmit procedural documents through the means of distance communication, as well as to limit the access of litigants to the courtrooms<sup>15</sup>;

- In accordance with the provisions set out in the abovementioned judgments, the courts and prosecutor's offices decided accordingly, as follows:
  - limiting the participation of litigants in the courtroom to strictly necessary persons;
  - the use of means of distance communication, where the legislation has allowed, for example, the administration of online evidence, for example, hearings.

Telework or work at home was not among the possible options in the courts, as the court activity involves at least the physical presence of magistrates, clerks and auxiliary staff. Also, regarding the documents left in the custody of the courts and the conditions applied to their removal from the public institutions, sometimes completely prohibiting this aspect.

#### ***d) Consolidation of the activity of the National Agency for the Management of Seized Assets (ANABI) – facilitation of the right to information (art. 31 Romanian Constitution)***

The consolidation of ANABI's activity represents an essential step in order to strengthen the capacity to effectively recover the proceeds of crime in Romania, ANABI representing a real center of efforts in this area. The digitization of the institution's work also improves the integrated approach to the recovery of criminal assets, combining support functions for prosecutors and courts with those of international cooperation, effective management of seized assets and social reuse of confiscated assets and values. We mention that ANABI is a public institution of national interest with legal personality, subordinated to the Ministry of Justice.

Currently, ANABI has in administration seized assets in criminal proceedings in a cumulative amount of approximately 203,348,420 euros (single account, accounts in financial-banking units and movable assets under administration or capitalization procedure).

In order to expand the efforts to digitalize the justice system, ANABI launched the online platform for conducting public procurement by electronic means. This innovative tool has been developed to facilitate the access of potential buyers to different procedures, respecting all standards of social distancing and to minimize the

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<sup>14</sup> <https://www.csm1909.ro/ViewFile.ashx?guid=bb0e53b8-20b7-4267-b78c-4f87c265944a|InfoCSM>.

<sup>15</sup> <https://www.csm1909.ro/ViewFile.ashx?guid=94a79875-529d-4a44-bdf1-37310628a7e9|InfoCSM>.

costs of participating in traditional procurement. Also, by digitalizing the working procedures related to the organization of these auctions, transparency and easy access to information on the activity of ANABI are ensured, while strengthening the internal mechanisms for efficient management of public resources<sup>16</sup>. Through this approach, ANABI has aligned itself with the profile agencies in France, the Netherlands, the United Kingdom, Belgium and the USA that are successfully implementing this good practice.

Although the exceptional situation of the pandemic has not yet ended, we cannot deny the impact regarding the technological development it has produced, even if it is still in an incipient form in the Romanian judiciary.

#### IV. The implications of digitalization on fundamental rights

##### a) *The right to defense*<sup>17</sup>

Regarding the right to defense, we emphasize that digitalization expands its scope of implementation, offering a potential to increase the level of defense insured at the constitutional level. In this sense, we exemplify by the possibility of the party to participate in the process, including in virtual format, by videoconference, in case of physical impossibility of the person to appear. In addition, this format also facilitates the development of processes with a cross-border component, offering flexibility and speed.

However, the right of the party to appear in person is a component of the right of defense that cannot be denied and must always remain an option. It has been restricted in the context of the present pandemic, but it cannot be annihilated now or in the future. We cannot deny the importance of this fact, also revealed by the legislator's option to impose, in certain processes, for example those of family civil law, the presence in person of the parties in order to facilitate the communication. This applies both to the lawyers representing the parties and to the judge.

We stress about the importance of physical presence in court from the following perspectives:

- on the one hand, from the judge's point of view, *understanding the case also involves a certain "process" of empathy, a "process" that is possible only through the physical presence of the parties in the courtroom. Simply reading written requests may be sufficient in many proceedings to give a sound and lawful decision, especially in low-value proceedings or when the party makes a request which is manifestly inconsistent with its purpose.*

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<sup>16</sup> Extras from the ANABI press release – <http://www.just.ro/comunicat-privind-lansarea-portalului-anabi-pentru-derularea-licitatiilor-publice-prin-mijloace-electronice>.

<sup>17</sup> Art. 24 Romanian Constitution – *The right to defense*

(1) *The right to defense is guaranteed.*

(2) *Throughout the process, the parties have the right to be assisted by a lawyer, chosen or appointed ex officio.*

### **Digitization of justice in the context of the COVID-19 pandemic...**

*But in most lawsuits, especially in family law disputes, the personal presence of the party in the courtroom does not leave the judge indifferent, but causes him to empathize volens nólens, to deepen the case according to the "dramatic situation". This is because judgment is about the lives of some people and even when it is about goods, and they are emotionally related to people.*

- On the other hand, regarding the parties, through the discursive act the parties can approve something, deny, claim, warn, say something and intervene in the speech of the other party. Communication in court by verbal issuance, tone and diction, is not just enunciative, in the sense that certain information is reported, as is reported by the weather or the exchange rate. The communication in the court hearing has a role of the self-expression of the party, this being the function of the speech. Even if the party is not present, the lawyer fulfills this function, being the first to empathize first with the situation of the party. Then, through the attention given to the party by the judge, the party acquires the feeling of a "connection", the satisfaction that he was listened to and explained. And through the videoconferencing system, the transmission of the voice is ensured, but the words no longer have the same "force", in the absence of the direct presence of the man in front of the judge. It has been shown that "the spoken word is the incorporation of an energy" transmitted by the person speaking, being able to reveal to the person to whom he addresses his own way of seeing things and the pathos of his being. Or the deepening of the details of some cases and the attitude of the party towards a life situation, makes the difference between the concepts of law, for example good or bad faith, so important in civil law disputes. Gestures and mime are the acts of externalization of the person, which accompany the discursive act<sup>18</sup>.

In parallel, the right of defense encompasses the existing evidence at issue. This aspect presents two facets:

- facilitating the process: the use of distance communication technologies will help to gather evidence faster and reduce costs. For example, in a cross-border procedure, a person may be heard by videoconference instead of being asked to be physically present. It is also possible to create a decentralized computer system that interconnects national systems, so that documents can be transmitted in electronic format, faster and more securely above borders;
- the need to maintain the physical administration or the proof itself: however, most proofs retain a physical need for administration or cannot be transposed into the virtual environment. We mention here, for example, the investigation of the crime scene, the reconstruction or material means of proof. Thus, we

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<sup>18</sup> L. Lungu, *The principle of orality in civil proceedings vs. court hearing by videoconference system* – <https://www.juridice.ro/682824/principiul-oralitatii-in-procesul-civil-vs-sedinta-de-judecata-prin-sistem-videoconferinta.html>.

consider that it is necessary to keep a hybrid system, keeping exclusively physical aspects in the process, because through digitization, not all components of the process can take place in virtual format, digitization cannot ensure at this time and most likely in the near future the total relocation of processes exclusively in virtual format.

*De lege ferenda*, in the case of an option of the legislator to allow conducting processes in virtual format exclusively, the administration of the evidence in the process will imply a total rethinking of the administration of the evidence and will represent a great challenge.

### **b) Free access to justice<sup>19</sup>**

Free access to justice is strongly influenced by the digitalization of justice. *Prima facie*, all the components under which this constitutional right of crucial importance is revealed are facilitated as implementation, creating new ways of exercising the right for citizens. In this regard, we refer to issues such as the introduction of easier possibilities for referral to the courts, through the means of distance communication and the use of electronic signatures, as well as easier exercise of remedies, aspects of speed of proceedings and obtaining decisions leading to improved access to justice, as well as improving the resolution of cross-border disputes, by replacing the physical presence with the virtual presence of the parties where possible. There is also an extension of the use of "weapons in civil proceedings", as well as a flexibility in the conduct of trials.

But do these aspects represent real developments in the judiciary, adding value to existing constitutional rights and greater benefits than the possible disadvantages of involving technology in this area? We argue the existence of a negative response at this time, due to the incipient stage of digitalization in Romania, as well as its lack of correlation with the essential principles of the act of justice. We cannot deny the potential for future development of justice systems through the use of technology, but we highlight some of the major obstacles that exist today:

- a) digitization primarily affects the principle of orality of the process - the right to a contradictory procedure can be restricted through videoconferencing. The lack of physical presence of the parties can destroy the spontaneity, indirectly affecting the good development of the process. Moreover, a sterile process, with a reduced contradiction by the means of distance communication in appeals, where the situation needs further clarification and the parties mostly feel wronged by the solution of the previous court, may be indirectly equivalent to the lack of an effective right of the party to exercise an appeal. *From the defining content of the principle of orality, but also from the low*

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<sup>19</sup> Art. 21 Romanian Constitution – *Free access to justice*

(1) *Any person may apply to the courts for the defense of his rights, freedoms and legitimate interests.*

(2) *No law may restrict the exercise of this right.*

(3) *The parties have the right to a fair trial and to the settlement of cases within a reasonable time.*

(4) *Special administrative jurisdictions are optional and free of charge.*

### **Digitization of justice in the context of the COVID-19 pandemic...**

*frequency of its invocation in the courts of judicial control, it is observed that it has a less strident presence in the landscape of the civil process, compared to the principle of contradictory or right to defense, despite the fact that the orality is the foundation for materializing the other principles<sup>20</sup>.*

Subsequently, the issue of indirect restriction of the principle of publicity of the process also arises correlatively. In order to witness a public process that takes place only virtually, for example, for health reasons generated by the COVID-19 pandemic, citizens wishing to participate must have the necessary technical means. This aspect is not met at the moment, as not all the country's population has access to the internet and the Romanian state has not provided free access points in this regard;

- b) equal use of weapons in the process may be affected by the lack of access to technology of one of the parties;
- c) ensuring the exercise of this right digitally for all citizens. The state must ensure that there is access to justice effectively and virtually, focusing in the same direction especially on vulnerable people, if it allows the relocation of the processes to the virtual environment. We mention in this sense that *digitalization involves opportunities and challenges for all groups of society, including the elderly. Digitization played an important role in communicating with the elderly during the COVID-19 crisis. The report of the UN Independent Expert on the Exercise of All Human Rights by the Elderly (2017) and the Influence of Human-Centered Robotics and Automation on the Rights of the Elderly highlights that robotics can lead to important advances for the autonomy and active participation of older people. However, technological advances and digitalization have the potential to threaten personal rights, such as the right to privacy. In addition, a developing digitalized world is increasing the importance of digital skills. According to the report, digitization may exacerbate inequalities and / or exclude certain groups that have limited or no access to digital technology; the use of assistive technology and robotics in the care of the elderly can compromise the dignity of the user<sup>21</sup>;*
- d) there are problems of trust of the citizens in the technological means used by the court. Additional cyber security measures are needed with the storage of growing data sets, as well as the protection of personal data and privacy disclosed in files. In addition, these measures subsequently require visibility, ways to bring them to the attention of citizens, which will increase confidence in the act of justice committed in the virtual environment.

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<sup>20</sup> L. Lungu, *The principle of orality in civil proceedings vs. court hearing by videoconference system* – <https://www.juridice.ro/682824/principiul-oralitatii-in-procesul-civil-vs-sedinta-de- judecata-prin-sistem-video-conferinta.html>.

<sup>21</sup> Council conclusions entitled "*Human rights, participation and well-being of older people in the digital age*", as endorsed by the Council by written procedure concluded on 9 October 2020 – <https://data.consilium.europa.eu/doc/document/ST-11717-2020-REV-1/ro/pdf>.

In support of the argument set out above, we also bring doctrinal opinions, which raise the same questions about the possibility of preserving the philosophy behind the work of justice in the digital age: *In the immemorial "chain" of justice in which its intervention has traditionally involved the mixing, in different proportions, of orality with writing, a new element has been added in recent decades, particularly dynamic, unique in nature, and explosive in its possible and probable consequences on the new field of operation: digital! It often intervenes with artificial intelligence in the traditional judicial process, shaking approaches and concepts, promoting speed and overcoming complexity through unusual solutions and ways, but questioning the meanings of the procedural principles once established as sacrosanct and considered imperative. The great craziness of slowness and duration, the sometimes exorbitant cost, the neighboring unpredictability, not infrequently, the arbitrariness of the outcome of the trial are thus much blurred, thus increasing access to justice and promoting the virtues of a fair trial and its reasonable time. But the digitalization of justice does not only mean the transfer of judicial information from one material support to another dematerialized, new contentious strategies or extraordinary technical improvements in the conduct of proceedings of all kinds, but involves a major leap in the philosophy of the judicial process, with radical implications for design and development in a necessary, inevitable "legal-digital revolution", but which presupposes a "fair balance" between the ups and downs of the managerial dimension and the preservation, the adaptation of the intrinsic nature and the defining objectives of the administration of justice<sup>22</sup>.*

### **c) The right to work and social protection<sup>23</sup>**

The right to work and social protection is a strongly impacted right by digitalization in general in any field and the justice system is no exception. In this regard, *the implementation by the employer of the technical and organizational conditions for the elaboration of work norms, especially digital ones, has effects on the professional autonomy and monitoring of employees, as well as on personal data, the processing of these data, in general on employee privacy, their private, social and family life.*

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<sup>22</sup> M. Dutu, *Let's not attempt to destroy the value of the court hearing!*, in Pandectele Române no. 3 of June 30, 2020.

<sup>23</sup> Art. 41 Romanian Constitution – *Labor and social protection of labor*

(1) *The right to work cannot be restricted. The choice of profession, trade or occupation, as well as the job is free.*

(2) *Employees have the right to social protection measures. These concern the safety and health of employees, the employment regime of women and young people, the establishment of a minimum gross wage in the country, weekly rest, paid leave, work in special or special conditions, vocational training and other specific situations, established by law.*

(3) *The normal duration of the working day is, on average, a maximum of 8 hours.*

(4) *For equal work, women have equal pay for men.*

(5) *The right to collective bargaining in the field of labor and the binding nature of collective agreements are guaranteed.*



## **Digitization of justice in the context of the COVID-19 pandemic...**

*The main effects on the autonomy and monitoring of employees must be analyzed in relation to the type of functions and the nature of the positions held, management or execution. Digitization and artificial intelligence, the central pillars of the new industrial revolution, involve completing the complex tasks performed by highly qualified employees, interconnecting work and the results of the activity of these employees, both within the same employer and especially with partner companies, collaborating or beneficiaries of the goods and services provided. Thus, on the one hand, digitization and automated processes lead to the replacement and completion of certain work tasks of employees, and, on the other hand, electronic devices and technological means (computers, internal and external networks, smartphones, software, applications, electronic work platforms) represents more of a technology of mutual assistance than of substitution of human labor<sup>24</sup>.*

In conclusion, two of its components are important in terms of impacting by digitization:

- 1) The training component. This aspect is important from the perspective of its growing dependence on the main activity carried out in the courts. Despite the fact that each unit has a structure that deals with the technology and information part, we believe that it should provide maintenance and focus on developing innovative technical solutions needed to improve the work of the court, and not on assisting each court employee in virtual approaches. In this regard, employees in the judiciary need to be continuously trained, both internally, on the use of applications developed by their own IT departments, as well as externally, in order to correlate initiatives in the field and integrate their use in current work. The importance of the judiciary providing continuously improved services must not be lost of sight as this can lead to violations of citizens' constitutional rights or inequities in society, as mentioned above. Along the same lines, we consider it necessary to test the computer skills of personnel hired in the justice field at the time of employment, at the level used at that time in court, the development of an initial training program to familiarize employees with existing internal software in the institution, and the development of a continuing education program, based on the needs communicated to the employer by the staff employed in the courts.
- 2) Regarding the issue of the disappearance of certain manual jobs through digitization, we consider that the risks in the field of justice are low. Most professions have a strong creative and intellectual component, as well as a low repetitive character, aspects that cannot be replaced by artificial intelligence at this time. The jobs allocated to the archive activity are at risk, as they move towards the virtual environment with quick steps, due to the benefits that the digitization of the archive brings.

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<sup>24</sup> M.C. Predut, *Digitization and automation. Obligation of employers to permanently ensure the technical and organizational conditions for the elaboration of work norms by employees* – <https://www.universuljuridic.ro/digitalizare-si-automatizare-obligatia-angajatorilor-de-a-asigura-permanent-conditiile-tehnice-si-organizatorice-pentru-elaborarea-normelor-de-munca-de-catre-salariati>.

3) The large-scaled use of the concept of telework or work at home:

- it can call into question the mental health of employees, from the perspective of the interdependence of work with the interpersonal relationships established at work. They need socialization, the formation of a team in order to optimally perform their work duties. According to a study conducted by the European Commission<sup>25</sup>, working from home in various legal forms has led to depression among employees, their lack equating to a decrease in long-term productivity. In this sense, the constitutional right to work may be restricted from the perspective of employee health, the employer must take this risk into account when using the concepts of telework or work at home;  
Moreover, the digital interconnection of work processes can increase the workload, all these technical and organizational conditions can impose a high level of responsibilities, an overload of work and a high work pressure that can negatively influence individual performance, health physical and mental, and overall employee safety<sup>26</sup>;
- Regarding the positive part of these concepts, through them the employer can change the nature of the activities performed under the employment contract and can generate a flexible program, which, in an optimal formula and specialized by types of employees, can extend the right to work. For example, when there is a situation of impossibility to perform the duties at the employer's premises, the employee, with the agreement of both parties, may enter telework until the situation is resolved, this flexibility leading to optimal compliance with the constitutional law in question, keeping the financial stability in exceptional situations.

**d) The right to information<sup>27</sup>**

The right to information is a complex right, its dimensions being constantly evolving, and digitalization contributes to its expansion and to the creation of new

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<sup>25</sup> Telework, work organisation and job quality during the COVID-19 crisis A qualitative study, European Commission – <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc122591.pdf>.

<sup>26</sup> M.C. Predut, *Digitization and automation. Obligation of employers to permanently ensure the technical and organizational conditions for the elaboration of work norms by employees* – <https://www.universuljuridic.ro/digitalizare-si-automatizare-obligatia-angajatorilor-de-a-asigura-permanent-conditiile-tehnice-si-organizatorice-pentru-elaborarea-normelor-de-munca-de-catre-salariati>.

<sup>27</sup> Art. 31 Romanian Constitution – *The right to information*

(1) *The right of the person to have access to any information of public interest may not be restricted.*

(2) *The public authorities, according to their competences, are obliged to ensure the correct information of the citizens on the public affairs and on the problems of personal interest.*

(3) *The right to information must not prejudice measures to protect young people or national security.*

(4) *The mass media, public and private, are obliged to ensure the correct information of the public opinion.*

(5) *Public radio and television services are autonomous. They must guarantee the social and political groups the exercise of the right to air. The organization of these services and the parliamentary control over their activity are regulated by organic law.*

ways of expressing itself and its legal guarantees. In this sense, *it is a true fundamental right, because the material and spiritual development of person, the exercise of the freedoms provided by the Constitution and especially those through which thoughts, opinions, religious beliefs and creations of any kind are expressed involves the possibility of receiving data and information on social, political, economic, scientific and cultural life*<sup>28</sup>.

In the context of correctly informing citizens, it is also noticeable its affectation by the new concept of "fake news". Fake news refers to those publications that intentionally or knowingly publish false statements. Thus, the extension of *ex officio* and virtual information by public authorities improves the implementation and observance of the constitutional right to information, actively combating the phenomenon of fake news and providing faster and more secure perspectives for informing citizens, in order to make informed decisions, so as to also ensure their personal well-being and informed participation in public life.

We thus summarize the impact of digitalization on this constitutional right:

- digitization increases access to legal information, by providing truthful, easily found and clear data in a structured way;
- publishing data aimed to meet the requirements of the open data format<sup>29</sup>, in order to allow their reuse, it will increase the involvement of civil society in the decision-making process, providing truthful and easy-to-use data, for example in order to develop studies or publications that highlight future needs in society in certain areas, and to create of a mechanism for publishing derived data sets, as processed by re-users;
- the possibility for civil society to verify the activity of public institutions and to ensure that they always represent the interests of citizens is strengthened by increasing the published data sets and by increasing the transparency of the institution's activity in a virtual environment;
- also, informing through the virtual environment can improve the legislative knowledge of citizens; In this regard, a positive aspect of constant information on, for example, civil proceedings would be informing the citizens of the use and benefits of extrajudicial or alternative reconciliations methods, leading in time to the diminution of the courts civil cases;
- regarding the negative aspects, the impact of digitization will reveal the uncorrelated data held by the authorities in certain areas in the first instance, but may eventually generate initiatives from the correlation and further unitary collection of the data for the future;
- also, the abundance of information published by public institutions, without ensuring the presentation of contextual aspects or explanations regarding their source, their nature, or the way of collection can confuse the citizens.

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<sup>28</sup> I. Muraru, E.S. Tănăsescu (coord.), *Romanian Constitution*, Ed. C.H. Beck, București, 2008, p. 299.

<sup>29</sup> Law no. 109/2007 regarding the reuse of information from public institutions.

Analyzing the aspects mentioned above and despite the slightly negative impact highlighted at the end of the analysis, we can certainly conclude that digitization serves to improve the implementation of the constitutional right to information, bringing substantially more benefits than limitations.

## V. Conclusions

The digitalization process in Romania in the field of justice has bloomed in the recent years, without flourishing with all its power. Initiatives in this area require extensive coordination and consolidation, interconnection and effective operability, training also making itself felt needed, with society already signaling the challenges as well as possible inequities.

Although Romania is currently at an early stage of digitization, which is largely limited to doubling the judicial efforts already carried out in physical format, the dilemma of extending the digitization process is beginning to take shape. What are the tendencies of the digitalization process in the field of justice, what efforts does it want to coagulate and what its purpose should be?

We believe that digitization should remain at the level of a technical solution that solves certain logistical or speed problems, keeping this tool only for the support part and certain procedures that require urgency. Moving the activity of courts and processes exclusively in the virtual environment, combined with the possible exacerbation of the tendency to replace human resources with artificial ones will affect the very essence of the law, destroying its bases and the philosophy behind its mechanism of operation.

In conclusion, although the impact of the digitalization of justice seems auspicious, facilitating the integration of the judiciary into the digital age and aligning it with sectors that provide essential services to citizens and require modernization, a digitalization that is not strictly observed and goes beyond its definition can seriously undermine the constitutional rights, leading to an opening of the Pandora's box.