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## Report On The National Scientific Conference *E-Courts: The Extended Area Of Justice*, Warsaw, 16 May 2022

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### Sprawozdanie z konferencji *E-sądy: Rozszerzona przestrzeń wymiaru sprawiedliwości*, Warszawa, 16 maja 2022

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On May 16, 2022, the nationwide scientific conference *E-courts – Extended Justice Space* was held remotely at Kozminski University in Warsaw. It was organised by the rector thereof, the editorial office of the quarterly “The Critique of Law” and the Legal Interdisciplinary Research Center of Kozminski University. The conference was an opportunity to look at the problem of organising and conducting remote hearings from the point of view of judges and a professional attorney in the light of the COVID-19 pandemic experience. The conference was attended by judges, professional representatives, doctoral students, students and guests. The conference was held under the media patronage of “Dziennik – Gazeta Prawna” and was conducted in Polish.

The conference consisted of a panel of speeches (5 papers) and a discussion panel in which all participants could ask questions and express their opinions. Both were moderated by Prof. Jolanta Jabłońska-Bonca, PhD.

The starting point for the deliberations of all the speakers were the temporary provisions contained in the act adopted because of the COVID-19 pandemic in Poland.<sup>2</sup> The speakers unanimously emphasised that the pandemic significantly accelerated the introduction of remote hearings to Polish courts and, despite some

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<sup>2</sup> The Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and the emergencies caused by them (Journal of Laws of 2020 item 374 as amended; hereinafter referred to as ‘the Anti-COVID Act’).

shortcomings, it has a positive impact on the justice system. The speakers called for the permanent entry of remote hearing into the Code of Civil Procedure.

The first lecture was given by Prof. Tadeusz Wiśniewski, PhD, retired Supreme Court judge, professor at the Kozminski Academy in Warsaw, on the topic: 'Remote Hearings in the Light of the Principle of a Fair Civil Trial'.<sup>3</sup> He began his speech with a general remark about the technological leap compared to the time when he began his judicial career. As an introduction, he pointed out that the right to a fair trial is an emanation of the right to a fair trial guaranteed both in Article 45 of the Polish Constitution and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He emphasised that open remote hearings are a rule in Poland, which does neither require the consent of parties nor they may object to it.

Trying to answer the fundamental question whether the provisional solutions from the Anti-COVID Act meet the fairness of the trial, the speaker noticed numerous advantages of remote hearings, manifested in: lower costs of administering justice, accelerating court proceedings, increasing the concentration of evidence, increasing the convenience for participants, meeting the requirements of modern life and increasing the digital competences of judges and professional representatives.

On the other hand, he sees a crisis of openness with regard to the problems with the accessibility of remote hearings to the public and thus the weakening of social control of the judiciary. Another problem is ensuring the independence of the testimony of witnesses. For instance, a witness who is in a virtual waiting room can read the testimony of other witnesses simply by accessing the broadcast as an audience. It also draws attention to the risk of obstructive actions by the parties, consisting in misleading the court as to the quality of the connection while the court still does not have any tools to monitor such quality. On the other hand, there is a risk that the defence may be impeded by actual disruptions to the connection. He also does not exclude that remote hearings may threaten the principle of the equality of the parties due to the digital exclusion of many people (lack of internet access, low quality of computer equipment or low digital skills).

The judge also raises doubts as to the one-person court as properly staffed, stressing, however, that the collegiality of adjudication is neither a constitutional value nor is it required in the light of the ECHR jurisprudence. The speaker also has doubts as to whether the remote hearings comply with the principle of direct proceeding – in particular, he notices difficulties in freely assessing the evidence by the court due to the difficult observation of the witness's body language, which may even have an impact on the determining of the material truth.

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<sup>3</sup> Original title of the lecture: *Rozprawy zdalne w świetle zasady rzetelnego procesu cywilnego*.

He concluded his speech with a remark that the legal community is divided as to the legitimacy of remote hearings. He assesses the new solutions positively, but he sees the challenges and threats associated with it. He suggests that a possible solution to these problems could be holding hybrid hearings. Finally, he informed that the European Court of Human Rights in Strasbourg stated that remote hearings do not violate Article 6 of the Convention (Right to a fair trial).<sup>4</sup>

The next speaker was Łukasz Olczyk, judge of the District Court for Warsaw Praga-Południe in Warsaw (the civil division), who delivered a speech on 'Practical Problems of Remote Hearings'.<sup>5</sup>

He began his speech by stating that the introduction of remote trials 'unblocked' the cases in the courts, which were not pending due to lockdown. He reminded that conducting remote hearings is a rule. Nonetheless, despite this, some judges abuse the exception allowing the organization of stationary hearings and do not organise remote hearings at all. Some judges prefer hybrid hearings, although they are sometimes associated with technical problems (e.g. people in the courtroom are poorly visible and audible to people participating remotely). He prefers to conduct traditional (stationary) hearings only when the case or evidence proceedings are complicated or many people participate in it, as he believes that direct contact with the participant in the courtroom may allow for a more efficient hearing then. Interestingly, he also sees practical problems with organising remote settlement sessions, as the conclusion of a court settlement requires a written form.

He also shared his experience in reducing the effects of digital exclusion. If a given person declares that he or she does not have technical means to participate in a remote hearing, then he or she will have the opportunity to come to the court building, where, in a separate room in the presence of a court employee, he or she will be given a laptop enabling him or her to connect to the court. However, he points out that too frequent use of this solution may paralyse the work of the courts because of limited resources.

The speaker believes that technical problems are the result of the sudden introduction of remote hearings regulations into Polish law. Unfortunately, technical problems significantly extend the time of the trial. One symptom of such problems may be the lack of people waiting for the trial in the virtual waiting room. Willing to check whether it is a technical problem or the absence is a result of the parties' sole decision, the judge resets the software and additionally connects to the remote hearing using his own mobile phone number, which is reflected in the protocol.

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<sup>4</sup> See the judgment of the European Court of Human Rights in the case of Jallow v. Norway (application No. 36516/19).

<sup>5</sup> Original title of the lecture: *Praktyczne problemy rozpraw zdalnych*.

He noted that the possibility of questioning a witness (regardless of where the witness is located) limited the use of the institution of legal aid by courts placed close to the witness's place of residence. He also informed about an opinion prepared by the Ministry of Justice, according to which, in the case of questioning witnesses abroad, the court should obtain consent from an authority of a foreign state (because of jurisdictional issues) – although this is not respected in practice by judges.

The judge also drew attention to the issues of morals at the hearing. He sees the need to regulate the wearing of toga by professional attorneys and to stand up when pronouncing a sentence, although he is not in favour of introducing an obligation in this regard. He is in favour of introducing the regulation of remote hearings into the Code of Civil Procedure, but not on a mandatory basis. In his opinion, the court should decide each time, taking into account the nature of the case, whether the hearing should be remote or stationary.

'Remote Hearing in Administrative court proceedings – A New Reality'<sup>6</sup> was a topic of the lecture given by Piotr Pietrasz, PhD, the judge of the Supreme Administrative Court, University in Białystok. First of all, he pointed to the specifics of these proceedings (other than civil proceedings), in which there is no full evidence proceedings, including no witnesses or experts. Thus, remote hearings do not cause significant difficulties in conducting the proceedings – except that it is not possible to submit documents and powers of attorney at the hearing, but it must be done earlier.

He also confirmed the opinion of Judge Łukasz Olczyk that remote hearings take more time due to technical problems. However, a very important issue to avoid them is the proper preparation of the hearing, including instructing participants about the need to meet the appropriate technical requirements to use the program and the inability to submit documents at the hearing as well as recommending the use of a headset.

In the context of openness, it also pointed out that all cases were remote and anyone could enter the hearing anonymously. In the context of communication with participants in the proceedings, he emphasised that he very often uses a chat and sometimes even body language to show that he cannot hear a participant.

Remote hearing – in his opinion – also significantly modified the role of the chairman, who, in addition to overseeing the order of the hearing, must also take care of the quality of the connection. It is also very important to cooperate by the chairman with IT specialists who help to solve technical issues.

Regarding moral aspects of hearing, he is not in favour of introducing the obligatory wearing of a toga by professional attorneys and of standing up when

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<sup>6</sup> Original title of the lecture: *Zdalna rozprawa w postępowaniu sądowo administracyjnym – nowa rzeczywistość.*

pronouncing a sentence – although he has not yet encountered a fact that someone would not wear it.

Bartosz Karolczyk, PhD, LL.M., attorney-at-law ('E-courts as a Phenomenon Modernising, Streamlining and Humanising the Judiciary'<sup>7</sup>), noted that remote trials, together with experiences of the pandemic (sensitising to the value of human life), brought together the participants of the dispute, who had so far often lost themselves in a conflict. The court is no longer a theatre, as it has become closer to how people live and communicate on a daily basis (for instance, participants could call the court and judicial departments created dedicated email addresses). Situations related to remote hearings frequently showed the human face of each of the participants, e.g. a child's crying in the background, a running cat, mutual assistance in solving technical connection problems.

The speaker also emphasised the streamlining of remote hearings. He has not yet encountered a case of violation of the rights to a court and noted the positive impact of remote hearings on: (a) the appearance of witnesses and thus a reduction in the number of hearings postponed for this reason (they can be questioned wherever they are in the world, and even during holidays); (b) reduction of costs of legal services for clients (they do not have to pay for lawyer's travel to distant courts located all over Poland); and (c) increasing the earnings of trial lawyers (not having to travel means they can handle more cases).

He praised both arbitration courts and common courts, which met the challenges and quickly developed codes of good practice and relevant instructions helping to prepare to remote hearings. The speaker is a supporter of the regulation of remote hearing in the Polish Civil Procedure Code, but sees the risk that the provisions may be an instruction manual on how to proceed during a remote hearing (an overregulation).

The last lecture was given by Prof. UG Anna Machnikowska, PhD (University of Gdansk), attorney-at-law ('Remote Hearing and Transparency of Proceedings'<sup>8</sup>). The thesis of her presentation was that remote hearing may serve to transparency of proceedings, but the conditions on which it was introduced and the accompanying technical circumstances paradoxically create the risk of using the provisions regulating it to limit the openness of the proceedings in practice. She expressed her objection to the argument that appeared in the public sphere that the openness of court proceedings was not as important as the speed of the proceedings.

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<sup>7</sup> Original title of the lecture: *E-sądy jako zjawisko modernizujące, usprawniające i uczłowieczające wymiar sprawiedliwości.*

<sup>8</sup> Original title of the lecture: *Rozprawa zdalna a jawność postępowania.*

She also noted two things. Firstly, there is a need to correct the organisational premises of this risk. Otherwise, future solutions to digitise justice will reproduce the same mistakes. Secondly, standards for the protection of procedural rights should be developed and confirmed so that it can be used as a criterion for assessing technical solutions for organising and conducting remote hearings. She also drew attention to the need to develop our own ICT system, which will have an appropriate functionality and level of security.

She concluded her speech by expressing doubts as to the necessity of such a far-reaching restriction of the openness of the proceedings (both for the participants in the proceedings and for the public), which took place during the pandemic in Poland in the context of solutions in other European countries. She pointed out that Polish law during the pandemic (in May 2021) had evolved in a dangerous direction, i.e. the participants of the proceedings, as a result of the amendment to the Anti-COVID Act, lost control over whether the trial would be held remotely or whether the case would be resolved without their participation (in a closed session).

Undoubtedly, the identification of numerous problems related to remote hearings and the exchange of views on this subject can certainly be used in the legislative work on introducing the provisions on remote hearings permanently to the Code of Civil Procedure, which is to start at the Ministry of Justice.