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The Right to a Fair Trial and the Administration of Justice in the Polish Judiciary System During the COVID-19 Pandemic[1]

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Summary: The COVID-19 pandemic significantly disturbed people's lives all over the world for many months and it has had a weighty impact on all spheres of life, both in terms of the private sphere of individuals and in relation to the functioning of state institutions, including courts. To protect public health and limit the number of infected citizens, it became necessary for state authorities to introduce emergency measures, some of which resulted in far-reaching restrictions on human rights – and the right to a fair trial was no exception. This article aims at presenting the way in which the Polish judiciary functioned during the pandemic, as well as the main problems related to exercising the right to a fair trial during the COVID-19 pandemic, including a lack of openness of court proceedings, remote hearings and the removal of the collegiality of judicial adjudication in most civil cases.

Keywords: right to a fair trial, administration of justice during the pandemic, Polish judiciary, openness of court proceedings, remote court hearings, COVID-19.

1 Introduction

The COVID-19 pandemic, being an unprecedented event on a global scale in the modern world, has significantly disturbed people's lives for many months. It had a weighty impact on all spheres of life, both in terms of the private sphere of individuals and in relation to the functioning of state institutions. To protect public health and limit the number of infected citizens, it became necessary for state authorities to introduce emergency measures, some of which resulted in far-reaching restrictions on human rights. In fact, in terms of the legal aspects, the issue of the permissible limitations of human rights has become one of the

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most frequently discussed problems related to the COVID-19 pandemic[2]. This is because, in the history of modern constitutionalism, we have not yet had to deal with such far-reaching restrictions on the rights and freedoms of individuals due to the need to protect one specific constitutional value: public health[3]. The limitations noted as the most evident and severe from the perspective of an individual were those referring to the limitations on the freedom of movement, freedom of assembly, freedom of economic activity, freedom of manifesting and practicing one's religion, and personal freedom[4]. Relatively less attention seems to have been placed on the right to a fair trial. However, ensuring the continuity of the functioning of the judiciary quickly became one of the most urgent problems that public authorities had to face in response to the pandemic.

Polish courts were also not immune to these problems. However, the situation in Poland was quite unique, since the typical problems common to many European countries struggling with the pandemic overlapped with problems related to the ongoing reform of the Polish judiciary and the crisis of public trust in that judiciary. This article aims at presenting the way in which the Polish judiciary functioned during the pandemic, as well as the main problems related to exercising the right to a fair trial during the COVID-19 pandemic, including a lack of openness of court proceedings, remote hearings and the removal of the collegiality of judicial adjudication in most civil cases. The structure of the paper is as follows: first, a brief overview of the right to a fair trial in the Polish constitutional order will be presented; second, the way in which the Polish judiciary system functioned during the pandemic will be analysed; finally, the new regulations introduced in response to the pandemic will be presented and then assessed from the point of view of their constitutionality and the practical problems related to their application.

2 A right to a fair trial in the Polish constitutional order

As Poland is a party to a number of international human rights treaties, including the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, in the Polish legal system, the right to a fair trial also has its basis in those international treaties. However, it is beyond the scope of this article to discuss all these acts, and therefore the focus will be on the Polish Constitution of 1997, particularly on its Article 45, according to

2 See: KJAERUM, Morten, DAVIS, Martha F., LYONS, Amanda (eds). COVID-19 and Human Rights. London: Routledge, 2021.

3 PODKOWIK, Jan. Prawa człowieka w czasach zarazy – wyzwania dla sądowej ochrony praw jednostki w dobie pandemii COVID-19. In GRZEBYK, Piotr, UZNAŃSKA Paulina (eds.). Prawo w czasie pandemii COVID-19, Warszawa: Wydawnictwo Naukowe Scholar, 2022, pp. 43–44.

4 The implications of the COVID-19 pandemic on fundamental rights and civic space. European Economic and Social Committee. [online]. Available at: <https://www.eesc.europa.eu/sites/default/files/files/qe-07-22-057-en-n_0.pdf> Accessed: 10.10.2022.

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which: '(1) everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court; (2) exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgements shall be announced publicly.'[5]

The right to a fair trial is one of the fundamental human rights that has a special and superior place in the catalogue of individual rights, as it is the primary means of protecting other constitutional freedoms and human rights. Traditionally, the right to a fair trial is understood as a three-element construction, which consists of the right of access to a court, that is, the right to initiate a procedure before a court; the right to an appropriate judicial procedure in accordance with the requirements of fairness and transparency; and the right to a court decision, that is, to obtain a binding resolution for a given case[6]. The court established to provide legal protection within the scope of Article 45(1) must meet certain requirements: it must be independent, and therefore not subject to the influence of other state authorities or other entities; impartial, and therefore objective towards the parties to the proceedings; and independent, that is, its decisions must be made solely on the basis of the law in accordance with the judge's own conscience[7]. The procedural dimension of the right to a fair trial is also extremely important, as this right cannot be effectively implemented without an appropriately shaped procedure. Therefore, the right to a fair trial includes the obligation of state authorities to provide citizens with an effective and efficient procedure to assert their rights in court. The requirement of proper court proceedings also includes the introduction of rules enabling the efficient, effective and fast resolution of court disputes. Moreover, the openness of court hearings – which will be discussed in more detail in section 5.1 – is undoubtedly an extremely important component of the right to a fair trial. According to this principle, it is necessary to ensure that not only parties to the dispute, but also other people (including the media), have access to public court sessions.

Unlike some other European state authorities, in response to the pandemic, the Polish government decided not to introduce any of the constitutional extraordinary measures[8]. However, it is worth noting that the Polish Constitution does not explicitly allow for the right to a fair trial to be limited during

5 On the European Law perspective, see: JOVICIC, Sanja. COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights. ERA Forum, 2021, vol. 21, pp. 545–560.

6 TULEJA, Piotr. Komentarz do artykułu 45. In TULEJA, Piotr (ed.). Konstytucja Rzeczypospolitej Polskiej. Komentarz. Warszawa: Wolters Kluwer, 2021, p. 160.

7 GRZEGORCZYK, Paweł, WEITZ, Karol. Komentarz do artykułu 45. In SAFJAN, Marek, BOSEK, Leszek (ed.). Konstytucja RP. Tom I. Komentarz. Art. 1–86. Warszawa: Wydawnictwo C.H.Beck, 2016, pp. 1124–1126.

8 Instead, on 13 March 2020, the relevant regulations of the Minister of Health declared a state of epidemic threat and one week later – on March 20 – this state was converted into a state of epidemic.

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any of the constitutional states of emergency anyway, as it does in relation to many other rights (see Articles 228–234). This proves that the right to a fair trial occupies a special position in the constitutional catalogue of human rights. This does not mean, however, that the right to a court is not subject to any restrictions – like most individual rights, it is not absolute. In the Polish legal order, the constitutionality of the restrictions on the rights and freedoms of individuals – including the right to a fair trial – should be assessed through the prism of the general Article 31(3) of the Constitution, which states that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. Whether these requirements regarding the right to a fair trial were maintained in Poland during the pandemic will be analysed in the following sections of the paper.

3 Functioning of the Polish judiciary system during the pandemic: An overview

The presentation of how the Polish justice system functioned during the entire pandemic would significantly exceed the space limitations of this article, since the dynamic development of the disease and the need to make quick decisions in this regard by state authorities resulted in very frequent changes to the relevant legal provisions. However, it seems necessary to provide some general information in this regard before proceeding with further considerations.

The basic legal act that regulated the functioning of the state and society during the pandemic was the Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them. The first version of this act did not contain provisions relating to the operation of the judiciary. However, as early as the first half of March 2020, the presidents of individual courts issued a number of orders that regulated the operation of these courts during the pandemic. In particular, they cancelled hearings scheduled for that period and, as part of their administrative functions, issued orders aimed at limiting the risk of the transmission of the disease in courts, such as allowing access to court buildings only to the parties to a dispute, suspending direct customer service or introducing the obligation to measure the temperature of every person entering court buildings[9].

In as many as 94% of courts (i.e., in 370 out of 392), presidents issued ordinances changing the rules of access to court buildings, with the majority of these

9 The functioning of courts in the Covid-19 pandemic. Primer. [online]. Available at: <https://sciendo-parsed-data-feed.s3.eu-central-1.amazonaws.com/ICLR/Instructions_for_Authors.pdf> Accessed: 18.12.2022.

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ordinances (345) limiting or even prohibiting the public from entering courts[10]. Some of these regulations indirectly limited the possibility of public participation in public court sessions, for example, by requiring the consent of the president of the court or the presiding judge to participate in the hearing or by limiting the maximum number of people in the courtroom. Others, however, explicitly excluded the participation of the public in hearings, leaving no possibility of abolishing these strict regulations in any case[11].

It can therefore be concluded that the first reaction of the judiciary to the pandemic was bottom-up; that is, it did not result from guidelines or orders made by state authorities, but was initiated directly by individual courts, which should be evaluated rather positively, as it allowed the quickest possible reaction to the threat and testified to the great responsibility and independence of persons managing the courts[12]. However, there were also critical voices alleging that there was no legal basis for the actions taken at that time by court presidents.

From the perspective of the operation of the courts at the national level, some very important regulations were introduced by the amendment to the Act of 2 March, which came into force on 31 March 2020.

First, the time limits for taking procedural steps were then suspended, both those arising from the statutes and those imposed by the courts during hearings (Article 15zzs (1)). Therefore, for example, if, according to general rules, a party was required to challenge a court's decision within 7 days, this deadline did not have to be observed.

The second most important change introduced at that time was the regulation providing that during the state of epidemic threat, no hearings or public hearings were to be held in civil cases, except for cases specified in Article 14a(4–5) of the Act as urgent (e.g., detention cases or parental authority cases). Such a solution practically excluded the possibility of examining most civil cases in the form of traditional stationary hearings. This partial suspension of the functioning of the civil justice system lasted until 16 May 2020[13]. At that time, however, the courts gained an additional power to deliver judgements in closed

10 PILITOWSKI, Bartosz, KOCIOŁOWICZ-WIŚNIEWSKA, Bogna. Raport z przestrzegania w Polsce zasady jawnego procesu i publicznego ogłoszenia wyroku w czerwcu 2020 r. [online]. Available at: <https://courtwatch.pl/wp-content/uploads/2020/06/FCWP-Monitoring-jawno%C5%9Bci-2020-06-25.pdf> Accessed: 10.10.2022.

11 Ibidem.

12 KUROSZ, Krzysztof, BITNER, Joanna, TERLECKI, Rafał. Koronawirus. Prawo do sądu w czasie epidemii: sprawy pilne a zawieszenie terminów. [online]. Available at: <https://www.rp.pl/opinie-prawne/art8947911-koronawirus-prawo-do-sadu-w-czasie-epidemii-sprawy-pilne-a-zawieszenie-terminow> Accessed: 18.10.2022.

13 KOŚCIÓŁEK, Anna. Jawność posiedzeń sądowych w postępowaniu cywilnym w dobie pandemii COVID-19. Przegląd Sądowy, 2021, no. 5, pp. 22–40.

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cabinet sessions without the participation of the parties to a greater extent than before[14].

The aforementioned Article 14a not only contained a list of cases classified as urgent, but also provided, inter alia, that in the event of a complete cessation of activities by a given court due to COVID-19, the president of the court of appeal could designate another court of equal jurisdiction to hear urgent cases from a court that had ceased operations. The president of the court of appeal also gained the right to delegate a judge, with his or her consent, to perform duties in another court for a limited period of time if, due to COVID-19, the interests of the justice system so required (Article 14b). Obviously, those regulations were ad hoc and were precisely targeted at one thing only, namely, at creating the conditions to ensure the continuity of the courts' operations during an unexpected outbreak of the COVID-19 pandemic; however, they were not aimed at interfering with the model solutions relating to the organisation and the system of the judiciary[15]. As this provision was of a very exceptional nature and strictly limited in time, it did not raise much controversy in terms of granting overly far-reaching powers to court presidents to influence which court would be competent to hear a given case.

Of course, throughout the pandemic, court buildings were also subject to the general restrictions for all public facilities, such as the obligation to wear face masks and follow sanitation protocols.

4 Civil and criminal procedure: The level of digitisation before the pandemic and the most important changes introduced after the outbreak of COVID-19

The Polish legislator had already introduced some changes to the civil procedure aimed at increasing the use of IT and digital means – both by the court and by the participants in the proceedings – several years before the outbreak of the COVID-19 pandemic. For example, since 2010, it has been possible to conduct writ-of-payment proceedings entirely in electronic form and to record open court sessions with the use of devices that enable image and sound recording. New solutions, such as electronic delivery, the possibility of taking evidence remotely (by videoconference) or the possibility of accepting evidence in the form of an electronic document, have also been introduced into the civil proce-

14 PADUCH, Andrzej. The Right to a Fair Trial Under Article 6 ECHR during the COVID-19 Pandemic: The Case of the Polish Administrative Judiciary System. Central European Public Administration Review, 2021, no. 19(2), pp. 14–15.

15 KŁAK Czesław. Ustrojowo-organizacyjne aspekty funkcjonowania wymiaru sprawiedliwości w czasie epidemii (art. 14a-14b ustawy z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych) z perspektywy konstytucyjnej. Wojskowy Przegląd Prawniczy, 2020, no. 5, p. 7.

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dure in recent years[16]. Furthermore, since 2016, participants in the proceedings could participate in hearings remotely, staying in the building of another court (Article 151(2) Code of Civil Procedure). However, this regulation had virtually no practical significance – no Polish court had used it for several years[17]. This was due to the fact that conducting a hearing in this form required the significant involvement of the courtrooms and staff of both courts, which was problematic due to the limited capacity of the courts and staff shortages. In addition, during COVID-19, this provision was not a useful tool to fight the pandemic, because it did not limit interpersonal contact and thus the transmission of the disease in any way – the parties had to appear in court and have contact with its staff anyway.

For the above reasons, in response to the epidemic threat, the Polish legislator introduced a completely new regulation, according to which, during the state of epidemic and within a year of its cancellation, public hearings should be held remotely, using devices that allowed for the simultaneous direct transmission of image and sound, unless conducting a 'traditional' hearing would not cause an excessive threat to the health of the people participating in it. Therefore, online hearings and closed-door hearings became the rule, with traditional face-to-face hearings being the exception. What was particularly innovative about this regulation was the fact that parties to the dispute and other people involved, such as witnesses, did not have to stay in the court building – they could participate in a hearing from any place: from work, from their own apartment and even from their car, which is certainly quite unique on a European scale. In addition, since May 2020 and for a further year after the state of epidemic has been cancelled, all cases will be heard by one judge, even those for which multi-judge panels have been used in the past. However, the president of the court may order a case to be heard by a panel of three judges if he considers it advisable due to the particular complexity or precedent nature of the case.

Since 2011, questioning parties and witnesses via videoconferencing has also been possible in criminal trials. However, in this case, it also requires the individual being interrogated to be accompanied by an appointed judge, either one of those examining the case or one from a court from another city. The practical application of these regulations has therefore been very limited. Moreover, there are many arguments around avoiding conducting remote hearings in criminal cases, mainly due to the particular importance of the right to defence in a criminal trial and the fact that, unlike in a civil trial, which is based mainly on documentary evidence, in criminal proceedings, evidence from witnesses' testimonies is of key importance, and therefore direct contact between the interrogated persons and the judge is particularly valuable for assessing their credibility.

16 GOŁACZYŃSKI, Jacek, KOTECKA-KRAL, Sylwia. Elektronizacja pism procesowych, doręczeń i posiedzeń jawnych w postępowaniu cywilnym w okresie pandemii COVID-19. Polski Proces Cywilny, 2020, no. 4, pp. 637–638.

17 Ibidem.

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In terms of the reaction to the pandemic in the field of criminal procedure, two main changes will be presented. First, the amendment of June 2020 introduced the possibility of remote participation in hearings by defendants and by private prosecutors in cases where the defendants were under detention (Article 374(3–8) Code of Criminal Procedure). In such cases, during the hearing, a court referendary or an assistant to the judge of the court in whose district the party resides should be present at the place of questioning. An advocate, a public prosecutor and a translator can also participate remotely in the hearing. A second significant novelty is the possibility of conducting remote detention sessions (Article 250(3b–3g) Code of Criminal Procedure). It is possible to refrain from forcibly bringing the accused to court if he or she connects with the court via a videoconference call. In such cases, a court official or an officer from the Prison Service should also be present at the place where the accused is staying. The aforementioned regulations introduce quite far-reaching changes to the existing model of criminal procedure and, importantly, even though they were introduced during the pandemic, their validity is not dependent on the continuity of the state of epidemic threat – they are of a permanent effect and will apply not only during the state of epidemic threat, but also after the end of this state. However, it should be emphasised that while remote hearings have become the norm in civil cases, in criminal cases, despite the legal possibility of the court using videoconferencing, these regulations have been used very rarely, mainly for the reasons indicated above.

5 The right to a fair trial during a pandemic: Crucial problems

It has been suggested several times in this article that the regulations introduced in connection with the outbreak of the pandemic raised some doubts as to their impact on the implementation of the right to a fair trial. This part of the paper will focus on the most important problems, both constitutional and purely practical, related to the right to a fair trial and the administration of justice during the pandemic. These problems will be analysed from the point of view of the Polish judiciary, however, it should be emphasized that similar issues have appeared, although on a different scale and in different forms, in most European countries[18].

5.1 Openness of court proceedings

The openness of court proceedings is one of the axiological pillars of the judiciary in a democratic state of law. As already mentioned, it is also a key element of the right to a fair trial, provided explicitly in Article 45(1) of the Polish Constitution, which mentions the 'public hearing of the case'. The transparency of court

18 KAMBER, Krešimir, KOVAČIĆ MARKIĆ, Lana. Administration Of Justice During The Covid-19 Pandemic And The Right To A Fair Trial. EU and Comparative Law Issues and Challenges Series (ECLIC), 2021, vol. 5, pp. 1049–1083.

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proceedings within the meaning of this provision should be understood, in particular, as transparency in relation to third parties not participating in the proceedings, including media representatives, who may disseminate information about the proceedings and their settlement[19]. The openness of court proceedings is also an extremely important guarantee and has an educational function, as it excludes the administration of justice in secret, outside of social control, and moreover, it strengthens the public's trust in the administration of justice and mobilises the court itself towards greater diligence and conscientiousness in conducting proceedings[20].

During the COVID-19 pandemic, none of the statutory provisions regulating the issue of the openness of court hearings changed; that is, the statutory catalogue of circumstances in which it is possible to exclude the openness of hearings was not extended in any way. However, as already mentioned, in practice, the participation of the public in open court hearings was drastically limited by the orders of court presidents, which in many cases prohibited persons who were not parties to the pending proceedings from entering the court. Interestingly, the research conducted in this regard shows that even when these orders theoretically allowed for the participation of the public in a hearing – because, for example, they did not prohibit it directly but only limited the number of people present at the hearing – persons wishing to participate in a public hearing were not allowed to enter the courthouse anyway[21]. In some cases, the order even explicitly allowed the public to participate in the hearing, but in practice, only the parties themselves were admitted to the court building by the security staff[22]. In turn, remote hearings were held with the use of systems that required logging in using a link that has been sent to the parties only. These links were not publicly available and it was generally not possible for the public to get them. Therefore, people not involved in the proceedings were unable to participate in remote hearings as an audience.

It goes without saying that, like most constitutional rights, the right to a public trial is not absolute. The Constitution itself explicitly states that 'Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest' (Article 45(2)). Interestingly, this provision – although it contains a closed catalogue of values whose protection justifies limiting the openness of

19 GRZEGORCZYK, Paweł, WEITZ, Karol. Komentarz do artykułu 45. In SAFJAN, Marek, BOSEK, Leszek (ed.). Konstytucja RP. Tom I. Komentarz. Art. 1–86. Warszawa: Wydawnictwo C.H.Beck, 2016, pp. 1140–1141.

20 Ibidem.

21 PILITOWSKI, Bartosz, KOCIOŁOWICZ-WIŚNIEWSKA, Bogna. Raport z przestrzegania w Polsce zasady jawnego procesu i publicznego ogłoszenia wyroku w czerwcu 2020 r. [online]. Available at: <https://courtwatch.pl/wp-content/uploads/2020/06/FCWP-Monitoring-jawno%C5%9Bci-2020-06-25.pdf> Accessed: 10.11.2022.

22 Ibidem.

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court hearings – does not allow this value to be limited because of 'public health', which could serve as the most adequate justification for limiting the openness of court sessions during the pandemic[23]. In the absence of such a basis, limiting the openness of the consideration of a case may be justified on the grounds of state security or public order; state security is identified in the literature as a state in which fundamental freedoms and rights, such as life and health, are protected; as far as the public policy condition is concerned, it is a very general condition, which includes, among others, activities related to the protection of public health[24]. The admissibility of limiting or excluding the openness of court sessions should also be assessed through the prism of the general provision of Article 31(3) of the Constitution, according to which any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and they shall not violate the essence of freedoms and rights.

Although the limitation of the public hearing of cases has a constitutional basis, the method of introducing such restrictions, their duration and the lack of attempts to even ensure public participation in hearings in a different, alternative form raise serious constitutional doubts. First, the restrictions on public access to public hearings resulted from the orders of court presidents; that is, acts that were not acts of generally applicable law. On the one hand, it allowed for a quick reaction to the threat of the pandemic and helped minimise the transmission of the disease, which should be positively assessed. On the other hand, the principle of the exclusivity of the act, according to which restrictions on constitutional rights and freedoms may be made only in the act, was clearly violated[25]. It seems that the legislator reacted quite quickly to the outbreak of the pandemic, and soon after the emergence of the threat, he managed to pass legislation regulating various aspects of social life during COVID-19. Therefore, nothing stood in the way of regulating the issue of public access to court hearings in the relevant acts. However, such a regulation was not adopted throughout the pandemic, so the right to a fair and open trial was de facto restricted by the administrative orders of court presidents. Furthermore, these restrictions were very severe, affecting the very essence of the right to a fair trial, as public participation in the practice was completely excluded. The pandemic was an unprecedented and unknown threat, so it seems justified to approach the classic elements of the test of the proportionality of restrictions on rights and freedoms quite liberally and to allow greater freedom for the legislator in choosing measures to respond to the situation. However, the complete elimination of public participation in hearings could easily have been avoided simply by publishing links to remote public hearings online. Unfortunately, such a solution was, basically not used in practice.

23 KOŚCIÓŁEK, Anna. Jawność posiedzeń sądowych w postępowaniu cywilnym w dobie pandemii COVID-19. Przegląd Sądowy, 2021, no. 5, pp. 22–40.

24 Ibidem.

25 Ibidem.

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5.2 Remote hearings

The problem of restrictions on public hearings of cases during the pandemic is directly related to the issue of newly introduced legislation regulating remote hearings[26].

Generally speaking, videoconferencing in court is not a new tool at all; it has already been implemented in many European states both in civil and in criminal proceedings and enjoys an established legal framework within the European Union[27]. As already mentioned, Polish procedural regulations have also allowed the use of various forms of videoconferencing in court proceedings for many years. However, during the pandemic, remote hearings became the rule in civil proceedings, and to a certain extent, they were allowed in criminal proceedings on a much larger scale than before. This caused a number of problems, both of a practical and legal nature.

In civil proceedings, the parties can now connect with the court and participate in the court hearing from any place, that is, without the need to be physically present in any court building. The purely practical problems of this type of court hearing are quite obvious, and they include problems with the quality of the internet connection, the digital exclusion of some – especially elderly – participants in the proceedings, or various technical problems due to the use of remote communication programmes. However, what is more important is that during a remote hearing, the direct contact between the judge and the person who is giving the testimony is seriously disturbed. Non-verbal communication plays a very important role when assessing the credibility of a witness or a party; it is therefore crucial for a judge to carefully observe their reactions, assess the level of nervousness, the pace of speaking, unconscious reactions of the body (such as blushing or nervous tics) and so on. Meanwhile, during remote hearings, observing these issues is extremely difficult. When conducting a remote hearing, the court is also unsure about whether third parties beyond the reach of the camera are not influencing the witness or giving them instructions as to the content of their testimonies.

It should also be noted that transferring the court into the virtual space has largely led to the disappearance of the special symbolism of this place, and thus, the seriousness of the court hearing is slightly disturbed. When the court is no longer behind a massive bench that clearly symbolises its special position, but is on the screen, it does not emphasise the power and authority of the court or the conventional age-old hierarchy[28]. The traditional structure of the courtroom –

26 More on the conceptual problems of online hearings from the perspective of European human rights law: KAMBER, Krešimir. The Right to a Fair Online Hearing. Human Rights Law Review, 2022, vol. 22, no. 2, ngac006.

27 GORI, Pierpaolo, PAHLADSINGH, Aniel. Fundamental rights under Covid-19: an European perspective on videoconferencing in court. ERA Forum, 2021, vol. 4, p. 575.

28 JABŁOŃSKA-BONCA, Jolanta. Remote hearings and judicial symbolism. A draft. Krytyka

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including the division into a part reserved for the court, a part reserved for the parties and a part for the public – is also absent from the computer or phone screen[29]. Many other court rituals are also absent during the proceeding when videoconferencing: the parties no longer stand when speaking to the judge or when the verdict is announced, and the professional lawyers do not always wear their traditional robes.

Apart from the issue of a lack of public access to court proceedings, remote hearings appeared to be a useful emergency measure to combat the pandemic. The judiciary is one of the foundations of the functioning of the state and the implementation of its tasks, so ensuring the continuity of the functioning of the courts, even at the expense of a loss of certain guarantees regarding the right to a public trial, has rather rightfully become the priority of state authorities. However, due to the significant impact of the regulations in question on the effective implementation of the right to an open and fair trial, they should apply only when the state experiences an exceptional situation; they should not apply after the pandemic threat has ceased, nor should they have lasting effects and remain permanently in the legal system[30]. Meanwhile, the introduction of remote hearings in civil proceedings will apply for one year after the end of the pandemic. Although such a solution was an adequate way to respond to the epidemic threat, it is difficult to find an explanation for extending the validity of these rules for another year after the epidemic threat has ceased.

In criminal trials, remote hearings have not become the rule; it is still not possible to participate in a criminal trial from anywhere – it is always necessary for the interrogated individual to be present in the court building or for a court official to accompany the person deprived of liberty. Therefore, many of the problems described above do not occur here, such as the possibility of other people influencing the content of the interrogated person's testimony. However, this does not mean that the introduced regulations do not raise some controversies.

First, waiving the 'forced bringing of the suspect to court' to a detention hearing and ensuring his participation in a remote form (Article 250 Code of Criminal Procedure) depends only on the decision of the procedural authority (the court or prosecutor). The position of the suspect has not been taken into account by the legislator in any way; even if he demanded that he be brought to the court, it is not necessary to do so[31].

Prawa, 2022, vol. 14, no. 2, p. 243.

29 Ibidem, p. 244.

30 GAJDA-ROSZCZYNIALNSKA, Katarzyna. Przebudowa wymiaru sprawiedliwości w czasach pandemii COVID-19 ze szczególnym uwzględnieniem postępowania cywilnego. Polski Proces Cywilny, 2022, no. 1, pp. 9–37.

31 SZUMIŁO-KULCZYCKA, Dobrosława. Wpływ pandemii COVID-19 na realizację prawa do sądu w sprawach karnych w Polsce. Polski Proces Cywilny, 2022, no. 1, pp. 191–214.

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Second, the defence counsel, as a rule, may participate in such a meeting at the defendant's place of residence or in the court; in the latter case, the court, at the counsel's or the defendant's request, may order a break in the meeting to allow the counsel to contact the defendant by phone. However, if the court considers that such telephone contact will interfere with the proper course of the hearing, it may refuse permission to do so. In such cases, the right to defence may be violated, as contact between the accused and his attorney during the hearing, which should be the rule, has been made subject to the discretionary decision of the court[32].

Some other doubts refer to the remote participation in trials of those accused who have been deprived of their liberty. While perpetrators of minor offences who are interested in a quick conclusion to their criminal case and who may reside away from the court could actually have an interest in having a remote trial, a person deprived of their liberty, usually the perpetrator of a more serious crime carrying a heavy penalty, often has an interest in directly expressing their position in court[33]. However, the new regulations allow for remote hearings only for persons deprived of their liberty; that is, perpetrators of serious, not minor, crimes.

Finally, the aforementioned regulations, although seemingly introduced in connection with the pandemic, are by no means episodic. The legislator did not foresee that they would cease to apply after the pandemic; the changes to the criminal procedure are permanent. Therefore, regardless of the assessment of the constitutionality of the introduced solutions – which can certainly be, at least partially, positive – it should be emphasised that changes in legislation during the pandemic should be aimed at minimising the negative effects of the disease and at enabling the return to the situation before the outbreak of the pandemic as soon as possible. They should not lead to a permanent change in the trial model or in the organisation of the judiciary[34].

5.3 Collegiality principle

The constitutional right to a fair trial also includes the right to have one's case heard by an impartial and independent court. The institution of the disqualification of a judge plays a key role in ensuring the impartiality and independence of a court; a supplementary role in this respect is played by more general institutions, such as the already discussed principle of the openness of proceedings in its external aspect (i.e., to the public) and the collegiality of adjudication[35]. The

32 Ibidem.

33 Ibidem.

34 GAJDA-ROSZCZYNIALNSKA, Katarzyna. Przebudowa wymiaru sprawiedliwości w czasach pandemii COVID-19 ze szczególnym uwzględnieniem postępowania cywilnego. Polski Proces Cywilny, 2022, no. 1, pp. 9–37.

35 GRZEGORCZYK, Paweł, WEITZ, Karol. Komentarz do artykułu 45. In SAFJAN, Marek, BOSEK, Leszek (ed.). Konstytucja RP. Tom I. Komentarz. Art. 1–86. Warszawa: Wydawnictwo C.H.Beck, 2016, pp. 1126–1127.

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consideration of certain categories of court cases by several judges instead of one is not a constitutional requirement and is not necessary to ensure the implementation of the right to a fair trial. However, since it is commonly accepted that the collegiate composition of the court ensures a higher standard of jurisprudence and thus strengthens the parties' right to a fair trial and to a judgement[36], it is worth briefly referring to the problem of the collegiality of the court during COVID-19.

As already indicated, the single-person settlement of all civil cases was introduced during the pandemic. Only as an exception, due to the significant complexity of a given case, could the president of the court order the consideration of a given case in the composition previously provided for by the law. The reasons for introducing such a solution were rather obvious – it was about reducing the epidemic threat, which was much greater in a situation where three people, not one, adjudicated jointly, that is, because they would have to spend many hours in one courtroom. There may have been some doubts as to whether the decision of the president of the court to order the case to be heard in a multi-member panel would not be arbitrary; however, it seems that this solution was reasonably correct, as it made the strict COVID-19 regulations more flexible if required by a specific case.

In the opinion of the author of this article, the introduction of one-person adjudication in civil cases was necessary to ensure human safety and health protection and was also a useful tool through which to achieve the intended goal of the new regulations, which was the maximum reduction of disease transmission. In principle, the provisions in question meet the requirements of the proportionality test, especially if one takes into account the fact that the collegiate composition of the court is not necessary to preserve the constitutional right to a fair trial, but only strengthens the independence of judges examining a specific case. However, for some unknown reason, the legislator again decided that these regulations would remain in force for one year after the end of the epidemic state. Therefore, this regulation, although useful and necessary during the pandemic, is not episodic and should be criticised.

It is also worth noting that the provisions in question completely eliminated social factors from civil cases[37]. According to Article 182 of the Constitution, the citizenry should participate in the administration of justice. This provision is implemented through the participation of jurors ('lay judges'), alongside professional judges, in the examination of certain cases, such as family or divorce cases. The Constitution does not specify the scope of this participation. It explicitly states that this scope shall be specified in a statute. Therefore, the temporal

36 MARKIEWICZ, Krystian. Wpływ regulacji "covidowych" na zasadę niezmienności (stabilności) oraz kolegialność składów sądów odwoławczych. Polski Proces Cywilny, 2022, no. 1, pp. 38–58.

37 Ibidem.

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removal of lay judges from the adjudicating benches is not contrary to the Constitution. Nevertheless, this solution is certainly not conducive to building citizens' trust in the judiciary, which has a particularly negative dimension during the crisis in Polish society's perception of the courts as fully independent bodies.

6 Conclusions

Needless to say, the COVID-19 pandemic significantly affected the functioning of courts and the administration of justice in Poland – as it did in many countries in Europe and around the world. Courts had to face many practical and legal difficulties in order to perform their regular tasks, while citizens could not fully enjoy the right to a fair and public hearing of their cases without undue delay.

The Polish Constitution does not provide for the 'suspension' of the functioning of the courts even during a state of emergency, and this was especially true during the pandemic[38]. What is noteworthy is that the Constitution obliges state authorities to ensure the safety of its citizens (Article 5) and to protect their health (Article 68(1)), as well as to combat epidemic diseases (Article 68(4)), which means that it is necessary to ensure not only the continuity of the functioning of the judiciary, but also the safety of participants in court proceedings[39]. Therefore, it was not only justified, but even necessary, to introduce precautionary measures that would limit the transmission of COVID-19 while still ensuring the functioning of the courts, including limiting the number of people in courtrooms, introducing sanitary rules and allowing some court sessions to be held online.

Under international human rights law, States can generally limit the exercise of most human rights if it is necessary to protect the rights of others or significant collective interests[40]. While State institutions had to adopt some measures to protect the right to life and right to health during health emergencies, including COVID-19 pandemic, "such measures must also respect the criteria for limitation or derogation of human rights, including among other things requirements of legality, non-discrimination, necessity, and proportionality (and timelimitedness, particularly for derogations)"[41]. The assessment of the constitutionality

38 KŁAK Czesław. Ustrojowo-organizacyjne aspekty funkcjonowania wymiaru sprawiedliwości w czasie epidemii (art. 14a-14b ustawy z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych) z perspektywy konstytucyjnej. Wojskowy Przegląd Prawniczy, 2020, no. 5, pp. 8–9.

39 Ibidem.

40 LEBRET, Audrey. COVID-19 pandemic and derogation to human rights. Journal of Law and the Biosciences, 2022, vol. 7, no. 1, p. 1.

41 Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards. [online]. Available at: <https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf> Accessed: 20.12.2022.

of the changes introduced in the Polish law during the pandemic is extremely difficult for two main reasons: first, because it was necessary to balance the fundamental right of an individual – the right to a fair trial – with the need to protect public health in an unprecedented situation brought about by a global pandemic that no modern government had ever faced before; second, because COVID-19 appeared suddenly, and the pace of its spread was absolutely unpredictable and surprised probably everyone, including state authorities around the world. Therefore, the state authorities had to act quickly, not being fully aware of the scale of the threat and not knowing how their decisions would affect the course of the pandemic. It seems that, in such special circumstances, in which the scale of threats was de facto impossible to predict, the classic requirements of the test of the proportionality of restrictions on the rights and freedoms of an individual, including the right to a fair trial, should be somewhat mitigated. This would lead to the conclusion that, given the special circumstances and the less strict constitutional requirements resulting thereof, the right to a fair trial and the protection of public health were balanced quite well. However, this does not mean that all decisions taken in connection with the pandemic and thus affecting the implementation of the right to a fair trial should be positively assessed.

What deserves criticism is that under the pretext of fighting the pandemic, some regulations were introduced and incorporated into the Code of Criminal Procedure, not only for a limited time, but permanently. Additionally, measures that directly affected the exercise of the right to court, namely access to court files by the parties to the proceedings, the possibility of obtaining information about cases, and finally access to court sessions by the public, were drastically limited or even eliminated, not by a proper legislative act, but through the orders of the presidents of the courts, who are not even sources of generally applicable law. Finally – given modern technology – the almost complete elimination of public participation in civil trials did not really need to be the case. Although it undoubtedly helped to limit interpersonal contact and, consequently, the transmission of the disease, it also clearly affected the essence of the right to a public trial and all resulting guarantees for the parties, and made it more difficult for the judge to properly assess the evidence. The exclusion of trial transparency prevents social control over the administration of justice and may negatively affect the level of trust of the parties and the public in the impartiality and reliability of decisions issued by the courts. The crisis of the judiciary in Poland has already seriously undermined trust in the courts and maintaining these new regulations only intensifies it.

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