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Judiciary digitalisation and the guarantee of effective legal protection in the era of the Covid-19 pandemic

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Digitalisation of the judiciary has been steadily implemented throughout recent years, but the COVID-19 pandemic has undoubtedly significantly sped this process up and led it to be used on a wide scale across not only Poland, but also the European Union. It can be argued that the digitalisation of court proceedings brings many advantages from the institutional point of view, such as facilitating conducting of proceedings even when faced with health risks or challenges related to possible long-distance commute to court. Nevertheless, the purpose of this article is to outline the potential risks, and drawbacks of an improper digitalisation of judiciary, from the perspective of the right to a court and due process of the defendant in criminal proceedings.

- ² The COVID-19 pandemic is in fact an extraordinary situation, although formally it did not cause the introduction of one of the constitutional states of emergency¹ in the Republic of Poland². The justice system has also been affected by the need to adapt to this reality, which will not deprive individuals of their rights, including the right to a fair trial. The Polish legislator decided to introduce numerous

¹ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended). According to the Art. 228 p. 1 of the Constitution in situations of danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster. Extraordinary measures may be introduced only by regulation, issued upon the basis of statute, and which shall additionally require to be published. However, despite the periodic hard-lockdown that took place in Poland during the first months of the COVID-19 pandemic, Polish Parliament did not decide to introduce a state of emergency or a state of natural disaster.

² P. TULEJA, *Pandemia COVID-19 a konstytucyjne stany nadzwyczajne*, *Pal.* 2020, No. 9, p. 5–21.

changes in various areas of law³. All these changes were made by adopting special anti-COVID laws⁴. Nevertheless, the adopted legal acts did not necessarily introduce solutions applicable exclusively for the time of the pandemic. It means that some of the introduced regulations that enable the digitalisation of the judiciary will not cease to be bound after the COVID-19 pandemic.

- 3 The issue of judiciary digitalisation may be analysed in aspects related to, *inter alia*: holding court hearings in the form of videoconferences (in full or in a limited scope), digitalisation of case files, delivery and filing of procedural documents by parties via an information and communication technology system (ICT), electronic registration of procedural hearings⁵. In many aspects using new technologies enables to fasten the proceedings, for instance by allowing parties to participate in court hearings while using electronic devices or by giving access to information about the case uploaded to a special platform. However, despite the many advantages resulting from the digitalisation of the judiciary, it is necessary to analyse how this issue affects the realisation of the right to a fair trial under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”)⁶.
- 4 At the same time, it should be borne in mind that the principle of the right to a court regulated in Article 45 of the Constitution of the Republic of Poland is very important in the Polish legal order and corresponds in its content to Article 6 of the Convention. The right to a court is expressed in the Constitution in Article 45(1), according to which, everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial, and independent court. The interpretation of the right to a court should take into account the provision of Article 31(3) of the Constitution, in particular, the principle of proportionality. The right to a court has a compound nature, comprising four following elements: the right to a fair court judgement with an appropriate reason of the court decisions, the right of access to a competent court, the right to an adequate judicial

³ Act of 2 March 2020 on special solutions related to the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 374); Act of 31 March 2020 on amending the Act on special solutions connected with preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them and some other acts (Journal of Laws of 2020, item 568); Act of 14 May 2020 on amending some acts in the field of protective measures in connection with the spread of the SARS-CoV-2 virus (Journal of Laws of 2020, item 875); Act of 19 June 2020 on interest subsidies for bank credits granted to entrepreneurs affected by COVID-19 and on simplified proceedings for the approval of an arrangement in connection with the occurrence of COVID-19 (Journal of Laws of 2020, pos. 1086); Act of 17 September 2020 on amending the Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them and some other acts (Journal of Laws of 2020, item 1639).

⁴ An “anti-COVID law” refers to the acts enlisted in the third footnote, adopted to regulate the spread of infectious disease, and allow proper functioning of courts and public institutions.

⁵ See: K. KARSKI, B. OREŹIAK, *Selected Considerations Regarding the Digitalisation of Criminal Proceedings in Light of the Standards of the Council of Europe: Analysis Taking into Account the Experience of the Current Pandemic*, Białystok Legal Studies 2021, vo. 26, no 6, passim.

⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, 4 November 1950, Council of Europe Treaty Series 005.

procedure and the right to an appropriately shaped system and position of the constitutional organs of justice. Limitations to the exercise of constitutional freedoms and rights may be established only by act and only when they are necessary in a democratic state for its security or public order, for the protection of the environment, health, and public morals, or for the protection of the freedoms and rights of other persons. Such limitations may not affect the essence of freedoms and rights. There is no explicit basis in Article 31(3) of the Constitution relating to pandemics, but it is accepted that the protection of health falls within the concept of public order. Hence, while it is conventionally and constitutionally possible to restrict the right to a court, the restriction must not be disproportionate and must adequately ensure the parties' right to a fair trial.

- 5 Before moving on to a more detailed analysis, two important points should be made. The scope of the considerations presented will be limited to the digitalisation of criminal court proceedings. The argument behind that is two-folded. First, the changes made to civil procedure during the state of pandemic primarily concerned the institutional functioning of the courts⁷. In view of this, they interfered less with the individual rights and freedoms referred to in Article 6 of the Convention as in the case of criminal cases, as will be presented in this paper. At the same time, unlike criminal proceedings, these changes were statutorily limited to the duration of the pandemic. Second, administrative court proceedings are organised in the Polish legal order on different institutional principles⁸ (different courts are distinguished, adjudicating only administrative cases), and, moreover, the subject matter of the cognition of these courts is, as a rule, different (administrative courts are courts of law, not of facts, and adjudicate on the legality of decisions of public administration bodies). Moreover, it is precisely in relation to digitalisation of criminal cases that the analysis of this issue from the perspective of the principle of a fair trial will be of significant importance, since it is in proceedings of this kind that the risk of a disproportionate restriction of the right to a trial may arise. Thus, the digitalisation of the administrative and civil proceedings shall be left aside, since the most radical and controversial changes were adopted into the criminal law.

⁷ Recognition of civil cases during the COVID-19 pandemic is stipulated in Article 15 zzs¹ and Article 15 zzs², of an Act on special solutions related to the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them, according to which a hearing or public hearing shall be conducted with the use of technical devices enabling it to be conducted remotely with simultaneous direct transmission of images and sound (remote hearing), provided that the persons participating in it, including members of the adjudicating panel, do not have to be in the court building. However, it is important to note that at the request of a party or a person summoned, filed at least 5 days before the scheduled date of a remote session, the court could provide them with the opportunity to participate in a remote session in the court building if the party or person summoned indicates in the request that they do not have the technical equipment to participate in a remote session outside the court building. At the same time, civil courts made more extensive use of the prerogative, introduced even before the pandemic, to examine witnesses in written form. The instruments in question made it possible to hold hearings, considering the parties' right to a trial, and its limitations complied with the principles of proportionality.

⁸ As stated in the Constitution of the Republic of Poland, the justice is exercised by the Supreme Court, ordinary courts, administrative courts, and military courts. Subject-matter of cognition of the ordinary courts are mainly criminal, civil, labour and family cases.

- 6 Having that in mind, presented considerations will focus on the issue of the anti-Covid regulations implemented by the Polish legislator that allow the conduct of remote hearings in criminal cases. The paper will contain an analysis of the above-mentioned provisions in the context of the right to a fair trial.
- 7 The analysis will be divided into two sections. First section contains the scope of the right to effective legal protection under Article 6 of the Convention, its components, and possible limitations, based on the relevant case law of the European Court of Human Rights (“ECHR”). It will discuss what are the limits to digitalisation of hearings in criminal matters under the Convention. Second section discusses the changes in the Polish criminal procedure concerning access to justice, the possibility of participating in hearings remotely, the possibility of holding hearings on pre-trial detention remotely and examines them in terms of the relevant ECHR standards. Both chapters will present what is the extent of changes to criminal procedure in Polish law related to digitisation of the judiciary introduced in relation to the COVID-19 pandemic. Consequently, presented analysis shall present how discussed changes fare against relevant standards of the European Convention of Human Rights (Article 6), based on ECHR case law.
- 8 To elaborate on the issues outlined above the paper will use methods based on the formal-dogmatic legal act analysis. Moreover, the interpretation of the provisions introduced into the Polish legal system will be confronted with the standard of the Convention reconstructed on the basis of the analysis of the ECHR case-law. Additionally, relevant doctrinal analysis of international and Polish scholars will also be included.

I. THE RIGHT TO A FAIR TRIAL IN LIGHT OF THE ART. 6 OF THE CONVENTION

A. General remarks

- 9 Article 6 of the Convention protects the right to a fair trial. This provision plays a fundamental role in ensuring a person’s effective legal protection as it covers three sets of rights. Firstly, it includes rights, which ensure the overall fairness of a trial. Secondly, it requires the presumption of innocence until proven guilty. Thirdly, it includes specific rights related to criminal proceedings.
- 10 Article 6 § 1 of the Convention states that
 - “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to:
 - a fair and public hearing;
 - within a reasonable time;
 - by an independent and impartial tribunal established by law.”

- 11 Moreover, the next sentence of this provision requires the judgement to be made public, with possible exceptions arising from, among others, public order, and the protection of private life, whereas Article 6 § 2 of the Convention concerns the above mentioned right to be presumed innocent.
- 12 Furthermore, Article 6 § 3 of the Convention enumerates minimal rights granted to the accused, which are as follows:
- “(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”
- 13 Digitalisation of the judiciary allowed for the access to court during the time of restrictions imposed in relation to the COVID-19 pandemic. Enabling the courts to work remotely on a wide scale proved beyond doubt that digitalisation might be an effective tool to address extraordinary challenges. The issue remains to conduct it correctly, meaning that in compliance with the Article 6 of the Convention.
- 14 When analysing the legal rights arising from the Article 6 of the Convention, it is crucial to take into account that they are subject to possible limitations and states enjoy a margin of discretion when it comes to the choice of means to exercise the rights foreseen in the Convention⁹. In fact, the ECHR underlined that it is up to the state’s courts to interpret and apply domestic law, as long as it is not “arbitrary or manifestly unreasonable”¹⁰, and when assessing the possible violation of the right of access to a court provided for in the Article 6 § 1 of the Convention, the state’s whole legal system should be considered¹¹.
- 15 Additionally, the state has a freedom to choose means guaranteeing litigant rights stated in the Article 6 § 1 of the Convention¹². Similarly, Article 6 § 3 of the Convention provides for a right to defend oneself in person or through legal assistance without specifics on how it should be exercised, which are up to a state’s discretion as long as they remain in compliance with the requirements of a fair

⁹ ECHR, *Nait-Liman v. Switzerland*, Judgment of 15 March 2018, Application no. 51357/07, § 114 and the case-law cited.

¹⁰ *Ibid*, § 116 and the case-law cited.

¹¹ *Ibid*, § 112.

¹² ECHR, *Siwec v. Poland*, Fourth 3 July 2012, Application no. 28095/08, § 45 and the case law cited.

trial¹³. However, any measures which result in the limitation of a right to a defence must be necessary and if there is a less restrictive measure available, it should be chosen instead¹⁴.

- 16 Moreover, the ECHR emphasised that this right is not absolute and may be subject to limitations, however they must not be “in such a way or to such an extent that the very essence of the right is impaired.”¹⁵. These admissible limitations must also serve a legitimate aim and there must be a proportionality respected between said aim and means undertaken to achieve it¹⁶. Additionally, the limitations may arise also from the interpretation of law, thus State’s courts undertaking it, should avoid doing it in a too strict or too flexible manner¹⁷.
- 17 Subsequently, when assessing the possible violation of Article 6 of the Convention, the nature of the dispute and what it means to the party should be taken into account.¹⁸ In the case of *Siwec v. Poland*, the ECHR found that whether a personal presence of a detainee before the first instance civil court is required (given that he is represented by an advocate), depends on whether the claim is based on his personal experience¹⁹.
- 18 Moreover, the individual’s characteristics, such as being when the party is a person with disabilities, may also be decisive when assessing whether the right to court was ensured²⁰. Indeed, in the case of *A.N. v. Lithuania*, the ECHR underlined that the courts may make “appropriate procedural arrangements” to guarantee the good justice process as well as the protection of the health of the person concerned²¹. In addition, in the context of possible limitations to one’s rights, the ECHR distinguished situations in which a person’s mental illness causes the complete inability to express a coherent view, from those in which it is possible, but the person lacks the ability to administer his own affairs²². Thus, the scope of possible limitations of the rights from Article 6 of the Convention varies accordingly.
- 19 These observations should also be taken into account when assessing the changes and limitations of rights in connection to digitalisation in the era of COVID-19 pandemic. Moreover, the digitalisation may entail further identification of characteristics which might be decisive in a case regarding

¹³ ECHR, *Marcello Viola v. Italy*, 5 October 2006, Application no. 45106/04, § 60 and the case-law cited.

¹⁴ ECHR, *Zagaria v. Italy*, 27 November 2007, Application no. 58295/00, § 31.

¹⁵ ECHR, *Nait-Liman v. Switzerland*, § 114 and the case-law cited.

¹⁶ *Ibid.*, § 115 and the case-law cited.

¹⁷ ECHR, *Witkowski v. Poland*, 13 December 2018, Application no. 21497/14, §§ 44 and 56.

¹⁸ ECHR, *Siwec v. Poland*, § 49 and the case-law cited.

¹⁹ *Ibid.*, § 48.

²⁰ Helsińska Fundacja Praw Człowieka, *Nowe Technologie, nowa sprawiedliwość, nowe pytania. Wdrażanie nowych technologii w wymiarze sprawiedliwości*, Clifford Chance, Warszawa 2021, available at: <https://www.hfhr.pl/wp-content/uploads/2021/07/Raport.-Nowe-Technologie-Nowa-Sprawiedliwosc-Nowe-Wyzwania.-Wdrażanie-nowych-technologii-w-wymiarze-sprawiedliwosci.pdf> (access: 21.04.2022), p. 29.

²¹ ECHR, *A.N. v. Lithuania*, 31 May 2016, Application no. 17280/08, § 89 and the case-law cited.

²² *Ibid.*, § 90 and the case-law cited.

conducting a proceeding with the use of digital solutions, such as dealing with persons without internet access or lacking basic computer operating skills, who suffer from digital exclusion²³.

B. Impact of digitalisation on the rights arising from Article 6 of the Convention

- 20 From the analysis of the Article 6 of Convention, it can be deduced that some of the provided rights might be subject to limitations or changes due to the digitalisation of judiciary in times of the COVID-19 pandemic. However, this does not concern all of them²⁴. In fact, having a remote hearing does not impact the independence and impartiality of the judge, presumption of innocence or the requirement for the tribunal to be established by law²⁵. Similarly, digitalisation of the judicial proceeding does not directly influence the right to have an adequate time to prepare a defence and to be provided with all the relevant information on the accusation, including the help of an interpreter, when needed.
- 21 On the other hand, digitalisation of the judiciary may impact the exercise of the right to defence, to examine witnesses and to obtain attendance as provided for in the above-mentioned Article 6 § 3 c) and d) of the Convention²⁶. Moreover, digitalisation may clearly impact the timeframe of the judicial review, although rather in a positive manner.
- 22 The most prominent aspect of the digitalisation of the judiciary is conducting hearings remotely. As such this entails a significant change of the practical aspects of the procedure as well as it requires the adoption of adequate best practices, which would ensure the respect of the rights arising from the Article 6 of the Convention in the online environment and outside of the courtroom. This includes not only the effective participation in the judicial proceeding, but also being able to communicate confidentially with an attorney. It should be noted, however, that the concept of remote hearings was not developed due to the COVID-19 pandemic, but certainly because of it, got used on a never seen before scale²⁷.
- 23 In this context it should be underlined that Article 6 of the Convention ensures the right to participate effectively in a criminal proceeding, which includes being present throughout it, hearing and seeing

²³ Helsińska Fundacja Praw Człowieka, *Nowe Technologie, nowa sprawiedliwość, nowe pytania. Wdrażanie nowych technologii w wymiarze sprawiedliwości*, opt. cit., p. 30 and chapter 3 for more on the issue of digital exclusion.

²⁴ For more on the art. 6 of the Convention See generally O.J. Settem, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings. With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency*, Springer, 2016.

²⁵ Similarly, it should be noted that recent case law of the Polish Constitutional Tribunal regarding Article 6 of the Convention (Judgement of 24 November 2021, K 6/21) deemed that this provision is partially unconstitutional. This concerns however whether the term court, used in the Article 6 of the Convention, includes the Constitutional Tribunal as well as whether the ECHR has competence to assess the legality of the election of judges of the Constitutional Tribunal. Thus, since this paper focuses on the issue of digitalisation of the judiciary and its possible impact on the rights arising from the Article 6 of the Convention - this issue falls outside of its scope.

²⁶ C. KULESZA, *Remote Trial and Remote Detention Hearing in Light of the ECHR Standard of the Rights of the Accused*, Białystok Legal Studies, 2021, Białostockie Studia Prawnicze, Vol. 26 nr 3, 2021, p. 207, available at: <http://hdl.handle.net/11320/11717> (access: 20.04.2022).

²⁷ See also K. KAMBER, *The Right to a Fair Online Hearing*, Human Rights Law Review, 2022, Vol. 22, Issue 2, ngac006.

what is being done and having the possibility to actively engage in it²⁸. However the weight of that right is different when it comes to the appeal hearing, especially concerning legal issues as opposed to factual ones²⁹. Thus, effective participation is rather linked to the ability to present one's case, than the right to be present in person in a civil court³⁰.

- 24 Moreover, the ECHR does not consider the concept of participation in the proceedings via videoconference as violating the Convention, when it “serves a legitimate aim” and there are appropriate arrangements in place to ensure the respect of the rights stipulated in art. 6 of the Convention, such as regarding the evidentiary proceedings³¹.
- 25 Whether the aim, which the digitalisation of the proceeding might serve, is legitimate depends on a given case. They might be connected to, among others, public safety, prevention of crime and protection of witnesses when a case concerns crime related to Mafia activity, facilitating the respect for the right to have a hearing within a reasonable time³² and a proper organisation of the justice system³³.
- 26 On the other hand whether the appropriate arrangements were undertaken to guarantee the effective legal protection mean, among others, providing an audio-visual link, which allows the detainee to follow the proceeding as well as to be seen and heard in the court, when making statements or posing questions to witnesses³⁴. The proceeding must also be organised in a manner that allows for the respect of the principle of equality of arms, which means that neither party is placed at a substantial disadvantage vis à vis the opponent³⁵.
- 27 Furthermore, a fundamental part of the above mentioned appropriate arrangements constitutes enabling the confidential communication between the party and their attorney³⁶. This requirement means the communication with an attorney without being heard by a third party³⁷. The ECHR underlined that without confidentiality due to supervision, the communication between an attorney and their client loses most of its value³⁸. In the case of *Zagaria v. Italy* the telephone conversation between the detainee and the attorney was being listened to and summarised in a report given to the

²⁸ ECHR, *Marcello Viola v. Italy*, § 52 and the case law cited.

²⁹ *Ibid.*, §§ 54-55 and the case law cited.

³⁰ See ECHR, *Siwec v. Poland*, §§ 45 - 47 and the case law cited.

³¹ ECHR, *Marcello Viola v. Italy*, § 67.

³² ECHR, *Marcello Viola v. Italy*, § 71-72; ECHR, *Asciutto v. Italy*, 27 November 2007, Application no. 35795/02, § 68.

³³ ECHR, *Parol v Poland*, 11 October 2018, Application No 65379/13, § 40.

³⁴ ECHR, *Marcello Viola v. Italy*, § 73.

³⁵ ECHR, *Rasmussen v. Poland*, 28 April 2009, Application no. 38886/05, § 42 and the case law cited.

³⁶ See ECHR, *Marcello Viola v. Italy*, § 75.

³⁷ ECHR, *Asciutto v. Italy*, § 60.

³⁸ *Ibid.*, § 60.

prison management³⁹. This was found to not satisfy the requirement of absolutely necessary restriction and resulted in a violation of the right to effective defence⁴⁰.

- 28 Lastly, it is important to analyse the case of *Jallow v. Norway*⁴¹ as it concerns the digital proceeding, and the judgement was issued during the times of COVID-19 pandemic. This case was initiated by a father, a citizen of Gambia, who was denied an entry visa to Norway to participate in a judicial proceeding regarding parental responsibilities over his son, following the death of the child's mother⁴². In consequence, he participated in the proceeding remotely, while his attorney was present in the courtroom.
- 29 The Norwegian court decided that since the applicant never exercised parental rights over his son and he barely knew him, he should not be granted the parental rights after the mother's death⁴³. Parental rights were also denied to the late mother's sister, who lived in the United Kingdom⁴⁴.
- 30 Additionally, the ECHR stated that the subject-matter of the case was not whether the refusal to grant a visa to attend the proceeding in person violated the applicant's rights, but whether the way the proceeding was conducted, provided him with a fair hearing⁴⁵.
- 31 Moreover, the judgement underlined that postponing the case while the applicant was trying to obtain a visa, carried negative consequences for the child's interest⁴⁶. This was instrumental, since the main proceeding's subject-matter was, in fact, the parental responsibilities, not the custody for a child, therefore the verdict was not based on the physical impression made by the applicant⁴⁷.
- 32 Furthermore, although the applicant had to participate in the hearing remotely, his attorney was present in the courtroom and they did not submit complaints regarding the possible problems throughout the hearing or with confidential communication⁴⁸. Subsequently, the principle of equality of arms was not found to be breached in this case, even though the applicant was not able to participate in the hearing in person, as opposed to the child's aunt, because she was not his opponent in court, which was proved by the fact that they both lost⁴⁹.
- 33 Thus, the case of *Jallow v. Norway* can serve as an indication for the analysis of future cases related to digital proceedings. The legitimate aim, which the remote hearing served, was deciding on a case in a

³⁹ ECHR, *Zagaria v. Italy*, § 32.

⁴⁰ *Ibid.*, §§ 32 and 36.

⁴¹ ECHR, *Jallow v. Norway*, 2 December 2021, Application no. 36516/19.

⁴² *Ibid.*, §§ 5-12 and 19.

⁴³ *Ibid.*, §§ 23-24.

⁴⁴ *Ibid.*, § 24.

⁴⁵ *Ibid.*, § 60.

⁴⁶ *Ibid.*, §§ 63-64.

⁴⁷ *Ibid.*, § 64.

⁴⁸ *Ibid.*, § 66

⁴⁹ ECHR, *Jallow v. Norway*, §§ 59 and 68-69.

reasonable manner, especially given that it concerned the legal responsibility for a child. As the main proceeding's case was about granting parental responsibility in a way that ensures the child's best interest, the applicant and the impression he might have made on the court was not at the core of the decision-making process. Moreover, he was provided with the appropriate procedural arrangements, which ensured he could actively participate in the proceeding and was represented by an attorney, with whom he was able to communicate confidentially.

II. THE RIGHT TO A FAIR TRIAL AND DIGITALISATION OF THE CRIMINAL PROCEEDINGS IN POLISH LAW DURING COVID-19 PANDEMIC

A. Judiciary digitalisation in criminal proceedings

- 34 The following considerations should be narrowed down to the issues related to the possibility of holding a criminal trial remotely. The Polish legislator decided to introduce relevant provisions to mitigate risk in the state of epidemics. From the perspective of human rights protection, this problem will be focused mainly on the issue of ensuring the right to a fair trial in holding court hearings in criminal cases with the use of equipment enabling simultaneous remote transmission of image and sound.
- 35 Before the introduction of the pandemic state, the Polish Code of the Criminal Procedure⁵⁰ did not contain regulations enabling the digitalisation of the proceedings to a large extent⁵¹. In principle, no regulation enabled the court to conduct remote hearing in full at any stage of the proceedings. However, despite a periodic lockdown⁵² in the justice system, the anti-Covid laws still required that the hearings in "urgent" cases must be held, as stipulated in anti-Covid regulations⁵³. These provisions

⁵⁰ Journal of Laws of 2022, pos. 534 as am.

⁵¹ Prior to the introduction of legislative solutions related to the prevention of the COVID-19 pandemic, the Code of Criminal Procedure provided for the possibility of conducting procedural and judicial activities in remote form to the extent referred to in: (a) Article 177 § 1a-1b of the Code of Criminal Procedure - interrogation of a witness with the use of technical equipment making it possible to conduct this activity with simultaneous direct transmission of images and sound; b) Article 184 § 4 - hearing a witness *incognito*; c) Articles 185a-185c - questioning in the so-called "blue interrogation room", within the subjective scope referred to in the above-mentioned provisions; d) Article 377 § 4 *in fine* - a possibility to question an accused who has not yet provided explanations, in the mode referred to in Article 177 § 1a; e) Article 390 § 3 - questioning of a co-defendant or a witness or expert in exceptional cases, when it is feared that the presence of the accused person could hamper the questioning; f) Article 517b - concerning accelerated proceedings.

⁵² During the initial months of the Polish pandemic state (so-called "hard lockdown"), the operation of the courts was suspended. No trials were conducted.

⁵³ According to the art. 14a ust. 1 po. 1 of the Act on amending the Act on special solutions related to preventing, counteracting and combating covid-19, other infectious diseases and crisis situations caused by them and some other acts, since 31st of March 2020 hearings regarding applications for the use, extension, modification and revocation of pre-trial detention were classified as urgent. This regulation ceased to be bound on 5th September 2020.

were introduced to secure the undisturbed examination of cases already initiated, i.e., by the prosecutor's motion to apply pre-trial detention in the course of investigation.

- 36 Nevertheless, despite limited scope of the above-mentioned provisions, the pandemic state pushed the Polish legislator to introduce regulations allowing for more complex digitalisation of the criminal proceedings. The Act of 19 June 2020 on subsidies to interest on bank credits granted to entrepreneurs affected by the effects of COVID-19 and on simplified proceedings for granting an arrangement in connection with the occurrence of COVID-19⁵⁴, has introduced the possibility of conducting a criminal trial remotely. The presented amendments are regulated in Articles 250 §3b-3h⁵⁵ and 374 §3-9⁵⁶ of the Polish Code of Criminal Procedure. These new regulations enable remote hearings to be held in two cases. Firstly, in relation to ruling on preventive detention, including at the pre-trial stage⁵⁷. Secondly, regarding the main hearing, to the extent that the accused is already deprived of liberty.
- 37 What is more, in contrast to the changes that were introduced to civil procedure due to the Covid-19 pandemic, the right to digitise the criminal proceedings was not restricted exclusively to the state of the coronavirus pandemic-related lockdown. This means that the discussed regulations have been implemented into the Code of Criminal Procedure and will not cease to be in force after the end of the pandemic⁵⁸. The Polish legislator, as a consequence of the COVID-19 pandemic, introduced the

⁵⁴ Journal of Laws of 2020, pos. 1086.

⁵⁵ Compulsory bringing of a suspect to court may be waived if the participation of the suspect in the session is ensured, in particular to submit explanations by means of technical devices which make it possible to conduct the meeting remotely with simultaneous direct transmission of images and sound. In that event the defence counsel shall take part in the session at the place of residence of the accused, unless the defence counsel appears court for this purpose or the court obliges him to attend the session in the court building due to due to the necessity to waive the risk of not deciding the motion for pre-trial detention before the end of the reasonable period of detention of the accused. In the event that the defence counsel takes part in the session while being in place other than the accused, the court on application of the accused or defence counsel may order a break for a definite period of time and allow the defence counsel to contact the accused by telephone the accused, unless granting the request may disrupt the proper conduct of the orderly conduct of the hearing or poses a risk of not deciding on the request for to remand the accused person in custody before the end of the permissible of detention of the accused.

⁵⁶ The court upon a motion of the public prosecutor, shall consent to his participation in the trial with the use of technical devices enabling participation in the trial at a distance with simultaneous direct transmission of images and sound, if these are not technical reasons do not prevent it. In such a case a defence counsel shall participate in a trial at the defendant's place of residence unless he appears in court for that purpose. If the defence counsel takes part in the trial while being in a different place. If the defence counsel takes part in the trial from a different place than the accused, the court, on application of the accused or the defence counsel, may order a break for a specified period of time, in order to continue the trial on the same day in order to enable the defence counsel to contact the accused by telephone, unless the submission of the request clearly does not serve the purpose of exercising the rights of the defence and, in particular, is intended to disrupt or unreasonably prolong the trial.

⁵⁷ See more: P. MISZTAL, *Zdalne posiedzenie aresztowe w trybie art. 250 § 3b-3h Kodeksu postępowania karnego. Uwagi de lege lata i de lege ferenda*, *Studia Prawnoustrojowe* 2021, no. 54, passim.

⁵⁸ A. MEJKA, *Definicja i rozpatrywanie przez sądy spraw pilnych w dobie koronawirusa i regulacji z tzw. tarczy antykryzysowej*, [<https://sip.lex.pl/komentarze-i-publikacje/komentarze-praktyczne/definicja-i-rozpatrywanie-przez-sady-spraw-pilnych-w-470129669>], access 28.4.2022.

possibility of conducting a remote hearing in a general manner, not necessarily related to the pandemic.

B. Remote criminal proceedings under the case law of the ECHR

- 38 Considering what has been pointed out in the first section of this paper, a few aspects related to right to fair trial in holding criminal hearings remotely need to be emphasised. First, the participation in the criminal proceedings remotely should be as equivalent as possible to a traditional court appearance. Therefore, it is crucial that digitalisation does not impede the exercise of the right to a fair trial guaranteed under the Convention. As stipulated by the ECHR “in the interest of a fair and just criminal process it is of capital importance that the accused should appear at his trial, both because of his right to a hearing and because of the need to verify the accuracy of his statements”⁵⁹.
- 39 The case-law of the ECHR generally recognises that videoconferencing as a form of participation of the accused in criminal proceedings is not in principle incompatible with the notion of a fair and public hearing⁶⁰. However, in the ECHR’s view, the use of this technology must always serve a legitimate purpose and participation in the hearing must comply with the requirements of a fair trial as set out in Article 6 and ensure the defendant’s effective rights of defence. These include, inter alia, the existence of a compelling reasons justifying such a measure⁶¹. In particular, the accused must be able to follow the proceedings and to be heard without technical hindrance and must be able to communicate effectively and confidentially with his defence counsel⁶².
- 40 As regards a legitimate aim for having a remote hearing in criminal cases, this premise should be understood as: the need to ensure public safety and order, the right to hear the case within a reasonable time or limiting the impact of the defendant’s direct presence on other participants in the proceedings, including the victims. In other words, by compelling reasons one might understand, i.e., prevention of disorder, prevention of crime, protection of witnesses and victims, rights to life, freedom, and security⁶³. For instance, when the defendant has contracted Coronavirus and his/her presence at the trial by remote means, while respecting other conditions, seems to be sufficient. Regarding the above,

⁵⁹ See: ECHR, *Lala v. the Netherlands*, 22 September 1994, Series A no. 297-A, § 33; ECHR, *Poitrimol v. France*, 23 November 1993, Series A no. 277-A, § 35; ECHR *Sejdovic v. Italy*, 1 March 2006, Application no. 56581/00.

⁶⁰ *Marcello Viola v. Italy*, Application no. 45106/04; *Asciutto v. Italy*, 27 November 2007, Application. no. 35795/02.

⁶¹ See C. KULESZA, *Remote...*, p. 208.

⁶² ECHR, *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb)*, Strasbourg, Updated on 30 April 2021, p. 33, 88; [https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf] (access: 21.4.2021); *Marcello Viola v. Italy*, 5 October 2006, Application no. 45106/04; *Zagaria v. Italy*, 27 November 2007, Application no. 58295/00; ECHR *Shulepov v Russia*, 26 June 2008, app. no. 15435/03; ECHR *Shugayev v Russia*, 14 January 2010, Application no. 11020/03; ECHR *Sevastyanov v Russia*, 22 April 2010, Application no. 37024/02; ECHR *Golubev v. Russia*, decision of 9 November 2006, Application no. 26260/02; M. A. Nowicki, *Sakhnovskiy przeciwko Rosji – wyrok ETPC z dnia 2 listopada 2010 r., skarga nr 21272/03*, w: idem, *Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2010*, Warszawa 2011, p. 132.

⁶³ *Marcello Viola v. Italy*, § 72.

when the defendant is infected with the virus, the premise of right to life and protection of public health might be applicable. In such a case, conducting criminal hearing remotely can effectively mitigate the risk of spreading the infection and, therefore, ensure protection of health and safety of other parties to the proceedings. On the other hand, standards guaranteed under the Article 6 of the Convention need to be respected. It means that remote hearing cannot be conducted to the detriment of the rights of the defence.

- 41 The ECHR identifies the most important issue as the necessity to ensure confidential communication between the defendant and his counsel⁶⁴. Therefore, video conferencing per se does not violate the right to a fair trial or the rights of the defence. However, it is subject to the assumption that the audio and video connection is of sufficient quality and that the defendant can not only present his views but also follow the proceedings in real time. Consequently, the technical facilities must ensure that the defendant is not only able to give explanations and make requests for evidence, but also to perceive the statements made by other participants in the proceedings. It must fulfil requirements of respect for due process⁶⁵. On the other hand, the ECHR claims that where the defendant communicates with the court by way of a video link, the exercise of the right to legal assistance takes on particular significance especially where there are numerous and serious charges against him/her⁶⁶. What is more, it is incumbent to ensure that recourse to this measure in any case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the right to fair trial⁶⁷.
- 42 The ECHR case-law seems to conclude that the higher the instance of court in criminal proceedings, the wider the margin for digitalisation of the criminal hearing. In this respect, when the criminal court becomes a court of law rather than a court of facts, there is more space for digitisation of the procedure. In *Kamasinski v. Austria*⁶⁸ ECHR noticed that the personal appearance of the defendant does not take the same crucial significance for an appeal hearing as it does for the trial hearing⁶⁹. The reason is that the higher courts often focus mainly on the law interpretation rather than gathering and assessing the evidence.
- 43 Additionally, there is a risk that remote hearing on pre-trial detention cases will be incompatible with the standard established under Article 5(3) of the Convention. It should be noted that the case law of the ECHR (mainly *Medvedev v. France*) clearly concludes that the purpose of this provision is to ensure

⁶⁴ *Marcello Viola v. Italy*, §§ 63-67; *Asciutto v. Italy*, §§ 62-73; *Sakhnovskiy v. Russia* [GC], § 98.

⁶⁵ See. C. KULESZA, *Remote...*, p. 207.

⁶⁶ See: ECHR *Shulepov v. Russia*, § 35, and *Golubev v. Russia* (dec.), 9 November 2006, Application no. 26260/02; *Sevastyanov v. Russia*, § 73.

⁶⁷ *Marcello Viola v. Italy*, § 67.

⁶⁸ ECHR *Kamasinski v. Austria*, 19 December 1989, Application. no. 9783/82.

⁶⁹ However, it depends on the special features of the proceedings involved. It means that one must take into account the entirety of the proceedings in the domestic legal system, inter alia, the possibility to examine a case as to the facts and the law and make a full assessment of guilt by the appellate or cassation courts.

that detainees are physically brought promptly before a judicial officer⁷⁰. The case-law of the ECHR has established an obligation of judicial review to ensure the protection of a person arrested or detained on suspicion of having committed a crime⁷¹. It is intended to provide effective safeguards against the risk of ill-treatment – which is the greatest in the early stages of criminal proceedings, when the defendant must be considered innocent until proven guilty, however, still can be temporarily detained under arrest by the court. Thus, the judicial review carried out on the first appearance of a detainee before a judge must, in the first place, be prompt to minimise any ill-treatment and unjustified interference with the freedom of the individual.

C. Remote criminal hearing in the Polish legal system

- ⁴⁴ Having in mind what has been stated above, a few findings need to be presented in that regard. Firstly, the regulations introduced to the Polish legal system during the Coronavirus pandemic enable holding a remote trial regardless of the existence of any normatively defined prerequisites. Therefore, the decision on holding a remote trial depends on the sole discretion of the court or motion of the prosecutor. In other words, no compelling reasons, as set out in the statutory grounds, need to exist for the accused to participate in a remote trial. In this respect, the decision was left to the discretionary power of the trial authority.
- ⁴⁵ Secondly, indicated provisions do not introduce any subject-matter scope for cases in which a remote hearing is possible. This means that, in principle, it is possible in any case, regardless of the nature of the alleged offence or the legal qualification of the act. What is more, as far as the scope of the regulation is concerned, participation in a remote hearing has been slightly limited to a few enumerative specified circumstances. When it comes to the pre-trial detention cases, it is not possible to hold a remote hearing if the suspect or defendant is deaf, mute, or blind. In such a situation, a traditional hearing is necessary. As regards the latter cases, remote hearings are possible for persons who are already deprived of their liberty. It does not matter whether the person is deaf, mute, or blind. If the defendant is deaf, mute, or unable to speak Polish, it is only necessary to ensure the participation of an interpreter. Nevertheless, a remote trial is permissible in any event for these persons. Therefore, in this aspect of the proceedings the participation of blind persons in a remote trial was left outside the scope of the regulation. This means that if such a person is deprived of liberty, it is always possible to hold a hearing with their participation by videoconference. The court is not obliged to consider any subjective criteria in favour of refraining from a remote trial⁷². On the contrary, even the lack of legitimate aim stipulated in the ECHR case law does not currently constitute an impediment to a video trial in Polish criminal proceedings.
- ⁴⁶ On the other hand, the doctrine proposes to limit the admissibility of digitalisation of criminal proceedings in cases of offences with a lower level of social harmfulness. At the same time, the use of

⁷⁰ ECHR, *Medvedev and Others v. France*, 29 March 2010, Application no. 3394/03.

⁷¹ *Ibidem*.

⁷² J. SKORUPKA, *Komentarz do art. 250, w: J. SKORUPKA (ed.), Kodeks postępowania karnego. Komentarz*, Warszawa 2021, Legalis.

remote hearings when deciding on pre-trial detention is criticised⁷³. According to the European Criminal Bar Association, proceedings conducted exclusively by means of videoconferencing may have a dehumanising effect and are not capable of achieving the educational objectives of criminal proceedings⁷⁴. In view of this, personal, physical presence of the suspect/accused is important, as it enables the judge to form an opinion about the suspect's credibility, his or her mental and health situation. This guarantees the possibility for the court to use all methods of perception both for the assessment of the evidence and for the assessment of the person of the suspect. From the psychological and sociological point of view, direct contact of the court with the suspect during the arrest session has a symbolic dimension. Even if the procedural rights of the suspect are fully respected, it is easier to dehumanise the person of the suspected person, who is only visible on the screen of the device enabling direct transmission of sound and images. Therefore, it seems legitimate to state that the greater the limitation of direct contact between the court and the defendant, the greater the likelihood of a pre-trial detention or a heavy sentence being imposed on the defendant, as observed by the ECBA. While it is not explicitly provided for in the normative context, the above context appears to be important in view of current trends in judicial practice as regards the pre-trial detention cases in the Polish legal system⁷⁵.

- 47 Thirdly, the organisation of a remote trial is not a prerequisite for mandatory defence. It should be emphasised that, as a rule, in Polish criminal procedure, an accused does not have to have a defence counsel appointed. Polish legislation expresses the principle that the accused has the possibility to self-defend himself. There are, however, certain exceptions to this principle, which relate to charges of the most serious offences or due to special characteristics of the accused. However, conducting criminal proceedings at a distance does not fall within these circumstances. In other words, the defendant at a remote trial may not have an appointed defence counsel at all.
- 48 However, where the accused is assisted by appointed defence counsel, the law does not indicate the need for confidential and appropriate contact between the defence counsel and his client. The regulation only stipulates that such a contact shall be made possible⁷⁶. However, in a situation in which

⁷³ ECBA, *Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World*, [http://www.ecba.org/extdocserv/20200906_ECBAStatement_videoink.pdf] (access: 21.4.2022); P. Misztal, *Zdalne...*, passim.

⁷⁴ Ibidem; see also: P. GIBBS, *Defendants on Video – Conveyor Belt Justice or a Revolution in Access?*, Transform Justice 2017; Fair Trials, *Justice Under Lockdown. A survey of the criminal justice system in England & Wales between March and May 2020*.

⁷⁵ A. KLEPCZYŃSKI, P. KŁADOCZNY, K. WIŚNIEWSKA, *Tymczasowe aresztowanie – (nie)tymczasowy problem. Analiza aktualnej praktyki stosowania tymczasowego aresztowania*, Warszawa 2019, [http://www.hfhr.pl/wp-content/uploads/2019/07/HFPC-Tymczasowe-aresztowanie-nietymczasowy-problem-web_01.pdf] (access: 21.4.2022); B. Pilitowski, *Aktualna praktyka stosowania tymczasowego aresztowania w Polsce. Raport z badań empirycznych*, Toruń 2019, [https://courtwatch.pl/wp-content/uploads/2019/12/tymczasowe_aresztowania_FCWP.pdf] (access: 21.4.2022).

⁷⁶ In the event that the defence counsel takes part in the session while being in place other than the accused, the court on application of the accused or defence counsel may order a break for a definite period of time and allow the defence counsel to contact the accused by telephone the accused, unless granting the request may disrupt the proper conduct of the orderly conduct of the hearing or poses a risk of not deciding on the request for to remand the accused person in custody before the end of the permissible of detention of the accused.

contact between the defence counsel and the accused would be intended to disrupt the trial or prolong the proceedings, the court may prohibit it⁷⁷. This premise, however, is highly vague, because the court, even before allowing contact between the accused and his defence counsel, assesses whether the contact benefits the exercise of the rights of defence. If the court concludes that the contact would only serve to obstruct the proceedings, it may even prohibit the exercise of the right of defence in this respect⁷⁸. This solution seems to be not compatible and far removed from the Convention standard⁷⁹.

- 49 Lastly, it is not a remote hearing in the full meaning of the term. The defendant who takes part in the hearing by means of devices enabling simultaneous transmission of images and sound must still be present in the justice administration infrastructure⁸⁰. It means that remote participation for instance from home is not permitted. Also, the defendant must appear in the building of another court, prison, or detention centre and, in addition, a staff member of the justice department referred to in the regulations has to be with him or her. This means that holding a remote hearing requires the involvement of the judicial institution to a greater extent than holding a traditional hearing. Since the defendant still must be in court, but not in the court where his trial is taking place, it is not a remote trial in the form referred to, for example, in civil proceedings.

III. CONCLUDING REMARKS

- 50 The COVID-19 pandemic posed an extraordinary challenge for the judicial systems regarding the digitalisation of the judicial proceedings in a manner consistent with the rights arising from the Article 6 of the Convention.
- 51 This paper demonstrated that the ECHR has, in principle, accepted the holding of court hearings by videoconference as an exception to the traditional trial, but in the presence of compelling reasons recognised by the ECHR and provided that there are appropriate procedural arrangements in place to guarantee a fair trial to the accused. The ECHR's case law provides premises, based on which the state's regulations might be evaluated.

⁷⁷ K. DUDKA, w: M. JANICZ, C. KULESZA, J. MATRAS, H. PALUSZKIEWICZ, B. SKOWRON, K. DUDKA, *Kodeks postępowania karnego. Komentarz*, Warszawa 2020, art. 250, Nb 10.C.

⁷⁸ See: J. MATRAS, *Standard „równości broni“ w postępowaniu w przedmiocie tymczasowego aresztowania*, Prok. i Pr. 2009, Nr 3, p. 5 i; C. Nowak, *Zasada równości broni w europejskim i polskim postępowaniu karnym*, PiP 1999, Nr 3, p. 38.; M. Wąsek-Wiaderek, *Zasada równości stron w polskim procesie karnym w perspektywie prawnoporównawczej*, Kraków 2006, *passim*; P. Wiliński, *Pojęcie rzetelnego procesu karnego*, in: P. Wiliński (ed.), *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych*, Warszawa 2009, p. 352.

⁷⁹ KULESZA, *Remote...*, p. 214-215.

⁸⁰ M. GUTOWSKI, P. KARDAS, *Epidemia a digitalizacja działalności prawniczej – czyli o korzyściach i szkodach przyspieszonej cyfryzacji polskiego wymiaru sprawiedliwości*, e-Palestra 2020, [<https://palestra.pl/pl/e-palestra/16/2020/epidemia-a-digitalizacja-dzialalnosci-prawniczej-czyli-o-pozytkach-i-szkodach-przyspieszonej-cyfryzacji-polskiego-wymiaru-sprawiedliwosci>], (access: 21.4.2022)

- 52 Furthermore, given the circumstances of the COVID-19 pandemic, the protection of human life and health should be considered as a legitimate aim, justifying the digitalisation of the proceedings. That being said, the significance of the right to be present before the court varies according to the subject-matter of the case and what it means to the party. On the other hand, the possibility to exercise the right to a confidential communication with an attorney as well as to actively participate in the proceeding constitutes one of the most fundamental components of the appropriate procedural arrangements, which guarantee the compliance of the digitalisation with the Convention.
- 53 The rights under Article 6 are not absolute and should be balanced with other rights protected by the Convention. In the era of the COVID-19 pandemic, due process rights must be balanced by legislators and courts with the protection of public health and the absolute right to life itself.
- 54 Moreover, the paper demonstrated that despite the numerous advantages of the digitalisation of criminal proceedings the amendment of Polish law in this respect contradicts the standard arising from the Convention. Analysed regulations enable the court to conduct remote hearings even with the lack of legitimate aim. Accordingly, no compelling reasons must be observed in a certain case in order to organise a trial *via* video-conference. Consequently, while interpreting provisions amended into the Polish criminal procedure during the pandemic literally, analysed matter is left to the sole discretion of the court. Considering the above, presented way of organising a court session does not promote anything other than acceleration of the proceedings and a kind of convenience for the procedural authorities⁸¹.
- 55 The second finding is that the scope of cases in which remote hearings are not admissible is reduced to a limited catalogue in pre-trial detention cases, i.e., situations when the defendant is deaf, mute, or blind. In other cases, remote hearings are allowed while the defendant is deprived of liberty. Since applicability of those regulations is not restricted to the state of Covid-19 pandemic, the subjective

⁸¹ As a *ratio legis*, the legislator indicated that "the proposed amendments to the Code of Criminal Procedure are aimed at extending the possibility of conducting selected activities of criminal proceedings remotely, which will serve to increase its speed, reduce costs and inconvenience for trial participants associated with the need to appear in court, and at the same time will create opportunities to reduce the risks resulting from the state of the epidemic for persons participating in these activities as a procedural body or participant". It seems that the legislator uses an unconvincing argumentative technique, based on the assumption that the participation of the parties to a criminal trial in an arrest hearing conducted in a traditional manner is a costly and burdensome event for them. Although in relation to the first of these qualities, one could admit that the proponent is right, for the infrastructural investment consisting in the introduction of technology enabling the initiation of digitalisation of proceedings would in the long run entail the reduction of expenses regarding each bringing of defendants from the arrest facility or the prosecutor's office, the involvement of Prison Service officers, etc., the second one remains completely wrong. It cannot be convincingly argued that the organisation of a hearing, which is associated with a potential weakening of the possibility to exercise procedural rights of a suspect, is at the same time associated with less inconvenience for the suspect. On the contrary, the suspected person and his defence counsel face more inconvenience in a situation in which the organisation of a remote hearing is immanently linked with the fact that they are not able to establish direct contact or to prepare for the hearing by accessing the case file; Justification of the draft Act of 19 June 2020 on interest subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for the approval of an arrangement in connection with the occurrence of COVID-19, print no. 382.

scope of the remote hearings is relatively broad. *De lege ferenda*, it should be considered inevitable to define a catalogue of procedural activities which, despite the digitalisation of the criminal process, cannot be transferred to the online sphere. The case of *Jallow v. Norway* can serve as an indication as to the ECHR's approach to digital proceedings. However, the extent of its application may vary in connection to the subject-matter of the case as well as possible individual characteristics of the party, such as disability or digital exclusion.

- 56 The third insight is that there is no domestic case-law related to the analysed provisions. The Polish courts do not apply provisions allowing remote hearings in criminal cases⁸². It seems that the lack of jurisprudence in this respect also leads to relevant conclusions. Refraining from applying the provisions in question means that the courts directly implement the standard resulting from the ECHR in this area.
- 57 Concerning the right to court and transparency of the proceedings as well as access to the court, the process of digitalisation may be estimated as a positive aspect, but several problems exist as it was pointed out in this paper. Criminal procedure requires the implementation of provisions under which the right to a fair trial and the obligation of the state to ensure access to and the right to justice for its citizens will be provided.

⁸² According to the reports, Polish courts conducted remote trials in exceptional cases. For instance, in 2021, the Warsaw Court of Appeal held only one criminal trial under this procedure. See: K. Janusz, M. Szwed, *Nowe technologie - Nowa Sprawiedliwość*, HFPR, Warsaw 2021 [https://www.hfpr.pl/wp-content/uploads/2021/03/E-rozprawy_Analiza.pdf] access 29.4.2021.

RESUME :

La présente étude analyse les réglementations relatives à la pandémie de COVID-19 adoptées en Pologne qui autorisent la tenue d'audiences à distance dans les affaires pénales. En raison de leur nature sensible, ces dernières pourraient être soumises à un risque plus élevé de restrictions disproportionnées du droit à un procès. Le document décrit l'étendue de la protection prévue par l'article 6 de la CEDH, ses composantes et les éventuelles limitations découlant des arrêts pertinents de la Cour européenne des droits de l'homme. L'analyse se concentre sur les éléments du droit à un procès équitable qui pourraient être menacés en raison de la numérisation des procédures judiciaires. Toutefois, la jurisprudence relative aux défis découlant spécifiquement de la réglementation relative à la pandémie de COVID-19 n'a pas encore été établie. L'étude examine les changements dans la procédure pénale polonaise concernant l'accès à la justice, la possibilité de participer aux audiences à distance, la possibilité de tenir des audiences sur la détention provisoire à distance et les examine au regard des normes pertinentes de la CEDH.

SUMMARY:

The study analyses COVID-19 pandemic regulations adopted in Poland that allow the conduct of remote hearings in criminal cases as due to their sensitive nature, they might be a subject to the greater risk of disproportionate restrictions of the right to a trial. The paper outlines the scope of protection provided under Article 6 of the ECHR, its components, and possible limitations, arising from the relevant judgements of ECtHR. The analysis focuses on the elements of the right to a fair trial that might be at risk due to the digitalization of the court proceedings emphasizing, however, that the case law related to challenges arising specifically from the COVID-19 pandemic regulations is yet to be determined. The study discusses the changes in the Polish criminal procedure concerning access to justice, the possibility of participating in hearings remotely, the possibility of holding hearings on pre-trial detention remotely and examines them in terms of the relevant ECHR standards.

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