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NEW TECHNOLOGIES
NEW JUSTICE
NEW QUESTIONS

Implementation of new technologies in justice

CLIFFORD
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HELSINKI FOUNDATION
FOR HUMAN RIGHTS

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Warsaw, July 2021

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ISBN 978-83-67027-01-4

Published by:

Helsinki Foundation for Human Rights
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Contents

Dear Readers,

We give you a report on the functioning of new technologies in the justice system. We decided to explore this issue because our daily observations of justice systems in Poland (and other jurisdictions) have not only revealed significant deficits in the way these systems work but also highlighted considerable delays in the adoption of new technologies by the courts. We then asked ourselves whether some of the limitations and shortcomings of the justice system might be reduced through the use and dissemination of what is broadly understood as "new technologies".

We looked for answers to this question in Poland and abroad because a technology considered a "novelty" in one country may as well be already well-recognised and widely used by international courts or courts operating in other domestic jurisdictions. While researching the use of new technologies in foreign justice systems, we primarily relied on the assistance provided by Clifford Chance offices outside Poland. Our thanks go to all staff who helped us in our research.

Our comparative legal study led us to believe that the rather cautious use of new technologies in the courts is a relatively widespread phenomenon. Based on that conclusion, we began to investigate the reasons for this rather conservative approach. After all, it seems fairly obvious that access to digitised documents must have a positive impact on the ease with which the court and the parties can examine such documents, which in turn can speed up proceedings. The possibility of examining litigants online should also have a positive impact on the pace at which a case is heard, as well as the reduction of costs of proceedings. New justice technologies bring other obvious advantages for the clients of the court system and specifically persons with disabilities and crime victims, who would certainly appreciate an opportunity to avoid a face-to-face meeting with their abusers in court.

Shouldn't these obvious advantages of new justice technologies lead to their rapid dissemination? Since this seems not to be the case, what stands in the way? Is it just the fear of novelty among judges and lawmakers, reluctant to learn how to use new technologies? An "old habits die hard" approach or unwillingness to leave one's comfort zone? The lack of lawmakers' interest in legislating new justice technologies?

Or maybe there are more serious, factual objections that make new technologies less attractive, such as those related to the very concept of adjudication or ensuring the fairness of adjudication?

While not shying away from expressing our own opinions on the subject, we asked these questions of justice system professionals: judges, prosecutors and lawyers. We give many thanks to all the respondents. We present their insights in the final section of the report. It is crucial that we listen to what these professionals have to say. We know that "war is too serious a matter to entrust to military men", but, as we have seen all too often in recent times, waging war without the military can have disastrous consequences.

We invite you to read our report. We hope that you will find it not only readable but also thought-provoking, especially in the section discussing the surveyed lawyers' answers to the question "Can a court conducting proceedings entirely online still be a fair and just court?".

Enjoy your reading!

EXECUTIVE SUMMARY

Introduction

- There is a continuous discussion among lawyers, academics and politicians about the need to reform domestic, EU and international systems of justice.
- Problems such as lengthy court proceedings, extensive formalism and bureaucratisation are common to many jurisdictions.
- As a result, the legal world is increasingly focusing on the potential of solutions based on new technologies.
- The concept of "digitisation of courts" can be understood as a number of processes, such as the introduction of remote trials, electronic communication with the court, digitisation of case files, but also solutions that go further, such as the creation of courts operating entirely online.
- The COVID-19 pandemic has greatly accelerated the introduction of online access to justice tools in many countries, including Poland.
- However, there are still many questions as to the further direction and pace of digitisation and transformation of the justice system.

International standards

- The increasing use of modern technologies, e.g. for the purpose of conducting remote trials, may on the one hand positively affect access to court by eliminating a number of existing practical barriers but, on the other hand, this process may also involve certain threats.
- The digitisation of the judiciary should thus be conducted in line with the standards arising out of Article 6 (1) ECHR. It is necessary to make sure that the introduction of new technologies to the courts will broaden and not restrict an individual's access to the court. This is particularly important in the case of persons who are "digitally excluded" due to, e.g., economic reasons or a lack of sufficient computer skills.
- It should be considered in which categories of cases further digitisation (e.g. remote trials, the establishment of online-only courts) would be excluded. As shown by the case law of the ECtHR, a cautious approach should be taken, for example, to the holding of remote hearings in criminal cases or hearings dedicated to decisions concerning different forms of

deprivation of liberty which may be ordered in the context of other types of proceedings. On the other hand, wider digitisation could be allowed in small civil or administrative court cases.

- Remote proceedings by means of distance communication must respect the right to a "public hearing" guaranteed under Article 6 (1) ECtHR. Although this right not absolute and some exceptions to it are allowed, it would be unreasonable to completely dispense with the principle of proceedings open to the public in the case of remote trials. The publicity may be ensured, for example, by the sharing of a link to the broadcast of the trial with interested persons or by allowing members of the public to watch a live feed of the trial displayed at a dedicated room in the court building.

Social determinants

- When carrying out in-depth digitisation of this sphere of public life, governments of individual countries as well as supranational structures must not forget about the phenomenon described as "digital exclusion".
- One of the rankings that enables the assessment of the level of digitisation across countries is the DESI ranking. It is an index of the digital economy and society, which is published by the European Commission and allows for the assessment of changes in the EU Member States in terms of digital competitiveness.
- In this ranking, Finland and the Scandinavian countries are the leaders, with the situation in Romania, Greece and Bulgaria being the worst.
- Poland ranks 23rd out of 28 EU countries (including Great Britain) in the DESI ranking. Only Cyprus, Italy, Romania, Greece and Bulgaria were rated lower. Poles have obtained their lowest score in the digital competence category.
- Considering the subject matter of this report, it is also worth paying particular attention to the category of digital public services. Estonia was the top performer in this category, with a slight lead over Spain, Denmark and Finland. Poland's score was slightly below the EU average, ranking Poland above countries such as Germany and the Czech Republic.
- In the International DESI ranking (the DESI ranking extended by 18 non-EU countries), Finland again ranked the highest, with five of the top ten places taken by European Union countries. Iceland has become the highest-ranked non-EU country (taking third place in the overall ranking). However, the average digital competitiveness score for the four lowest-ranking EU countries is notably lower than the one of e.g. China and Russia.

- The two most frequently cited reasons for not having access to the Internet in Poland are the lack of the need, i.e. the absence of motivation, and the lack of appropriate skills (67.7% and 52% of the indications, respectively). Other reasons include extensive costs of equipment (21.6%) and extensive access costs (14.7%). Similar reasons are identified in Czechia, Italy and Spain, countries that are often compared to Poland.
- Of the 3.82 million people from Poland who have never used the Internet, as many as 3.26 million – or ca. 85% – are aged between 55 and 74.

Solutions in force in different countries

- The report's analysis covers the legal systems of England and Wales, Czechia, Spain, Japan, the United States and Italy. In addition, we have taken into account, to a certain extent, solutions that are in place in the Netherlands, Armenia, Kazakhstan, Kyrgyzstan, Russia and Hungary.
- The process of digitisation of the judiciary is relatively underdeveloped in most of the surveyed countries. None of the surveyed jurisdictions operates fully-fledged online courts, as defined in this report.
- Tools based on artificial intelligence, although they do appear in the judiciary practice of most of the surveyed countries, are still usually at the stage of testing and pilot programmes – an example being a programme implemented in the Oost-Brabant District Court designed to help Dutch judges in deciding cases involving road traffic offences or the programmes used to assess the risk of an offence being committed tested by law enforcement authorities e.g. in Spain or England and Wales.
- The COVID-19 pandemic has forced countries to allow for a broader application of new technologies by the judiciary, specifically for the purpose of handling cases during remote hearings and trials. In the vast majority of the surveyed jurisdictions, it is possible to conduct e-trials by means of distance communication technology.
- In the substantial majority of the surveyed jurisdictions, there have not yet been any landmark court decisions specifically addressing the fairness requirements of remote proceedings.
- One can indicate numerous examples of good practice in the use of modern technologies – e.g. Italian provisions on the confidentiality of communications between litigants and their legal representatives or solutions adopted in several of the respondent countries enabling the electronic submission of pleadings and remote access to the case file.

- Unfortunately, the surveyed countries lack good practices regarding ensuring access to courts for digitally excluded persons.

Opinion of lawyers in Poland

- According to over 93% of the lawyers who took part in the study conducted by the HFHR, the Polish justice system does not adequately use new technological solutions.
- A comparable group, almost 90%, claimed that the changes introduced during the legislative process have not kept pace with the development in the sphere of new technologies.
- At the same time, the vast majority, i.e. as many as 96% of the respondents, stated that the implementation of technology-based solutions could improve the functioning of the justice system.
- Practitioners pointed out that new technologies may, to a certain extent, be an opportunity for the justice system and an answer to the problems they have been faced with in their everyday work for years.
- In their view, the potential of innovative and digital solutions could lead, in particular, to speeding up proceedings, rationalising the use of time by adjudicating panels, rationalising the use of time by court staff, simplifying the handling of cases, saving costs (both on the side of the State Treasury, as well as parties to proceedings, witnesses and lawyers), facilitating and speeding up communication with the court, as well as making it less formal to a certain extent.
- Despite the strong belief of the respondents in the possibilities offered by enhanced digitisation of the justice system, it seems that they see there are some limits to this process. Over half (57.4%) of the respondents did not agree with the opinion that courts conducting proceedings entirely online are the future of the justice system.

Report methodology

The authors of the report aimed to present the state of implementation of solutions based on new technologies in justice systems and formulate recommendations for various entities – the legislative, executive and judicial bodies and professional associations.

Such an assumption was realised by reaching out to various research methods and tools. The analyses carried out for the purposes of this report focused on four key areas:

- the legal situation (national and international);
- social and infrastructural determinants;
- the practice of criminal justice authorities (in particular, national and international courts);
- the opinion of lawyers on the current situation in the judiciary and prospects for the future.

The research mainly involved:

- a review and comparison of national judicial procedures that allow for the use of tools based on new technologies;
- a review of internal rules and regulations applicable in international courts and tribunals;
- a compilation of international standards on access to courts and fairness of judicial proceedings (taking into account the specific needs of persons with disabilities);
- a review of expert reports on the scale of digital exclusion in Poland and European countries;
- an analysis of the scale of the use of e-trials by Polish courts and the state of preparedness of the Polish justice system for remote proceedings;
- a survey among Polish lawyers on the use of digital tools within the Polish justice system and the possible and desired directions of the development of digitisation of justice.

The adopted research methods have been chosen so to ensure they are complementary and allow for the most complete diagnosis of the state of implementation of new technologies in justice systems (both at the legislative and practical level).
Due to the diversity of issues discussed in the report, methodologies relevant to a given area of analysis are discussed separately in each chapter.

International standards as a boundary for the implementation of innovative solutions in the justice system

In addition to the social and organisational factors guiding reforms of justice systems, it is also necessary to take into account obligations arising under international law. In this chapter, particular attention is paid to the European Convention on Human Rights, because many of the countries whose systems are examined in this report are bound by this legal instrument and fall under the jurisdiction of the European Court of Human Rights.

1. Digitisation of justice and Article 6 of the European Convention on Human Rights

1.1. Introduction

The notion of "digitisation of justice" may relate to different, albeit interrelated, phenomena. The first one is Online Dispute Resolution (ODR). This name derives from a similar concept, Alternative Dispute Resolution (ADR), which describes forms of dispute resolution alternative to court proceedings, such as mediation or negotiation. Accordingly, ODR usually means alternative, online forms of dispute resolution[1]. ODR must be distinguished from the phenomenon of digitisation (computerisation) of court proceedings, i.e. proceedings which involve traditional courts but are conducted with the wider use of new technologies, for example, those allowing the conduct of remote hearings (over a video link), taking of remote witness testimony, digital circulation of documents, digitisation of case files etc.[2] Finally, the concept of "online courts" relates to the courts that conduct all their operations online[3]. This chapter deals only with the digitisation of court proceedings. The issues related to the use of modern technologies in arbitration proceedings have been discussed separately.

1 The term is used in this sense in EU law – see Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), OJ L 165, 2013, p. 1; cf. in European Committee on Legal Co-Operation (CDCJ), *Technical Study On Online Dispute Resolution Mechanisms*, CDCJ (2018)5, Strasbourg 2018, pp. 12–14 (https://rm.coe.int/cdcj-technical-study-on-online-dispute-resolution-mechanisms/16809f0079; (accessed on: 16.09.2020).

2 See e.g. P. Krzykowski, Informatyzacja postępowania przed sądami administracyjnymi – refleksje na temat nowelizacji z 12 kwietnia 2019 r. (Dz.U. 2019, poz. 934), *Studia Prawnoustrojowe* 46, 2019, pp. 163–175; K. Flaga-Gieruszyńska, J. Gołaczyński, D. Szostek (Eds.), *Informatyzacja postępowania cywilnego. Teoria i praktyka*, Warszawa 2016.

3 See, in particular, R. Susskind, *Online Courts and the Future of Justice*, Oxford 2019.

Furthermore, this chapter assumes that despite rapid technological developments, courts will be manned by human judges. However, the academic literature has been long discussing the possibility of delegating certain jurisprudential functions to computer programs using algorithms based on what is known as "artificial intelligence"[4]. A comprehensive discussion about the risks associated with the use of artificial intelligence falls beyond the scope of this chapter, but some problems in this area will be signalled.

This subchapter seeks to establish and compare opportunities and risks that modern technologies in relation to the implementation of the standards enshrined in Article 6 of the European Convention on Human Rights[5]. Aiming to do so, this chapter briefly presents Article 6 standards and then attempts to determine whether they can be effectively implemented in proceedings conducted before online courts. In the absence of fully relevant case law of the European Court of Human Rights (which is principally a consequence of the fact that remote court proceedings are relatively rare in Europe, or at least they have been until the coronavirus pandemic materially changed the situation), the following discussion is, to an extent, speculative. However, this chapter draws on an international literature and reports on the digitisation of court proceedings and the impact of the process on respect for the right to a court.

1.2. Digitisation of justice: practical European perspectives

In 2018, the Council of Europe European Committee on Legal Co-operation (CDCJ) published a technical study on online dispute resolution mechanisms in the practice of European states. According to the study, individual countries make only limited use of information technology in the sphere of justice. None of the countries has opted for the complete digitisation of judicial proceedings. Also, the states do not use mechanisms based on artificial intelligence to replace judges in the decision-making process. Sometimes, albeit very rarely, IT tools are used in compulsory ADR procedures before a case is

4 See e.g. A. D'Amato, Can/Should Computers Replace Judges?, *Georgia Law Review* 11 (5), 1977, pp. 1277–1301; T. Sourdin, Judge in Robot? Artificial Intelligence and Judicial Decision-Making, *UNSW Law Journal* 41 (4), 2018,, pp. 1114–1133; R.M. Re, A. Solow-Niderman, Developing Artificially Intelligent Justice, *Stanford Technology Law Review* 22 (2), 2019, pp. 242–289.

5 Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4 November 1950 (Journal of Laws of 1993, No. 61, item 284) ("ECHR").

referred to a court. Besides, electronic proceedings are conducted in matters involving minor civil disputes, consumer disputes and the order for payment procedures. However, such proceedings usually enable the unsuccessful party to lodge an appeal which results in the case being referred to a traditional court. Moreover, European courts use distance communication technologies to conduct remote hearings of witnesses and experts[6].

At present, the most relevant embodiment of the notion of "online court" is arguably the Civil Resolution Tribunal (CRT) operating in the Canadian province of British Columbia. Technically classified as a tribunal rather than a court, the CRT is nevertheless a part of the justice system. The CRT deals with the settlement of certain categories of disputes: small claims disputes with a value up to $5,000, *strata property* disputes (regardless of value), disputes concerning motor vehicle accident and injury claims of up to $50,000, and disputes regarding societies and cooperative associations. CRT proceedings are conducted entirely online. First, an interested person uses the *Solution Explorer* tool, which helps to determine the legal category of the case and obtain an appropriate electronic application form. Once the case has been brought, the other party may reply within a specified period (the reply may be submitted electronically or otherwise). Then the parties negotiate an amicable settlement of the dispute. If the negotiations prove unsuccessful, the case is referred for mediation involving a "facilitator". It is only when the parties fail to resolve the case amicably that the case is decided by the CRT. The parties may submit evidence, which must be sent electronically. The CRT procedure is largely a written one, but the Court may also contact the parties by telephone or over a video link (a hearing may be held in this way, either). Once the proceedings are concluded, the CRT issues an order, which may be enforced in the same way as decisions of traditional courts are enforced. Certain CRT decisions may be appealed to the British Columbia Supreme Court. Other may be challenged in the form of a *Notice of Objection* submitted to, and heard by, the British Columbia Provincial Court[7].

However, many countries are nowadays considering far-reaching digitisation of judicial proceedings. In particular, the United Kingdom is pursuing a reform

6 CDCJ, *Technical Study*..., pp. 4–5.
7 This overview has been prepared based on the information obtained from the Civil Resolution Tribunal's website https://civilresolutionbc.ca/ (accessed on: 16 September 2020).

programme with a budget of over £1 billion[8]. Moreover, the process of judicial digitisation in many countries has been accelerated by the coronavirus pandemic, which necessitated solutions enabling the remote examination of court cases – solutions adopted in this area are discussed in Chapter IV of this report[9]. Digitisation of the justice system is also discussed by legal scholars, most notably by Prof. Richard Susskind of the University of Oxford in *Online Courts and the Future of Justice*[10].

1.3. Guarantees under Article 6 ECHR

All courts, including those extensively using modern technologies in their activities, which decide criminal and civil cases (as defined in the case law of the ECtHR) must comply with the requirements stemming from Article 6 of the ECHR. Article 6 consists of three paragraphs: the first sets out the general requirements of fairness of judicial proceedings, the second expresses the principle of the presumption of innocence and the third establishes safeguards for the accused in criminal proceedings. This subchapter is primarily devoted to the standards expressed in the first paragraph, which include: the requirement of an impartial and independent court ("tribunal" in the Convention parlance);

- the requirement that the court must be "established by law";
- the right of access to a court;
- the right to a fair trial;
- the right to a hearing within a reasonable time;
- the right to public proceedings.

It is worth noting that in the light of the Court's case law, an individual may waive procedural rights under Article 6(1) ECHR. "However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important public interest; and it must be attended by minimum safeguards commensurate with its

8 An overview of the reform is available at the UK Government's website at https://www.gov.uk/guidance/the-hmcts-reform-programme (accessed on: 16.09.2020). see also P. Cortés, T. Takagi, The civil money claims online: the flagship project of court digitalisation in England and Wales, *Computer and Telecommunications Law Review* 25 (8), 2019, pp. 207–212.

9 See e.g. B. Pilitowski, B. Kociołowicz-Wiśniewska (Eds.), *Sądy dostępne przez Internetem. Lekcje z Polski i 12 krajów świata*, Court Watch Poland Foundation, Toruń 2020.

10 R. Susskind, *Online Courts*...

importance.... In addition, it must not be tainted by constraint"[11]. Therefore, if remote court proceedings were voluntary, in the sense that the individual could freely choose between traditional and fully digitised proceedings, it would be possible to derogate from some of the guarantees under Article 6 ECHR. However, if individuals did not have such a choice and remote proceedings were the only option available, it would be necessary to ensure that all of the above guarantees are respected (even if only some are absolute). Otherwise, parties to remote proceedings would need to be afforded the right to challenge decisions of online courts before a court which fully satisfies the above standards. It should therefore be considered whether the digitisation of judicial proceedings poses any particular risks to each of these requirements.

1.4. Digitisation of justice and the right of access to a court

In this chapter, "right of access to a court" is understood as the right to institute judicial proceedings. Notably, the ECtHR case law does not require states to operate second-instance courts – however, if national law provides for two-instance proceedings, also the appellate (and/or cassation) courts should meet the requirements of Article 6 ECHR[12]. Moreover, as already noted, if the body examining the case in the first instance does not satisfy the requirements of Article 6, then it is necessary to ensure that the individual concerned can apply to a court which satisfies such requirements[13].

The right of access to a court is not absolute and may be subject to various restrictions. However, they must not be disproportionate or impair the essence of the right to a court[14]. At the same time, the ECtHR notes that barriers to access to a court may arise not only from legal provisions (e.g. those establishing time limits) but also from the practice (e.g. an excessively formalistic interpretation of law)[15]. An assessment of whether access to a court was disproportionately restricted in a given case should take into account

11 *V.C.L. and A.N. v. the United Kingdom*, nos. 77587/12 and 74603/12, 16 February 2021, § 201.
12 See e.g. *Andrejeva v. Latvia* [GC], no. 55707/00, 18 February 2009, § 97.
13 See e.g. *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018, § 65.
14 See e.g. *Naït-Liman v. Switzerland* [GC], no. 51357/07, 15 March 2018, § 114.
15 See *e.g. Zubac v. Croatia* [GC], no. 40160/12, 5 April 2018, §§ 97–99; *Witkowski v. Poland*, no. 21497/14, 13 December 2018, §§ 44–57.

the factors such as the nature of the case and the individual features of the person concerned (e.g. a disability, financial situation, etc.)[16].

The digitisation of justice may undoubtedly lead to the dismantling of some barriers to access to a court. For example, the absence of the requirement to appear in person in court, resulting from the remote nature of proceedings, certainly improves access to justice. This is particularly important for persons with motor disabilities and the inhabitants of smaller settlements, located far away from the courts. However, the digitisation of court proceedings can greatly improve access even for those who can easily reach the local courthouse. For example, certain individuals may experience difficulties in accessing a traditional court because of geographical barriers (the court is a long way from their home) or psychological barriers (they are reluctant to take part in time-consuming and complicated litigation)[17]. From this perspective, it is certainly a great convenience to be able to do all the formalities remotely, over the Internet. Another important solution may be the digitisation of case files, especially such that takes into account the needs of persons with disabilities. Notably, the use of properly designed electronic tools can make the entire judicial process significantly easier. For example, the claimant will no longer have to complete the entire statement of claims manually but will be able to submit their claims on a special electronic form through a creator application available on the court's website[18]. In this way, those of the prospective litigants who do not have sufficient legal competence and, at the same time, are unable to retain professional legal representation can obtain meaningful access to a court more easily. Furthermore, the introduction of tools facilitating access to legal representation and/or enabling self-assessment of one's legal situation, which have been proposed by the scholarship and already implemented in some jurisdictions (see above) as an "add-on feature" of online courts may increase the legal awareness of members of the public, indirectly contributing to the further tangible improvement of access to a court[19].

However, the digitisation of court proceedings may also entail some risks. A particularly worrisome problem would be the restriction of access to a court for persons without access to the Internet or those having insufficient computer

16 See *e.g. Siwiec v. Poland*, no. 28095/08, 3 July 2012, § 51; *Parol v. Poland*, no. 65379/13, 11 October 2018, § 49; *A.N. v. Lithuania*, no. 17280/08, 31 May 2016, §§ 101–102.
17 See e.g. E. Katsh, O. Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press 2017, pp. 41–42.
18 See e.g. Susskind, *Online Courts*..., pp. 156–157;
19 *Ibid.*, 121–133.

skills. The problem of "digital exclusion" is discussed in more detail in Chapter III of this report, but it should be noted already at this point, that a roll-out of any reforms related to the digitisation of the courts should therefore be preceded by an in-depth analysis of the availability of Internet access, and a given country population's ability to operate computer tools, as well as actions aimed at protecting the rights of people who are unable to enjoy the benefits of electronic litigation[20]. It also seems that, at least in the initial phase of judicial digitisation, individuals should continue to be able to use the traditional (non-digitised) procedural track[21]. A different approach could be considered for disputes between non-private litigants. It is also important to expand individuals' access to professional legal representation. Furthermore, the right of access to a court will only be ensured if the tools for electronic communication with the court are easily accessible, also for persons with little or no computer skills.

A certain restriction of the right to a court may also result from the design of fully-fledged online courts proposed by some legal experts, which envisages that mandatory negotiations and mediation should precede the adjudication phase[22]. Documents developed by the Council of Europe recommend that ODR mechanisms should be voluntary[23]. It is also worth noting in this context that the CJEU judgment of 18 March 2010 in *Rosalba Alassini*[24], in which the Court held that the principles of equivalence and effectiveness and the principle of effective judicial protection do not preclude national legislation which requires that disputes concerning electronic communication services between end--users and providers of such services must be referred to an obligatory out--of-court settlement procedure preceding the bringing of legal action before a court, provided that the "procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are

20 See, for example, a report by Justice, a UK-based organisation: A. Finlay et al., *Preventing Digital Exclusion from Online Justice*, JUSTICE 2018, https://justice.org.uk/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf (accessed on: 24.09.2020).

21 See e.g. K. Głomb et al., *Kompetencje przyszłości w czasach cyfrowej dysrupcji. Studium wyzwań dla Polski w perspektywie roku 2030*, Warszawa 2019, pp. 41–42.

22 See e.g. Susskind, *Online Courts*..., pp. 135–141.

23 See e.g. Resolution 2081 of the Parliamentary Assembly of the Council of Europe of 27 November 2015, *Access to justice and the Internet: potential and challenges*, para. 7.1.

24 Judgment of 18 March 2010, *Rosalba Alassini and Others v Telecom Italia SpA and Others,* C317/08, C318/08, C319/08 and C320/08.

possible in exceptional cases where the urgency of the situation so requires". To justify the argument against the settlement procedure being only accessible by electronic means, the CJEU pointed out that such a solution could result in the denial of rights of persons without access to the Internet[25].

1.5. Digitisation of justice and the right to an impartial and independent court

According to the ECtHR, the notion of "independence" refers both to "(i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit, which must provide safeguards against undue influence and/or unfettered discretion of the other state powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties."[26] Accordingly, what is crucial in this context is the existence of appropriate guarantees, relating to the procedure of judicial appointments, the duration of terms of judicial offices, the stability of the office (irremovability), remuneration policies, etc.[27] The notion of impartiality, in turn, pertains to the equal treatment of the participants in the proceedings. According to the ECtHR's case law, impartiality has two dimensions: the subjective one, which implies that the court should treat the litigants equally, i.e. without favouritism or discrimination, and the objective one, meaning that nothing should affect the perception of the court as impartial in the eyes of an unbiased observer[28]. As the ECtHR has noted, "justice must not only be done, it must also be seen to be done"[29].

The digitisation of judicial proceedings does not seem to pose any particular threat to judicial independence or impartiality. After all, the judge will not become more susceptible to pressure simply because the hearing is conducted through remote communication and the paperwork is sent electronically.

25 *Ibid.*, para. 58.
26 *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, § 234.
27 See, e.g. *Henryk Urban and Ryszard Urban v. Poland*, nos. 23614/08, 30 November 2011, § 45.
28 See, e.g. *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005, §§ 118–133.
29 See e.g. *Chim and Przywieczerski v. Poland*, nos. 36661/07 and 38433/07, 12 April 2018, § 159.

However, substantial threats may be associated with the courts' widespread use of computer algorithms for adjudication purposes. Even now, to a certain extent, such algorithms are used in certain developed countries (especially, the USA) to estimate the risk of re-offending, for example, to determine whether an inmate should be released early on parole[30]. Polish courts do not use algorithms in this way for the time being, although automated processes are sometimes used by administrative authorities. For example, reports generated by the STIR system may form a basis for a tax body's decision to "freeze" a bank account[31]. Wider use of such tools by the courts could jeopardise litigants' right to have their case heard by an independent and impartial court. This risk is primarily attributable to the fact that the de facto decision-maker would not be the court, but rather the algorithm relying on large-volume databases of, say, court decisions made in similar cases. Moreover, if the resolution of certain categories of cases were to be assigned solely to computer programs, one could hardly speak of any "independence", "impartiality" or even "the right to a court" whatsoever. However, the Council of Europe's documents[32] indicate that, in practice, the use of theoretically objective algorithms can lead to results that are difficult to reconcile with the principle of equality before the law. For example, certain studies conducted in the USA suggest that decisions made with the use of algorithms operated by public administration and private companies are biased against black persons[33]. Another obvious risk is that the state (or a third-party developer) may intentionally alter the design of the algorithm to interfere with the content of judicial decisions. This risk is exacerbated by the fact that the source codes

30 See e.g. D. Kehl et al., *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing*, http://nrs.harvard.edu/urn-3:HUL.InstRepos:33746041 (accessed on: 30.09.2020).

31 See arts. 119zg-119zzd of the Polish Code of Tax Procedure [*Ordynacja podatkowa*] of 29 August 1997 (Journal of Laws of 2020, item 1325); see also M. Szubiakowski, Problemy proceduralne blokady rachunku bankowego w celu przeciwdziałania wyłudzeniom skarbowym, *Zeszyty Naukowe Sądownictwa Administracyjnego* 3, 2018, pp. 47–55.

32 See European Commission for the Efficiency of Justice (CEPEJ), *European Charter on the use of Artificial Intelligence in judicial systems and their environment*, Council of Europe 2019, pp. 51–56; Committee of Experts on Internet Intermediaries (MSI-NET), *Study on the Human Rights Dimensions of Automated Data Processing Techniques (in Particular Algorithms) and Possible Regulatory Implications*, Council of Europe 2018, p. 12, https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5 (accessed on: 30.09.2020).

33 See e.g. J. Larson et al., *How We Analyzed the COMPAS Recidivism Algorithm*, 2016, https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm (last accessed on: 30 September 2020); H. Ledford, Millions of black people affected by racial bias in health-care algorithms, *Nature.com*, 24 October 2019, https://www.nature.com/articles/d41586–019-03228–6#ref-CR1 (accessed on: 30.09.2020).

of the relevant software are usually not shared with the public to protect the copyrights of their authors[34].

The above does not mean, of course, that any use of mechanisms based on Artificial Intelligence by the courts must be rejected. For example, AI tools could be used to analyse judicial decisions, identify lines of judicial authority, etc.

1.6. Digitisation of justice and the requirement of a court "established by law"

The requirement of a court or tribunal "established by law" relates to the lawfulness of the creation of a given court, a given person's (judge's, juror's) mandate to sit on the adjudicating panel, the designation of the composition of the adjudicating panel, and the determination of the court's jurisdiction. Digitisation of court proceedings does not, in principle, pose any major risks in this respect, provided that it is carried out based on clear and properly enacted legal provisions. However, concerns may be raised by arrangements such as the mechanism for the random allocation of cases currently used in Polish courts[35]. This mechanism is based on a third-party developed algorithm, which has not been made available to the public[36]. Because of the lack of transparency, the litigants may have doubts as to whether the composition of the court hearing their case has been determined lawfully, or whether irregularities in this respect (infringing their right to have their case heard by a court established by law) have occurred as a result of the design of the random allocation mechanism[37]. It is worth noting, however, that in the judgment

34 See e.g. CEPEJ, *Ethical Charter*..., p. 53; A. Cerrillo i Martinez, How Can We Open the Black Box of Public Administration? Transparency and Accountability in the Use of Algorithms, *Revista Catalana de Dret Públic* 58, 2019, pp. 17–18; P.B. de Laat, Algorithmic Decision-Making Based on Machine Learning from Big Data: Can Transparency Restore Accountability?, *Philosophy & Technology* 31 (4), 2018, pp. 525–541.

35 The rules for the allocation of EU law cases to judges via the Random Case Allocation System (*System Losowego Przydziału Spraw*, SLPS) are specified in the Regulation of the Minister of Justice of 18 June 2019 – Common Courts Working Rules and Regulations [*Regulamin urzędowania sądów powszechnych*] (Journal of Laws item 1141).

36 In a judgment of 11 December 2018 (case no. II SAB/Wa 502/18), the Provincial Administrative Court in Warsaw ruled that the SLPS source code does not constitute "public information" within the meaning of the Access to Public Information Act of 6 September 2001 [*Ustawa o dostępie do informacji publicznej*] (Journal of Laws of 2019, item 1429, as amended). This judgment is still appealable.

37 See e.g. K. Izdebski (Ed.), *alGOVrithms. State of Play. Report on Algorithms Usage in Government-Citizens Relations in Czechia, Georgia, Hungary, Poland, Serbia and Slovakia*, Fundacja ePaństwo 2019, pp. 15–29.

of 19 April 2021 (case no. III OSK 836/21), the Supreme Administrative Court found that the Minister of Justice had failed to actively engage in examining the request of the non-governmental organisation e-Państwo Foundation for the disclosure of the algorithm of the Random Case Allocation System (*System Losowego Przydziału Spraw*, SLPS). The Supreme Administrative Court (SAC) stressed that "[t]he algorithm showing the manner of operation of the SLPS network application by means of which the composition of the panel hearing a case is determined falls within the concept of public information because it informs about the manner in which courts operate, the manner of receiving and handling cases (Article 6 (1)(3)(d) of the Access to Public Information Act)." A request for access to the source code of the SLPS is currently pending before the SAC.

It is thus important to increase the transparency of the rules governing the operation of computer tools used by judicial authorities, especially those utilised in making decisions directly relevant to individual freedoms and rights. The need to increase the transparency of algorithmic systems is also highlighted in recommendations of the Council of Europe's Committee of Ministers[38].

1.7. The right to a fair trial in the context of remote judicial proceedings

According to Article 6 (1) ECHR, "everyone is entitled to a fair (...) hearing" of their case. The Convention does not define the concept of "fair hearing" and does not list the safeguards that a party to legal proceedings should be afforded (however, as already indicated, it sets out the procedural rights of the accused in criminal proceedings). Accordingly, these aspects have been clarified in the extensive case law of the ECtHR but the detailed criteria for the fairness of proceedings may vary according to the type of proceedings involved. Notably, such procedural variation may involve not only the difference between criminal and civil proceedings (which is explicitly explained in the Convention) since different types of cases dealt with in civil proceedings may also require different procedural arrangements. For example, in cases involving compulsory psychiatric confinement, the Court pays particular attention to the need to ensure that a subject of such proceedings has

38 See point 4.1. of the Appendix to Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems.

an opportunity to personally contact the court[39]. Conversely, in commercial cases, the ECtHR allows for the increased formalism of evidentiary proceedings[40]. Furthermore, the individual characteristics of a participant in the proceedings (especially their disability) may sometimes necessitate the arrangements that adjust the proceedings to their specific needs and limitations[41]. Certainly, certain forms of digitisation do not raise any serious controversies relating to the fairness of proceedings. These include the digitisation of case files of court proceedings or the introduction of measures of electronic communication with the court. However, the introduction of remote hearings or creation of courts that would operate exclusively online could be a more challenging task. Quite obviously, such solutions, albeit possibly problematic, should not be rejected outright as remote procedures conducted in some categories of cases not only would have *no* adverse effect on the fairness of the proceedings but also would be capable of mitigating the general problem of the excessive length of proceedings. However, any introduction of remote proceedings should be preceded by an in-depth analysis of, inter alia, categories of cases that may be disposed of in this way. In relation to certain types of cases, conducting hearings exclusively online would arguably be problematic. The greatest controversy surrounds remote criminal proceedings. The ECtHR has not examined in its case-law the fairness of proceedings before criminal courts operating entirely online as such a body is yet to be set up in a Member State of the Council of Europe. However, the Court has on several occasions dealt with applications in which persons accused in national criminal proceedings complained that their rights under Article 6 ECHR had been violated because they have been provided with the opportunity to participate in a hearing only over a video link. Particular attention should be paid to the judgment in *Marcello Viola v. Italy*[42]. In *Marcello Viola,* the ECtHR ruled that the participation of an accused person in proceedings by videoconference does not, "as such", infringe the Convention, but States must ensure that the recourse to that measure serves a legitimate aim and that the accused person's right to participate in the taking of evidence is not violated. In this particular case, the accused's participation in a hearing over a video link was justified by the fact that he was an inmate of a maximum-security prison (serving a sentence for another offence related to his activities in the Mafia), and his physical transfer to the courtroom would have required the application of

39 See e.g. *Zagidulina v. Russia*, no. 11737/06, 2 May 2013, § 62; *D.R. v. Lithuania*, no. 691/15, 26 June 2018, §§ 90–91.
40 See e.g. *Siwiec v. Poland*, § 51.
41 See e.g. *A.N. v. Lithuania*, no. 17280/08, 31 May 2016, §§ 90 and 102.
42 *Marcello Viola v. Italy*, no. 45106/04, 5 October 2006.

special security measures. Providing the inmate with an opportunity to remotely take part in a hearing also shortened the duration of the proceedings, held the Court. The ECtHR also noted that the fight against the Mafia sometimes requires the adoption of extraordinary measures intended to protect public safety and order. Mafia members can influence public life, infiltrate state institutions and exercise, even indirectly, undue pressure on other participants in the proceedings, including victims, by merely being present in the courtroom. Accordingly, the ECtHR held that the accused's participation in the hearing by videoconference had pursued legitimate aims. At the same time, the Court observed that the applicant was allowed to participate in the hearing effectively and actively: he could see the courtroom, the court and other participants and hear what they said; he was also seen and heard by those present in the courtroom. During the hearing, neither the applicant nor his defence lawyer reported any technical problems. Also, there was nothing that would suggest that the accused's right to confidential communication with his defence lawyer may have been violated. The ECtHR further noted that the applicant only attended an appellate hearing over a video link (he was physically brought to the hearings conducted before the first-instance court). Accordingly, the Court did not find any infringement of Article 6 ECHR. However, there are also examples of ECtHR decisions in which the Court held that the hearing conducted with no direct participation of the accused did not meet the Convention standards. For example, in *Zagaria v. Italy*[43], the ECtHR found a violation of Article 6 (1) and (3)(c) ECHR being a consequence of the fact that during a hearing in which the accused participated over a video link, authorities overheard the accused's telephone conversation with their defence lawyer. ECtHR found a violation of Article 6(1) ECHR also in *Shulepov v. Russia*[44] and *Shugayev v. Russia*[45]. These rulings were influenced by the fact that not only the accused followed the trial at a distance, but also their defence lawyer was absent from the courtroom. In a relatively similar case, *Sevastyanov v. Russia*[46], the ECtHR further noted that the accused had been informed that he would be able to attend the Supreme Court hearing exclusively over a video link on the day of the trial. Moreover, according to the Court, the Government did not show any legitimate justification for conducting the hearing in this way in a situation where, at earlier stages of the proceedings, the applicant had been allowed to attend hearings in person.

43 *Zagaria v. Italy*, no. 58295/00, 27 November 2007.
44 *Shulepov v. Russia*, no. 15435/03, 26 June 2008.
45 *Shugayev v. Russia*, no. 11020/03, 14 January 2010.
46 *Sevastyanov v. Russia*, no. 37024/02, 22 April 2010.

Therefore, the ECtHR's case law does not entirely preclude the possibility of allowing the accused to participate in a hearing by distant communication technology. However, the Court has ruled that certain conditions should be met in such a situation: there must be an objective aim justifying the use of means of distance communication, the defence lawyer must be present in the courtroom and the accused must be able to communicate in confidence with the defence lawyer. On the other hand, it would arguably be incompatible with the ECHR if the proceedings were conducted in a fully remote fashion, i.e. without the physical presence of the accused's defence lawyer in the courtroom.

Reports of non-governmental organisations point to multiple risks associated with the conduct of remote hearings in criminal proceedings[47]. In this respect, attention should be paid to a *Fair Trials'* report summing up a survey of the criminal justice system in England and Wales during the times of the coronavirus pandemic[48]. The report also includes the results of a survey conducted among solicitors and barristers dealing with criminal proceedings on online court hearings and sessions at the pre-trial stage[49]. According to 44% of the surveyed lawyers believe that remote hearings make it significantly more difficult for the accused to participate in the proceedings. 67% of respondents stated that hearings conducted over a video link or telephone had a "significant negative impact" on the communication between the accused and their defence lawyers. 75% of respondents thought that remote hearings and sessions had affected the accused's and their lawyers' participation in evidentiary proceedings (the presentation and challenging of evidence, etc.). 60% of respondents declared that the use of video ink or telephone had a generally negative impact on the overall fairness of the proceedings. *The European Criminal Bar Association* (ECBA) also presented a report on the use of videoconferencing in criminal matters[50]. The report separately discusses purely domestic and cross-border proceedings. In domestic cases,

47 Scholarly writings note multiple threats to the accused's rights resulting from the use of new technologies in criminal proceedings – see, in particular, M. Simonato, Defence Rights and the Use of Information Technology in Criminal Procedure, *Revue internationale de droit pénal* 85 (1), 2014, pp. 292–302.

48 Fair Trials, *Justice Under Lockdown. A survey of the criminal justice system in England & Wales between March and May 2020*, https://www.fairtrials.org/sites/default/files/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf (accessed on: 25.09.2020).

49 *Ibid.*, p. 7.

50 ECBA, *Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World*, September 2020, http://www.ecba.org/extdocserv/20200906_ECBA-Statement_videolink.pdf (accessed on: 25.09.2020).

the ECBA recognises that videoconferencing may be an appropriate method of hearing suspects or the accused in minor cases at an early stage of the proceedings to determine whether the proceedings should advance, provided that the suspect or accused consents to be heard in this way[51]. However, the organisation criticised the use of videoconferencing technology to conduct hearings during which a decision as to pre-trial detention is made. The ECBA noted that the judge's personal, physical contact with the suspect (accused) is important because it allows the judge to form an opinion on the suspect's (accused's) credibility, mental and health state, etc. Moreover, the use of remote hearings restricts access of the suspect (accused) to their defence lawyer and may adversely affect the confidentiality of their communication[52]. The physical presence of the suspect (accused) in the courtroom may also be seen as a safeguard against inhuman or degrading treatment[53]. The ECBA also believes that remote trials cannot replace trials conducted with the physical attendance of the parties concerned. It is traditional trials that should remain the rule, and every accused person, regardless of the seriousness of the charges laid against them, should have the right to be physically present at the trial. A trial conducted exclusively over a video link may have a dehumanizing effect and is unable to achieve the educational objectives of criminal proceedings[54]. The ECBA emphasised, however, that new technologies may be used, for example, to enable the accused with "special needs or reduced mobility" to take part in procedural steps, if they wish to do so[55]. The ECBA report presents a different approach to the use of videoconferencing technology in cross-border proceedings. In this regard, ECBA noted that the prompt organisation of a videoconferenced hearing of the suspect may limit the number of European Arrest Warrants, some of which are issued mainly to ensure that suspects are physically present during procedural steps. At the trial stage, videoconferencing may be the only *de facto* available solution enabling a suspect staying abroad to participate in the proceedings[56]. Other reports published in recent years (also before the outbreak of the coronavirus pandemic) drew attention to the negative impact of videoconferencing on respect for the suspect's rights. Technical problems, difficulties in communication between the suspect and the defence lawyer and failure to ensure sufficient confidentiality of such communication have been pointed

51 *Ibid.*, p. 13, paragraphs 49–50.
52 *Ibid.*, p. 13, paragraphs 51–54.
53 *Ibid.*, p. 13, paragraph 55.
54 *Ibid.*, pp. 13–15, paragraphs 56–66.
55 *Ibid.*, p. 15, paragraph 67.
56 *Ibid.*, pp. 4–9.

out among the problematic issues[57]. The Helsinki Foundation for Human Rights ("HFHR") was one of the NGOs which negatively assessed the Polish legislation enabling the conduct of detention hearings over a video link. As the HFHR argued in an opinion published in June 2020, the arrangement is incompatible with the Constitution and the ECHR[58]. According to the HFHR, "the physical presence of a suspect at a pre-trial detention hearing allows the court to carry out a more complete assessment of their testimony. It therefore promotes the implementation of the principle of substantive truth and reduces the risk of the wrongful application of the custodial preventive measure."[59] The Foundation also drew attention to the aforementioned risk of technical problems and difficulties in communication between the suspect and the defence lawyer. The HFHR also referred to a judgment of the Supreme Court of Norway[60], which found that a decision of detention on pre-trial detention taken at a remote hearing to which the suspect has not consented may have violated art. 5 (3) ECHR. Accordingly, the Supreme Court held that while deciding to convene a remote detention hearing, the court should each time assess the risk of transmission of infectious disease and compare this risk with the value of the appellant's protected interests[61].

The objections expressed in the above reports and opinions seem to have merit. Indeed, the conduct of remote hearings in criminal matters, both at the pre-trial and trial stage, may undermine respect for the rights of the suspect (accused). It would therefore be appropriate to propose that criminal cases remain within the remit of "traditional" courts, which should, in principle, deal with proceedings at sessions and hearings which enable the suspect (accused) to be physically present. The suspect's (accused's) attendance in meetings and hearings via videoconferencing technology could only be allowed if they gave their voluntary and informed consent to such measures, especially in situations where objective reasons (such as a disability, psychiatric in-patient admission, overseas stay) hinder or prevent their physical attendance. However, wider use of remote hearings should be considered in petty offence cases.

57 See e.g. P. Gibbs, *Defendants on video – conveyor belt justice or a revolution in access?,* Transform Justice 2017, https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf (accessed on: 25.09.2020).
58 HFHR, Statement to the Chairman of the Senate Committee on Family, Social Policy and the Policy on Ageing, 14 June 2020, https://www.hfhr.pl/wp-content/uploads/2020/06/druk-senacki-nr-142-uwagi-HFPC.pdf (accessed on: 25.09.2020).
59 *Ibid*.
60 Judgment of the Supreme Court of Norway, 8 May 2020, case no. HR-2020–972.
61 *Ibid*, referred to in: HFHR, Statement to the Chairman...

However, criminal cases are not the only type of court proceedings the fairness of which may be impeded by the introduction of remote hearings. First, all proceedings that may result in deprivation of liberty, in both criminal (see above) and civil cases (e.g. involuntary placement at a psychiatric hospital, nursing home or a post-penal detention centre) should enable the participants at risk of being deprived of liberty to physically attend the hearing. The arguments in favour of that rule are similar to those cited above in the context of criminal proceedings – the physical presence of a person who may be deprived of liberty should enable the judge to form an opinion on the situation of the participant concerned and may improve the participant's communication with their legal representative. Notably, the case-law of the ECtHR (see above) and the jurisprudence of the Constitutional Court[62] both emphasise the importance of the physical presence of a person whose placement at a psychiatric institution is considered during the relevant court hearing. Second, for similar reasons, any adjudication on measures strongly interfering with individual freedoms and rights, such as a judicial declaration of incapacitation, should be assessed critically. Moreover, studies discussed in American literature show that the remote adjudication of immigration cases may negatively affect the rights of the migrants concerned since it turned out that the courts more often ordered the deportation of those foreigners who attended hearings over a video link than those who were physically present during hearings[63]. However, those reservations do not mean that the possibility to take part in such proceedings through video conference should always be excluded: it may certainly happen that a remote hearing is the participant's only practically available option to follow the proceedings. Accordingly, as far as the fairness of proceedings is concerned, enabling the participant to attend the hearing over a video link is a more preferable solution than deciding the case in their absence.

However, as we have already indicated, there are many categories of cases that could be conducted remotely without detriment to the general fairness of proceedings, for example, those cases that do not require complex evidentiary proceedings. Moreover, remote examination of cases concerning disputes

62 See e.g. the judgment of the Constitutional Court of 22 March 2017, case no. SK 13/14, OTK-A of 2017, item 19; judgment of the Constitutional Court of 19 August 2020, case no. K 46/15, OTK-A, 2020, item 39.

63 See I. Eagly, Remote Adjudication in Immigration, *Northwestern University Law Review* 109 (4), 2015, pp. 933–1020; D. Thorley, J. Mitts, *Trial by skype:* A causality-oriented replication exploring the use of remote video adjudication in immigration removal proceedings, *International Review of Law and Economics* 59, 2019, pp. 82–97.

between businesses should also be considered acceptable. In such cases, as a rule, there is no risk of digital exclusion of any of the parties. Moreover, given the nature of such disputes, the parties usually do not have to appear before the court "in person". Also, the digitisation of proceedings before administrative courts should not raise any major concerns.

Proceedings theoretically capable of being held remotely must nevertheless be subject to certain guarantees of fairness. Detailed standards of fairness may differ depending on the type of proceedings and other factors, such as a disability of a party to the proceedings, professional legal representation, etc. An exhaustive discussion of the standards of a fair trial under the ECHR obviously goes beyond the scope of this report. However, it is worth paying attention to the most important guarantees derived by the ECtHR from Article 6 ECHR, namely the equality of arms and the right to adversarial proceedings[64].

In the context of online judicial proceedings, equality of arms can be undermined, first and foremost in a situation where, due to factors such as the above-mentioned digital exclusion or even transient technical problems (e.g. a computer or network connection failure), a party has limited ability to communicate with the court during a remote hearing. Although Susskind proposes that online courts should proceed as frequently as possible in an asynchronous manner, namely without the necessity of simultaneous presence[65], which would mitigate (to an extent) the problem of transient technical problems. After all, it would be possible to send a pleading or even a recorded verbal statement after the failure is remedied. However, the asynchronous method of conducting online proceedings may also raise doubts as it constitutes a departure from the traditional concept of a court hearing. *De facto* inequality of arms may also result from the lack of appropriate digital competences of a party to the proceedings.

As regards the right to be heard, it is worth emphasising that under Article 6 § 1 ECHR, cases should generally be examined in oral proceedings[66]. This rule applies, in particular, to proceedings before a first instance court, whereas the special features of the proceedings before an appellate and/or

64 See *e.g. Regner v. Czech Republic* [GC], no. 35289/11, 19 September 2017, §§ 146–149; *Kress v. France* [GC], no. 39594/98, 7 June 2001, § 65.
65 Susskind, *Online Courts*..., pp. 60, 143–144.
66 See e.g. *Göç v. Turkey* [GC], no. 36590/97, 11 July 2002, § 47.

cassation court, most notably the fact that the scope of appellate and cassation review is limited solely to the points of law, may justify the exclusion of an oral hearing if such a hearing has been already conducted in proceedings before the first instance court[67]. Nevertheless, for certain categories of cases, the ECtHR allows for the complete abolishment of the oral hearing. For example, in *Pönkä*, the ECtHR held that states may introduce a simplified civil procedure for the adjudication of small claims to reduce costs and accelerate proceedings[68]. The small claims procedure may be conducted in writing unless an oral hearing is considered necessary by a court or a party requests it. The court may not accept such a request but should justify its decision. The ECtHR has extensively addressed exceptions to the hearing principle in the Grand Chamber judgment in *Ramos Nunes de Carvalho e Sá v. Portugal*. In *Ramos,* the ECtHR noted that the absence of a hearing could be justified, inter alia, by the following circumstances: where the participants in the proceedings do not contest the facts and the case may be decided based exclusively on the case file; the case concerns "purely legal issues of limited scope" or "points of law of no particular complexity"; case concerns highly technical issues such as those related to social security[69]. In addition, as indicated above, the parties may also waive their right to a public hearing under certain conditions. In this respect, therefore, it would be permissible to depart from examining cases at hearings and proceed in what R. Susskind calls asynchronous proceedings. In this type of proceedings "there is no need for everyone to be available at the same time. Like using email, participants can make their contributions whenever suits them…"[70]. Such a procedure would certainly be great facilitation for judges and participants in the proceedings and could also reduce the length of proceedings.

However, in other situations, cases should be considered at hearings conducted in a manner that respects the parties' right to be heard. This right presupposes not only the party's right to take part in, and to speak out during, the hearing but also the right to general active participation in the proceedings: making evidentiary submissions, examining and cross-examining witnesses, etc. Therefore, the question arises whether the party will be able to exercise all these rights in a situation where court proceedings are conducted online.

67 See e.g. *Miller v. Sweden*, no. 55853/00, 8 February 2005, § 30; *Andersen v. Latvia*, no. 79441/17, 19 September 2019, § 82.
68 *Pönkä v. Estonia*, § 30.
69 *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, §§ 190–192.
70 Susskind, *Online Courts*..., p. 143.

Arguably, the answer to that question should be affirmative. Apart from the aforementioned cases in which physical contact between the court and a party to the proceedings is required, there are no sufficient grounds to conclude that the right to be heard can be exercised only at "traditional" hearings. After all, a party can still present their case, examine and cross-examine witnesses and experts, ask witnesses and experts questions, make evidentiary submissions, etc. during a video conference. Furthermore, nothing in the case law of the ECtHR suggests that the standard of fairness of proceedings laid down in Article 6 (1) ECHR may only be achieved through the physical presence of a party (participant) in the courtroom. In *Pönkä v. Estonia*, the case concerning a domestic court's failure to hold an oral hearing requested by the applicant who acted as the respondent in a civil case while incarcerated abroad, the ECtHR pointed out that a hearing of a party does not necessarily have to take the form of an oral hearing in a courtroom – the court may also consider alternative procedural options such as new distance communication technologies[71].

Nevertheless, it is worth noting certain risks to the overall fairness of the proceedings associated with hearings held "live" over a video link. For example, if a witness is examined over a video link at their place of residence, there is a risk that third parties may exert pressure on the witness or tamper with the witness' testimony[72]. However, this risk may be somewhat mitigated by the adoption of the rule that a witness gives their testimony over a video link but from a traditional court. At the same time, in certain cases, a videoconferenced hearing could as well adversely affect the litigants' position. For example, a victim of domestic violence, attending a hearing from their home, could be subjected to pressure from their tormentor. On the other hand, traditional court proceedings are not devoid of such risks, either. After all, a party or witness may be subject to strong, unlawful pressure by outside actors before the proceedings are initiated or in between hearings. Such pressure is likely to discourage litigants from asserting their claims in court.

Technical issues related to the absence of sufficient safeguards against the impersonation of a party to the proceedings or the obtaining of unauthorised access to court systems to manipulate or obstruct the course of proceedings may also pose a significant threat to the fairness of proceedings. Problems

71 *Pönkä v. Estonia*, no. 64160/11, 8 November 2016, § 39.

72 See e.g. J. Hynes, N. Gill, J. Tomlinson, In defence of the hearing? Emerging geographies of publicness, materiality, access and communication in court hearings, *Geography Compass* 14 (9), 2020, p. 6, https://onlinelibrary.wiley.com/doi/full/10.1111/gec3.12499 (accessed on: 28.09.2020).

related to the delivery of electronic correspondence may also arise. However, such risks can be minimised by appropriate technical solutions.

Different kinds of threats to the right to a fair trial would emerge if algorithms based on artificial intelligence were used in the adjudication process. The literature points out, for example, that the principle of the adversarial process would be superfluous in cases decided by a computer program; the program would simply resolve the case as soon as the parties enter all relevant information into the system[73]. However, such proceedings would be so distinct from the "classic" court proceedings that they would be hardly capable of being reviewed at all against the standards of Article 6 ECHR.

1.8. The right to a hearing without undue delay

Susskind sees online courts as the optimum solution to the problem of lengthy court proceedings encountered by courts around the world[74]. The digitisation of court proceedings should indeed significantly speed up the pace of adjudication. First, communication between the court and the parties will take less time as it will no longer be necessary to wait until a party receives the court's notice, delivered by the postman, collected by the party from the post office after an unsuccessful delivery or deemed served on the party upon the ineffective expiry of the time-limit for the pick-up of undelivered registered mail, etc. If the judicial process is fully digitised, all pleadings will be sent online, e.g. through a dedicated, purpose-built computer system. Naturally, the system must be properly programmed so to avoid irregularities in delivery and ensure the effective verification of the litigants' identities[75]. Second, online proceedings enable a more flexible approach to the setting of court dates. After all, the litigants and witnesses will not have to physically appear in court, and the court will not be restrained by the limited availability of physical courtrooms in the building. This flexibility would be even greater for the asynchronous proceedings (see above), which can be conducted as a continuous exchange of correspondence between the litigants and the court, without the need to schedule any hearings. Third, as already noted, it is proposed that online courts

73 See e.g. A. Zuckerman, Artificial intelligence – implications for the legal profession, adversarial process and rule of law, *Law Quarterly Review* 136, 2020, pp. 445–448.
74 Susskind, *Online Courts*..., pp. 27–31.
75 See e.g. D. Menashe, A Critical Analysis of the Online Court, *University of Pennsylvania Journal of International Law* 39 (4), 2018, pp. 933–935.

should use software that helps persons seeking a legal remedy to evaluate their legal situation as well as should employ ODR mechanisms. Such measures may lead to a situation in which more cases are settled amicably online, which will reduce the overall number of litigated cases.

In fact, the only threat to the right to have a case heard without undue delay entailed by the introduction of online courts is that the court may be prevented from functioning by a technical malfunction (power failure, server failure, hacker attack, etc.). Such a threat cannot be eliminated but appropriate technical measures can reduce the risk of its occurrence or mitigate its negative effects. Moreover, even today the work of courts may be bogged down by similar problems. The initial phase of digitisation of judicial proceedings may also pose certain problems related to judges becoming accustomed to conducting cases entirely online. For example, judges may find it difficult to use the computer tools introduced for that purpose. In any case, the discussed reforms should be introduced gradually and combined with the regular training of judges in the use of new technologies.

1.9. The right to a public hearing

Polish legal scholars identify two aspects of the principle of public access to court proceedings: an internal and external one[76]. The internal aspect concerns the publicity of the proceedings from the perspective of the parties (participants) and is expressed, for example, in their right of access to case files. Internal publicity is a key guarantee of a fair trial. On the other hand, external publicity entails the possibility for the public to participate in the proceedings. That aspect will be discussed in detail below.

Under Article 6 (1) ECHR, everyone is entitled to a "public hearing". Furthermore, according to Article 6 (1), judicial proceedings must be held in open court and that any exclusion of the press or public from the trial is permitted only to protect the values described in that provision.

As the ECtHR points out, the public hearing of a case protects individuals from having their cases decided secretly, without any public oversight on the

76 See e.g. P. Grzegorczyk, K. Weitz, *Komentarz do art. 45 Konstytucji*, in: M. Safjan, L. Bosek (Eds.), *Konstytucja RP. Komentarz*, vol. 1, Legalis 2016/el.

courts. From this perspective, the principle of overt proceedings also serves as a safeguard of procedural fairness. It is also a means of maintaining public confidence in the justice system[77].

The right to a public hearing is, quite obviously, not absolute. First, as indicated above, the ECtHR allows derogations from that principle. Second, the Convention itself provides for certain exceptions justifying the exclusion of members of the media and public from a hearing ("the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[78]) Third, the ECtHR have noted that the obligation to publicly pronounce judgments should be interpreted with a "degree of flexibility" and it is not always necessary for a court to publicly read out the operative part of the judgment if the judgment has been rendered publicly by other means[79].

There is no doubt, however, that a public hearing and pronouncement of a judgment should be a rule subject only to limited and reasonably justified exceptions. Consideration should thus be given to the extent to which this principle can be applied in proceedings before online courts.

As already noted, a party's right to have their case examined at a hearing may arguably be exercised also when the hearing is organised by videoconferencing, provided, of course, that all interested actors have an opportunity to actively participate in procedural steps. A similar approach should be taken to the question of the audience's presence at the hearing. Accordingly, if members of the public were to be able to follow the hearing without being physically present in the courtroom, the requirement of "public hearing" within the meaning of Article 6 ECHR may be considered fulfilled. Indeed, such effective online attendance is arguably sufficient to ensure that the aims of the overtness principle are attained, namely that the proceedings are not conducted "secretly", and the public may exercise a specific kind of oversight on the activities of the courts.

77 See e.g. *Martin v. France* [GC], no. 58675/00, 12 April 2006, § 39.
78 Article 6(1) ECHR.
79 See e.g. *Welke and Białek v. Poland*, no. 15924/05, 1 March 2011, § 83.

Another way for ensuring the publicity of remote hearings is arguably to make publicly available online broadcasts of all hearings (with the obvious exception of those capable of being disposed of in camera for the reasons set out in Article 6 (1) of the ECHR). A Polish judicial body, the Constitutional Court, already broadcasts its hearings[80], but it might not be so easy to introduce a similar solution for common courts.

First, any broadcasting arrangement would result in a far-reaching interference with the litigants' privacy[81]. Certainly, audience participation in a hearing also constitutes such an interference, and the overtness of proceedings is directly enshrined in the Constitution and the Convention. Nevertheless, there are differences between audience physical presence in the courtroom and an online broadcast of the hearing. An online hearing can basically be watched by an unlimited number of viewers, while only a small group of people can usually be present in a courtroom at a given time. Also, it is much easier to observe a hearing online as there is no necessity of travelling to the court building. Second, in the case of "traditional" hearings, the court may prohibit audio-visual recording. Theoretically speaking, such a prohibition may also be issued for online hearings, but its enforcement would be more difficult. After all, any interested person would have no problems with recording the hearing, for example with the use of an external device. This situation further exacerbates the aforementioned risks for the right to privacy, as it cannot be ruled out that excerpts from an online hearing (for example, witnesses' testimonies) would later appear in social media or on YouTube. The question arises whether such threats to the privacy of litigants and witnesses would constitute a particular kind of psychological pressure that may affect their testimonies. Moreover, the question arises whether the online broadcasting of *all* court hearings could exert a certain pressure on the judges and induce them to make populist decisions[82]. On the other hand, the above risks should not be exaggerated – it may be expected that a significant number of online hearings would not be followed by any third-party viewers. Furthermore, it would seem reasonable to introduce certain limits on the number of persons able to simultaneously follows a broadcast: such quotas might be based, for instance, on technical

80 Foreign courts' practices concerning the broadcasting of hearings during the coronavirus pandemic are widely discussed in a report by the Court Watch Foundation (B. Pilitowski, B. Kociołowicz-Wiśniewska (Eds.), *Sądy dostępne przez Internet*...).

81 This fact was noted by, among others, the Polish Ombudsman, in his statement sent to the President of a Łódź District Court (RPO, Wystąpienie do Prezesa SR dla Łodzi-Śródmieścia w Łodzi, 19 June 2020, https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20prezesa%20s%C4%85du%2C%2019.06.2020.pdf, (accessed on: 28.09.2020).

82 See e.g. CDCJ, *Technical Study*..., p. 7.

considerations (see below). After all, the size of trial audience is now limited by the size of the courtroom. Another solution would be to broadcast online hearings only in specially designated public areas[83]. Alternative solutions may also be considered, such as, for example, providing the public with an opportunity to observe a remote hearing in a specially dedicated room in the court building (see also Chapter VIII, section 3.4 of this report).

Third, some non-governmental organisations, including the HFHR, consider the monitoring of court proceedings as a form of social oversight on the courts or a kind of "spiritual support" for a party to the proceedings. To properly perform this function, NGO representatives not only attend hearings but also make the court aware of their presence. As far as virtual hearings are concerned, NGOs would certainly still be able to monitor the hearings, but they may no longer be able to effectively play the "watchdog" role, inherently linked to the physical presence of a monitor in the courtroom.

Fourth, and finally, it appears that the real-time video broadcast of several court hearings would require the provision of appropriate technical measures to the courts (the sheer volume of transmitted data may cause court servers to crash, especially in larger courts), which could be a costly affair.

1.10. Conclusions

In conclusion, the digitisation of proceedings may notably have a positive impact on the possibility of exercising the right of access to a court guaranteed in Article 6 (1) ECHR. Solutions such as the digitisation of case files, electronic communication with the court or remote hearings will speed up proceedings and eliminate at least some of the barriers to access to justice for certain entities.

At the same time, in order to ensure the full implementation of Convention standards, lawmakers should consider some of the risks that may be associated with the far-reaching digitisation of proceedings. In particular, it would be necessary to ensure that the introduction of modern technology in courts does not lead to restrictions on the right of access to a court for digitally

83 See S. Prince, 'Fine words butter no parsnips': can the principle of open justice survive the introduction of an online court?, *Civil Justice Quarterly* 39 (1), 2019, p. 122.

excluded persons. It is also important to consider which categories of cases should be disposed of in the "traditional" way. In this respect, it seems that remote procedures would raise doubts, especially in criminal cases, although nothing in the case law of the ECtHR explicitly suggests that the adoption of such a solution is fundamentally unacceptable. "Traditional" trials should also be maintained in certain types of civil cases where the possibility of direct contact between litigants and the court is particularly important. On the other hand, there is a wide range of cases where remote proceedings should not raise any serious concerns. After all, the parties' rights to be heard and the equality of arms principle can be ensured also in a remote hearing setting. However, upholding these principles in remote proceedings would require the implementation of certain solutions aimed at, inter alia, establishing the rules applicable in cases of technical failures on the part of any of the participants in the proceedings, limiting the possibility of exerting pressure on "remote" witnesses and introducing certain safeguards to minimise the risk of impersonating a litigant in electronic correspondence with the court. One should also bear in mind that the ECtHR permits, for certain categories of cases, the oral trial to be entirely dispensed with; thus, in this respect, it would be possible to conduct the proceedings entirely online, with communication between the parties and the court being conducted in an "asynchronous" mode. At the same time, under Article 6 (1) ECHR, court cases should be heard in public as a matter of principle. The principle of public access to (publicity of) trials can also be implemented in a remote trial setting. However, such implementation requires that arrangements be made which, while allowing interested members of the public to observe the trial, do not lead to an invasion of the privacy of the parties and witnesses and have no adverse effect on the interests of the proceedings.

2. Guarantees for the protection of the right to a fair trial in the United Nations system

2.1 Introduction

For the purposes of this report, the starting point for determining the human rights requirements for measures aimed at the full or partial digitisation of a justice system are the standards stemming from Article 6 of the European Convention on Human Rights. This methodological approach is based on

the fact that many countries whose legal systems we examined are bound by the Convention and are under the jurisdiction of the European Court of Human Rights.

For this reason, in the previous subchapter, we present in detail the guarantees that should accompany the administration of justice, regardless of whether it is carried out by an "offline" or "online" court, or whether the judgment or the examination of a witness or a party takes place during a remote or an on-site hearing, as well as we inquire which digital tools may (positively or negatively) affect the fairness of proceedings.

However, an exhaustive discussion on the matter demands making a brief reference to other human rights norms and systems, which should be taken into account both by national lawmakers introducing solutions that make use of new technologies and by the courts applying such solutions in practice, in the circumstances of specific cases.

It is particularly worth looking at the regulations and guidelines in force within the United Nations system and the discussions taking place within its structures.

Before examining the specific rules and provisions, one should note that the Human Rights Council's July 2020 Resolution on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers "[e]ncourages States to make available to judiciaries current information and communications technology and innovative online solutions, enabling digital connectivity, to help to ensure access to justice and respect for the right to a fair trial and other procedural rights, including in extraordinary situations, such as the COVID-19 pandemic and other crisis situations, and to ensure that judicial and any other relevant national authorities are able to elaborate the necessary procedural framework and technical solutions to this end"[84]. The above mention shows that the United Nations recognises the process of technological transformation and particular challenges faced by the courts in times of the pandemic, as well as the opportunity offered by digital solutions in such conditions.

84 Resolution adopted by the Human Rights Council on 16 July 2020, A/HRC/45/16.

Remote judicial procedures during the coronavirus pandemic were also a topic of interest for the UN Special Rapporteur on the Independence of Judges and Lawyers. In a joint declaration issued with the Inter-American Commission of Human Rights, the Special Rapporteur emphasises that "the use of technological means for the provision of justice services cannot undermine due process rights of the parties and participants in the virtual hearings, especially the right of defence in criminal matters, to legal assistance, to adversarial proceedings, and the right to be tried without delay; the confidentiality and security of the information transmitted using this type of mechanism being guaranteed at all times." The states of the region are also requested to guarantee access to an affordable and pluralistic Internet for everybody within their territory, and in particular for individuals and groups in vulnerable situations, and urge them to take positive measures to reduce the digital gap[85].

However, the United Nations notably started the discussion on the technological aspects of the operation of justice systems and the impact of technology on the fairness of proceedings already before the emergence of the pandemic and regardless of the solutions introduced in its aftermath[86]. For this reason, it can be anticipated that this debate will continue. At the opening of the March 2021 United Nations Congress on Crime Prevention and Criminal Justice, the UN Secretary General stressed that "[t]he rule of law of the future must be built for and with technology to facilitate people's access to justice and to address these emerging trends, including the proliferation of misinformation and hate speech"[87]. The Congress also discussed, among other issues, access to a court or the use of technology within the broader criminal justice system (including as part of international cooperation frameworks)[88].

85 Joint declaration on access to justice in the context of the COVID-19 pandemic prepared by the Inter-American Commission on Human Rights (IACHR) and the United Nations Special Rapporteur on the Independence of Judges and Lawyers, https://www.ohchr.org/EN/Issues/Judiciary/Pages/SRJudgeslawyersIndex.aspx (accessed on: 6.07.2021).

86 Resource Guide on Strengthening Judicial Integrity and Capacity, https://www.unodc.org/res/ji/import/guide/resource_guide/resource_guide_english.pdf (accessed on: 6.07.2021).

87 *Remarks to the Opening of the 14th United Nations Congress on Crime Prevention and Criminal Justice,* https://www.un.org/sg/en/content/sg/speeches/2021–03-07/remarks--opening-of-14th-un-congress-crime-prevention-and-criminal-justice%C2%A0 (accessed on: 29.05.2021).

88 Report of the Fourteenth United Nations Congress on Crime Prevention and Criminal Justice, https://undocs.org/A/CONF.234/16 (accessed on: 29.05.2021).

2.2. Guarantees of a fair trial in the International Covenant on Civil and Political Rights

Notwithstanding the above, we will use the International Covenant on Civil and Political Rights (the "Covenant" or "ICCPR")[89] as the main point of reference for the presentation of the standards developed within the UN systems and, in particular, the elements specifying the right to a court and the procedural guarantees relating to the deprivation of liberty.

Article 14 of the Covenant includes several rights that contribute to the standard of a fair trial. For the purposes of this report, the following elements of this standard should be considered the most relevant:

- the principle of equality of arms;
- the right to a fair hearing;
- the right to a public hearing;
- the right to a competent, independent and impartial court;
- the right to a court established by law.

Most of the standards described during the analysis of Article 6 ECHR overlap with those developed based on the provisions of the Covenant, including its Article 14, so they will not be examined in detail. In this chapter, attention will be paid to the key framework that governs the introduction of new technologies into the criminal justice system and the areas covered by specific recommendations made by United Nations bodies.

a. An open court as a guarantee of protection of rights

One of the issues most frequently raised in the discussion on the digitisation of justice is the remote form of hearings and trials. Accordingly, we revisit this topic several times in the report. Before indicating what requirements must be met in order to fulfil the requirement of a public hearing, it is important to emphasise the purpose of the principle of public access to proceedings and the reasons behind its inclusion in international instruments. According to a general comment to the Covenant, "The publicity of hearings ensures

89 International Covenant on Civil and Political Rights opened for signature at New York on 19 December 1966.

the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large."[90]. In this way, the aforementioned general social value of public access to proceedings has been underlined.

However, it is worth noting that the guidelines drawn up on the basis of the Covenant follow the pattern of the regional standards laid down by the European Court of Human Rights and recognise that the requirement of a public hearing does not apply with equal force to all stages of proceedings. In particular, it is argued that the requirement does not fully apply to appellate proceedings, which, to a certain extent, may be conducted in writing, or to pre-trial proceedings[91]. At the same time, it should be noted that under Article 14, any court decision given in any criminal or civil case must be made public, except where "the interests of juvenile persons otherwise require" or where the case concerns "matrimonial disputes or the guardianship of children". Even at this final stage of the proceedings, the manner in which the trial is conducted may not have the effect of limiting the public nature of the announcement of the decision.

Guidelines formulated by the Human Rights Committee emphasise that in order to comply with the requirement of a public hearing, the justice system should be structured in a way that practically enables:
public notification of the time and venue of the hearing;
provision of adequate facilities for the attendance of interested members of the public.

In fulfilling the above-mentioned requirements, it is necessary to take into account the potential public interest in the case, the duration of the hearing and the time given to interested members of the public for the notification of their attendance. This guideline is addressed, on the one hand, to the legislative bodies responsible for the preparation of legal frameworks for the operation of justice systems and, on the other hand, to the courts, which must assess, on a case-by-case basis, whether it is possible to comply with these requirements.

90 Human Rights Committee (HRC), General comment no. 32, para. 28.
91 *Ibid.*

The above standard has been developed, *inter alia,* by the United Nations Human Rights Committee in *Van Meurs v. The Netherlands*. However, the Committee justified its decision by emphasising that a failure to provide a large courtroom did not constitute a violation of the requirements under Article 14 if no interested member of the public has notified their wish to attend the hearing. The Committee has complemented this view in its decisions arising out of complaints which alleged failures to ensure the publicity of proceedings in highly controversial cases involving allegations made against public or commonly known figures. In the Committee's opinion, the holding of a hearing in a small courtroom that could not accommodate the interested public is incompatible with the relevant Covenant standard[92].

Although the above considerations apply to "traditional" justice systems, they remain valid for remotely conducted trials and hearings. It can be assumed that a well-functioning electronic case management system would facilitate the practical implementation of these guidelines by the courts because it would allow information on the time and date of the trial to be posted in a way accessible to interested parties. As it has already been proposed, attendance in a hearing could be ensured by sending a case-specific link or by displaying the live broadcast of the hearing in another courtroom.

If the lawmakers decide to introduce remote trials into the reality of the justice system, it will also be important to raise public awareness of this change and the new possibilities it offers and, above all, to inform members of the public how they can find out whether a trial will be held remotely or traditionally and what they need to do to attend it. After all, it may not be the nature of the case or the lack of technical capacity that limits the public access to justice, but the absence of publicly available information. As a consequence, the publicity of trials will be illusory.

However, in addition to the technical capacity to ensure public participation, it is important to draw attention to other aspects associated with the transfer of trials to an online setting and, above all, the risks associated with such transfer. The considerations from the previous subchapter focusing on the protection of the privacy of the parties to the proceedings remain valid in this context. Notably, the wording of Article 14 of the Covenant indicates that media representatives ("the press") and the public may be excluded from all

92 HRC, *Van Meurs v. The Netherlands,* UN Doc. CCPR/C/39/D/215/1986 (1990) § 6.2.

or part of a trial for reasons of morals, public order or national security in a democratic society, or where the interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. It is also worth considering whether the somewhat "uncontrolled" nature of the online space will not in fact result in courts interpreting the above-mentioned grounds for the purposes of online hearings more broadly than in the case of traditional hearings, in order to prevent unauthorised participation in a hearing, disclosure of classified information or violation of the privacy of parties or witnesses.

In view of the timing of the publication of this report, one should also ask whether the pandemic and the ensuing restrictions on social contacts have impacted the way in which the standards for the holding of trials are defined. The International Commission of Jurists noted in a publication that "public health" was not explicitly listed as a ground for excluding publicity of court hearings. Consequently, in theory, online trials (satisfying the above requirements regarding their organisation) may be a solution for preserving the public nature of proceedings while imposing restrictions on physical access to the courthouse. On the other hand, one needs to revisit the question as to whether the conduct of online hearings (and the rules governing access to such hearings) automatically leads to the exclusion of publicity on grounds of the protection of privacy[93]. At the same time, it is necessary to distinguish a situation in which a court has created all technical possibilities for public participation from a situation in which the decision to conduct an online trial determines its non-public nature (despite the lack of substantive grounds for restricting public access).

2.3. Special guarantees in criminal proceedings

Not only the Convention but also the Covenant lays down specific guarantees that criminal proceedings must meet in order to be considered fair. These include, in particular:

- the right to be informed promptly of the cause of the charge;

93 International Commission of Jurists, *Videoconferencing, Courts and COVID-19 Recommendations Based on International Standards*, https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf (accessed on: 26.05.2021).

- the right to a defence
- the right to prepare a defence;
- the right to an interpreter;
- right to examine witnesses;
- the right to be tried without undue delay.

b. The right to a defence

The guarantee of the right to a defence is an important element affecting the fairness of criminal proceedings. Given the thematic scope of this report, it is particularly important to reflect on effective contact with a lawyer in the setting of a remote trial or hearing. The crux of the problem is communication with a lawyer, both before and during the hearing (and especially, a detention hearing). In accordance with the Committee's guidelines and jurisprudence, communication between the lawyer and accused should take place in private and in conditions that fully respect the confidentiality of their communications[94].

According to studies conducted so far, remote contact between the defence lawyer and the person deprived of liberty significantly impedes the full performance of the defence lawyer's duties in criminal proceedings; we have already discussed this in more detail referring to Strasbourg standards and ECBA recommendations. The above concerns are expressed in a paper on the digitisation of justice systems in the times of the Covid-19 pandemic prepared by Fair Trials International: "To ensure that video links are working properly, prison staff or court officials often stay in rooms that should be available for confidential communications between the lawyer and the client. It may also be more difficult for a lawyer to determine during a videoconference whether their client has any special needs or requirements that need to be addressed"[95].

A relevant factor for ensuring the right of a defence is the adequacy of time available for the preparation of the defence. The assessment of whether such time is adequate in a given case must be made with regard to the

94 HRC, General comment no. 32, para. 34.
95 Fair Trials International, *Justice under Lockdown in Europe,* https://www.fairtrials.org/sites/default/files/publication_pdf/COVID-19%20Europe%20Survey_Justice%20under%20lockdown%20paper_Sept% 202020_0.pdf (accessed on: 29.05.2021).

circumstances of a given case. It is accepted that particular consideration should be given to the complexity of a case, the accused's access to information and evidence (and the extent of such material) and to their lawyer, as well as time limits prescribed by national law[96]. If a defence lawyer or accused person has reasonable grounds to believe that the time for preparing a defence is insufficient, they are obliged to apply to the court for the adjournment of the trial.[97] On the other hand, the court is obliged to grant reasonable requests for adjournment, in particular if the accused is charged with a serious offence and additional time is needed to prepare their defence[98]. This requirement must certainly be assessed in the context of the requirement to have the case heard within a reasonable time. This aspect is all the more important as it is conceivable that the development of digital tools may entail the risk of giving primacy to the expeditiousness of the proceedings over the fairness of the criminal process and its function as a source of procedural guarantees.

Another element that should be taken into account is the creation of appropriate conditions for the conduct of a defence. Such conditions will certainly be created if the following criteria are met: access to the case files is provided, the files must contain complete information, be accessible within reasonable timeframes and such access must include the possibility of obtaining copies of case file documents. In this respect, the digitisation of court files and making them available to the parties in electronic form could notably make a real impact on improving the effectiveness of the defence (from the perspective of both the accused and their counsel). A report entitled *Criminal Justice, Fundamental Rights and the Rule of Law in the Digital Age,* published by the Centre for European Policy Studies and Queen Mary University of London, concludes: "In the digital age, fairness also increasingly depends on the possibility for the defence to benefit from full access to digital case management systems and digitalised case files. Provided that this condition is satisfied, reducing reliance on paper files, which require physical access and only allow limited time for their inspection, can be extremely important for the daily work of defence lawyers. The replacement of paper

96 Amnesty International, *Podręcznik sprawiedliwego procesu*, Warszawa 2014, p. 75 [original English title: *Fair Trial Manual*], https://www.amnesty.org/download/Documents/POL-300022014POLISH.PDF (accessed on: 27.05.2021).

97 See the Views of the HRC in the following cases: *Douglas, Gentles and Kerr v. Jamaica*, HRC, UN Doc. CCPR/C/49/D/352/1989 (1993), § 11.1, *Sawyers and McLean v. Jamaica*, HRC, UN Doc. CCPR/C/41/D/226/1987 (1991) § 13.6.

98 HRC, General comment no. 32, para. 32.

registries through the digitisation of case files and the implementation of IT tools and systems for the electronic management of cases can potentially reduce delays and increase the quality of legal assistance, with significant advantages in terms of fundamental rights (including the right to personal liberty)"[99].

b. The right to an interpreter

The right to an interpreter is an important aspect that must be considered in the context of ensuring the fairness of criminal proceedings. As research results have shown, the remote conduct of hearings affects the effectiveness of the interpreter's assistance and participation of the accused persons who need interpretation services. In the above-mentioned survey by Fair Trials International, lawyers claimed that members of vulnerable groups, and especially those in need of an interpreter's assistance, were the most affected by the consequences of the remote administration of justice. A report presenting the survey's findings referred to the situation in Latvia as an example of that state of affairs. It was noted that simultaneous interpretation made it difficult for suspects to understand what was being said, but the courts did not allow for consecutive interpretation as it significantly prolonged the process. Lawyers from Spain made similar observations[100].

In this context, it is worth noting that the standard developed under the Covenant includes not only the right of access to an interpreter but also requires that interpretation should be of appropriate quality to ensure the effective participation of the accused in the proceedings. However, as the Committee points out, a complaint about the competence of an interpreter can be raised if the accused have brought the issue of quality of interpretation to the attention of the court[101]. This factor should guide the court's decision on whether or not the trial should be conducted remotely.

99 Centre for European Policy Studies and Queen Mary University of London, *Criminal Justice Report, Fundamental Rights and the Rule of Law in the Digital Age,* https://www.ceps.eu/ceps-publications/criminal-justice-fundamental-rights-and-the-rule-of-law-in-the-digital-age/ (accessed on: 30.05.2021).

100 Fair Trials International, *Justice...*, (accessed on: 29.05.2021).

101 Amnesty International, *Podręcznik...; cf.* HRC, *Griffin v. Spain,* UN Doc. CCPR/C/53/D/493/1992 (1995) § 9.5.

c. Presumption of innocence

Another aspect that should be noted, and has not yet been raised, is the obligation to respect the principle of the presumption of innocence, which is a foundation of a fair trial and the source of several procedural obligations on criminal justice authorities. In the context of the topic of this report, particular attention should be paid to the manner in which the accused are presented and the dissemination of their image[102].

In its recommendations on videoconferenced court hearings, the International Commission of Jurists proposes that the accused should not appear in prison uniforms. Arguably, the manner in which the accused's location is shown or designated during the recording may also be relevant. Fair Trial International recommends that prison infrastructure should not be displayed in the background during a videoconference/remote hearing[103].

2.4. Detention hearings

When pointing to the standards that should be taken into account in the design of legislation and measures geared towards the digitisation of justice systems, it is necessary to draw attention to Article 9 ICCPR. Article 9 sets out the key guarantees against arbitrary deprivation of liberty. According to Article's paragraph 3, "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."

It is particularly important to stress that the above requirement is absolute and does not depend on the initiative or choice of the person concerned[104]. The above guarantee is effective if the arrested or detained person is brought to appear physically before a judge[105]. According to a General Comment, "[t]he physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody and facilitates immediate transfer to a remand detention centre if continued detention is

102 HRC, General comment no. 32, para. 30.
103 Fair Trials International, *Justice...*, (accessed on: 29.05.2021).
104 HRC, General comment no. 35, para. 32.
105 *Ibid.*, para. 34.

ordered. It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment."[106] This principle has been reaffirmed and developed in the Basic Principles of the Working Group on Arbitrary Detention[107]. According to these recommendations, a person deprived of liberty must appear physically at the first hearing and whenever they so request[108]. This standard and, above all, its purpose, cannot be fully achieved if a remote hearing is held, which prevents the detainee from directly addressing the court[109].

It should also be noted that another provision of the ICCPR, Article 14 (3) (d), stipulates that anyone charged with a criminal offence has the right to be present during the trial. This topic has already been discussed at length as part of the analysis of the Convention standards and the considerations presented there remain valid also for the UN system. It should be added that the Human Rights Committee indicates that in absentia proceedings are, in some circumstances, permissible in the interest of the proper administration of justice, i.e. when the accused, despite having been informed of the proceedings sufficiently in advance, declines to exercise their right to be present. The Committee concludes that in such cases, the right to attend the trial in person may be deemed to have been waived[110]. Thus, the assessment of whether the standard enshrined in Article 14 (3) ICCPR has been met is affected by the defendant's decision to exercise (or not to exercise) the right in question.

As the International Commission of Jurists pointed out in a briefing note on remote hearings during the coronavirus pandemic, in view of the jurisprudence of international courts, including the UN Human Rights Committee, it would be difficult to accept that the ordering of a remote criminal trial without the consent of the accused and/or their lawyer is compatible with international standards[111].

106 *Ibid*.
107 UN General Assembly, *Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,* https://undocs.org/en/A/HRC/30/37 (accessed: 26.05.2021).
108 *Ibid.*
109 As in: Centre for European Policy, *Criminal Justice Report...* (accessed on: 30.05.2021).
110 HRC, *Mbenge v. Zaire* (16/1977), 1983, 2 Sel. Dec. 76, p. 78, § 14.1.
111 International Commission of Jurists, *Videoconferencing...* (accessed on: 29.05.2021).

2.5. Summary

UN standards, like those established under the ECHR, should guide national laws and courts in the introduction of new technologies. They cannot, however, be perceived as constraints on the further digitisation of justice as the modernisation of the judicial systems will undoubtedly contribute, in some respects, to an increase in the fairness of proceedings. The noteworthy developments in this area include the digitisation of case files, improvements for persons with disabilities and videoconferencing solutions that speed up the disposition of cases by allowing witnesses to testify without the need to travel to a distant court.

However, any implemented measures must be based on careful consideration and compliant with the requirements of a fair trial, with particular attention being paid to the specific nature of criminal proceedings and the guarantees afforded to accused persons. Standards under the Covenant clearly indicate that whenever the lawmakers introduce and the courts apply new legal arrangements (including digitisation measures), they must consider the essence and purpose of a given procedural step, which is best demonstrated by the problem of personal participation in detention hearings.

II.

Digitisation of justice and access to courts for persons with disabilities

For some persons, digitisation of the operation of the justice system is not only an opportunity for greater convenience or saving time. The use of new technologies in court proceedings can lead to the bringing down of barriers that may prevent persons with disabilities from participating fully in various spheres of social life, including in their interactions with the courts. However, it is important to remember that persons with disabilities are not a homogeneous group and that each person with a disability may have individual needs, which should entail a variety of measures and tailor-made solutions. The Convention on the Rights of Persons with Disabilities[112] ("Convention"), to which Poland is a party, is based on the idea of full and equal enjoyment of human rights and fundamental freedoms by persons with disabilities (Article 1 of the Convention). The goal of enabling persons with disabilities to participate independently and fully in all spheres of life should be achieved by the elimination of obstacles and barriers to accessibility of the physical environment and also to services and information (Article 9 of the Convention). The Convention specifically emphasises the obligation to guarantee accessibility in the sphere of the administration of justice. Under Article 13 (1) of the Convention, States are required to ensure that persons with disabilities have "effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings…".

It is worth emphasising at this point that the provision of reasonable accommodation for persons with disabilities in legal proceedings should not be seen as favouring one of the parties or as discriminating against the other litigants[113]. In this case, the introduction of certain solutions or facilities is aimed at ensuring the real equality of the parties ("equality of arms") and is intended to ensure that persons with disabilities can effectively exercise their right to a court. This was also highlighted in the International Principles and Guidelines on Access to Justice for Persons with Disabilities ("International Principles"), which was prepared by the UN Special Rapporteur on the rights

112 Convention on the Rights of Persons with Disabilities done in New York on 13 December 2006 (Journal of Laws of 2012, item 1169, as amended).

113 Cf. D. Pudzianowska, J. Jagura, *Równe traktowanie uczestników postępowań. Przewodnik dla sędziów i prokuratorów*, Warszawa 2016, p. 28, https://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_rowne_traktowanie_uczestnikow_postepowan.pdf. (accessed on: 14.04.2021)

of persons with disabilities[114]. According to the International Principles, individualized accommodations for persons with disabilities should include "all the necessary and appropriate modifications and adjustments needed in a particular case, including intermediaries or facilitators, procedural adjustments and modifications, adjustments to the environment and communication support, to ensure access to justice for persons with disabilities."[115]

Digitisation of justice can be one of the measures to improve accessibility to the courts for a certain group of persons with disabilities. Some of these individuals are already using new technologies in their daily lives. For example, blind and visually impaired persons use computers/tablets and smartphones equipped with special audio software that reads out the content on the screen (screen readers) or magnifies or changes the contrast of the displayed content. With a screen reader, it is possible to efficiently use other computer programs or access documents and text files. However, the software can only be used with documents that are "readable", which means that it will not process ordinary scans or photos of documents, but only accessible files saved in the pdf format (e.g. converted from a text file or a scanned document) or text files (e.g. in the doc format)[116]. There are programmes capable of optical character recognition and converting a scan/photo of a document into readable text. However, the correct operation of these features may depend on the quality of the source scan/photo.

Given the above, there is no doubt that the digitisation of court files and the use of electronic communication can significantly improve access to justice for blind and visually impaired persons. Thanks to digitisation, that group of people would be able to access the case files and electronic notifications or summonses. In the same way, a blind or visually impaired person could submit documents during court proceedings. As highlighted above, digitised documents must be created in accessible and readable formats compatible with the software used by blind and visually impaired persons. Importantly,

114 Special Rapporteur on the rights of persons with disabilities, Committee on the Rights of Persons with Disabilities, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, 2020, https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Principles_A2_Justice.pdf. (accessed on: 14.04.2021)

115 *Ibid.*, p. 15.

116 J. Dębski, D. Paszkiewicz, *Dostępność serwisów internetowych. Dobre praktyki w projektowaniu serwisów internetowych dostępnych dla osób z różnymi rodzajami niepełnosprawności*, pp. 55–57, http://niepelnosprawni.pl/files/nowe.niepelnosprawni.pl/public/2015/publikacje/Dostepnosc-serwisow-internetowych-Dominik-Paszkiewicz-Jakub-Debski.pdf. (accessed on: 14.04.2021)

these solutions could also help to implement the principle of independence of persons with disabilities (which forms a basis of the Convention), as the solutions would enable them to communicate with the court without the assistance and participation of third parties.

In this context, one should also mention the need to ensure that persons with disabilities may freely access the websites of public authorities, including those of the courts, as referred to in Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies. On the other hand, according to a study conducted in 2019 by the European Commission, 10 of the 27 Member States of the European Union do not guarantee that persons with visual or hearing impairments may access online information about the judicial system[117]. Interestingly, the website of the Polish Supreme Court, for example, received only the "satisfactory" grade (the second-lowest on a four-point scale) in an annual audit of the digital accessibility of websites of Polish public institutions performed by the Widzialni Foundation. On the other hand, the accessibility of the website of the Polish Constitutional Court was rated as "insufficient", which is the lowest possible grade[118].

The availability of remotely transmitted trials and hearings can be another factor increasing effective access to a court. Remote participation in procedural steps may be of particular importance for persons with physical disabilities who may find it particularly difficult to overcome the existing architectural barriers to reach the court premises or move around in court buildings. Such solutions can also provide a significant advantage for people whose presence in unfamiliar surroundings during formalised procedures can be particularly stressful or intimidating, as may be the case for persons with anxiety disorders or neurodiverse persons, including those on the autism

117 The 2020 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2020) 306, p. 21, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf. Polish version: Unijna tablica wyników wymiaru sprawiedliwości z 2020 r., Komunikat Komisji do Parlamentu Europejskiego, Rady, Europejskiego Banku Centralnego, Europejskiego Komitetu Ekonomiczno-Społecznego i Komitetu Regionów, https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52020DC0306&from=EN. (accessed on: 14.04.2021)

118 P. Marcinkowski, M. Luboń, *Raport Dostępność 2020*. Fundacja Widzialni, p. 9, https://widzialni.org/container/aktualnosci/raport-dostepnosci-2020.pdf.

spectrum[119]. However, no general conclusion can be drawn that remote hearings or communication with the court will be beneficial for all such persons. It is worth noting that in April 2020, during the first outbreak of the coronavirus and at the beginning of the fast-tracked implementation of remote hearings by UK courts, the Equality and Human Rights Commission (the UK's equality body) warned that remote hearings may put some persons with disabilities at a disadvantage and create a risk of unfair resolution of their cases. Referring to their ability to follow the course of court proceedings, the Commission noted that "video hearings can significantly impede communication and understanding for disabled people with certain impairments."[120] According to the Commission, remote hearings "are not suitable for people who need support with communication"[121].

Besides, online communication may cause additional difficulties for, inter alia, persons with cognitive impairments, intellectual and mental disabilities or neurodiverse persons, including those on the autism spectrum, persons with specific learning difficulties, etc. In particular, such difficulties may be experienced by individuals with a short attention span, those being reluctant to speak up, or suffering from severe anxiety disorders, or those unable to control their impulses or thoughts. For example, the necessity to maintain sustained attention during online sessions (e.g. due to a low connection quality) may put additional strain on persons with intellectual disabilities, and some persons with severe anxiety may be afraid of managing technology. People with specific learning disabilities may find it challenging to operate a computer and follow the proceedings attentively at the same time, and an autistic person may experience sensory overload from having to look at a screen[122].

One should also not forget that persons with disabilities are at greater risk of social exclusion and poverty, which may translate into their limited access

119 Judicial College, *Equal Treatment Bench Book*, 2021 edition, p. 476, https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021–1.pdf. (accessed on: 14.04.2021)

120 Equality and Human Rights Commission, *Inclusive justice: a system designed for all. Interim evidence report. Video hearings and their impact on effective participation*, p. 2, https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf. (accessed on: 14.04.2021)

121 Equality and Human Rights Commission, *Inclusive justice: a system designed for all. Findings and recommendations*, p. 16, https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf. (accessed on: 14.04.2021)"

122 Judicial College, *Equal Treatment Bench Book*, pp. 476–478.

to the Internet and digital equipment[123]. According to a 2012 Eurobarometer survey, 70% of the European general population declared having Internet access at home. However, the figure for persons with disabilities was only 52% (in the case of Poland, the percentage was even lower as only 35% of persons with disabilities declared having access to the Internet)[124]. Because of this, it is clear that socio-economic factors will have a real impact on the access of persons with disabilities to the courts that use new technologies. The above considerations merely highlight some of the hopes and dangers that the digitisation of justice may entail. The above examples show that the process of judicial digitisation should be based on, among other things, accessibility of newly introduced solutions for persons with disabilities as a step towards ensuring that such persons can effectively exercise their right to a court. The methods and measures used should be as flexible as possible to respond adequately to the diverse and individualised needs of persons with disabilities. The discussion on remote hearings in the UK illustrates that the implementation of modern solutions can be beneficial for some persons with disabilities but cause added difficulties for others. Therefore, the use of digital tools should always be preceded by a detailed analysis and assessment of a given person's individual needs. No assumptions should be made about somebody's ability to use the technical solutions in question. In this context, a crucial thing to do is to ask the person concerned about their needs and determine whether they will be supported or deterred by the proposed solutions. In some cases, professional or specialist knowledge may be required and the selected mode of communication may need to be tested. It is therefore essential to improve the digital competence of persons with disabilities, as well as those of the justice personnel. The latter should also develop their knowledge of the rights and needs of persons with disabilities that may come to light in the course of procedural steps. At the same time, it should be remembered that an accessible justice system is one of the guarantees of full enjoyment of human rights and freedoms by persons with disabilities.

123 European Disability Forum, *European Disability Forum's recommendations on digitalisation of justice*, 2020, https://www.edf-feph.org/content/uploads/2021/02/EDF-recommendations-on-digitilisation-of-justice.pdf. (accessed on: 14.04.2021)

124 Scholz, F., Yalcin, B., Priestley, M., "Internet access for disabled people: Understanding socio-relational factors in Europe", *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*, 11(1), 2017, Article 4. https://doi.org/10.5817/CP2017–1-4. (accessed on: 14.04.2021)

III.

The problem of digital exclusion

1. Introduction

New technologies undeniably offer a wide range of opportunities for improving, and increasing access to, justice. However, while carrying out extensive digitisation of this sphere of public life, national governments must not forget about the phenomenon described as "digital exclusion" or "digital divide". Otherwise, digitisation of justice, instead of enabling citizens to function in a given legal system, may in practice lead to the curtailing of rights of some individuals, or the actual possibility of exercising such rights. By contrast, according to a report by the United Nations Conference on Trade and Development (UNCTAD), the accelerated digitisation of almost all areas of daily life related to the COVID-19 pandemic has highlighted the need to reduce disparities in access to information and communication technologies (ICTs)[125]. This short chapter presents and defines the problem and outlines its scale, also by identifying vulnerable groups. The discussion will focus primarily on Poland, with data on selected countries surveyed, described in Chapter VII, compiled complementarily.

2. Barriers to widespread access to new technologies

The common understanding of digital exclusion, which assumes only a lack of access to computers or the Internet, should be considered a misleading simplification of a much more complex real-life problem. It may be helpful to look at the four levels of access to new media identified by J.A.G.M. van Dijk, i.e. motivational access, physical access, skills access and access to different ways of using new technologies ("usage access")[126]. Following this line of thought, one may consider as digitally excluded those who do not have physical access to technologies that process, store and transmit information in an electronic form or who do not have the resources, motivation or skills to use them effectively. Consequently, it should be noted that the phenomenon defined in this way also includes the narrower problem of so-called digital illiteracy. It is a mistake to seek the source of digital exclusion solely in the

125 See UNCTAD, *COVID-19: Accentuating the Need to Bridge Digital Divide*, 6 April 2020, https://unctad.org/system/files/official-document/dtlinf2020d1_en.pdf (accessed on: 14.04.2021).

126 J.A.G.M. van Dijk, *The Deepening Divide. Inequality in the information Society*, Sage, London 2005; van Dijk, *The network society* (2nd edition), Sage Publications, London 2006 cited in D. Batorski, *Wykluczenie cyfrowe w Polsce*, in: D. Grodzka (Ed.),*Społeczeństwo Informacyjne*, Studia BAS, 3(19) 2008, Warszawa 2009.

unequal distribution of material resources. Mental resources (appropriate skills or technical knowledge) and social resources (relationships and support networks that enable appropriate access to new technologies or the acquisition of appropriate skills) also play a key role[127]. For this reason, Batorski accurately divides barriers to the dissemination of access to new technologies into hard barriers, i.e. infrastructural or financial, and soft barriers, namely the lack of motivation or appropriate skills to use new technologies[128]. At this point, it is worthwhile to take a closer look at two English expressions mentioned at the beginning of this paper, digital divide and digital exclusion. Although they are often used interchangeably, differences in their literal meaning reflect differences in the perception of the described phenomenon. The notion of digital divide is mainly used in the United States, where research focuses primarily on systematic differences in access to and use of computers or the Internet[129]. Digital exclusion, on the other hand, is inextricably linked to the concept of eInclusion used in Europe[130]. The European approach is reflected in policies and actions of the European Union that focus on ensuring that all sections of society have access to the benefits of ICTs, which seems to be a much more comprehensive and appropriate attempt to address the issue at hand. Indeed, one has to agree with the observation made by Batorski that it is much more important to: "... see that digital exclusion is something more than digital divide and that digital exclusion is not only about differences in access, skills or usage but, above all, about those that lead to social and economic exclusion."[131]

It seems obvious that the absence of access to ICTs can potentially result in economic or social exclusion. It is enough to note how a huge role information and communication technologies have played in the recent months of the COVID-19 pandemic restrictions in enabling access to education[132] or work for many of us. That is precisely why it is so important that the successive digitisation of different spheres of judicial activity should take due account of the phenomenon of digital exclusion, so as not to lead to a restriction of rights of digitally excluded persons.

127 Batorski, *Wykluczenie*..., pp. 227–228.
128 *Ibid.*
129 Batorski, *Wykluczenie*..., pp. 224–225.
130 *Ibid.*
131 *Ibid.*
132 See e.g. Helsinki Foundation for Human Rights, *Human Rights in the Times of a Pandemic*, Warszawa 2021, chapter 6.

3. Diverse level of digitisation

DESI, or the Digital Economy and Society Index, is a national level of digitisation ranking[133]. DESI is regularly published by the European Commission and allows for the assessment of digital competitiveness changes in the EU Member States. The Nordic countries are the leaders of the last DESI. In contrast, the Index statistics for Romania, Greece and Bulgaria are the worst. Considering the subject matter of this report, particular attention should also be paid to the category of digital public services. Estonia was the top performer in this category, with a slight lead over Spain, Denmark and Finland. Poland's score was slightly below the EU average.

However, in the international version of DESI ranking (which additionally includes 18 non-EU countries)[134], Finland ranked the highest and five of the top ten places were taken by European Union countries. Iceland has become the highest-ranked non-EU country, ranking third in the overall classification. However, the average digital competitiveness score for the four lowest-ranking European Union countries is lower than the one of e.g. China and Russia.

4. The state of digital exclusion in Poland

The distinction between the aforementioned hard and soft barriers in accessing new technologies is very important. Although the lack of physical access to certain technologies is usually associated with digital exclusion, the obstacles belonging to the latter group – such as the absence of motivation, knowledge or digital skills – in reality turn out to be much more of a problem. This observation was valid for Poland in 2009[135] and remains relevant more than a decade later.

The two most frequently cited reasons for not having access to the Internet in Poland are the lack of the need, i.e. the absence of motivation and appropriate

133 The Digital Economy and Society Index is available at https://digital-strategy.ec.europa.eu/en/policies/desi (accessed on: 28.05.2021).
134 The International Digital Economy and Society Index is available at https://digital-strategy.ec.europa.eu/en/library/i-desi-2020-how-digital-europe-compared-other-major-world-economies (accessed on: 28.05.2021).
135 Batorski, *Wykluczenie*..., pp. 247–248.

skills (67.7% and 52% of the indications, respectively)[136]. However, 21.6% of the answers pointed to excessive equipment costs and 14.7% – to excessive access costs[137]. The situation is similar in Czechia, Italy and Spain – the majority of respondents surveyed during a 2019 study pointed to the absence of the need as the reason for having no access to the Internet[138].

Of the 3.82 million people who have never used the Internet, as many as 3.26 million – or about 85% – are aged between 55 and 74[139]. This is a massive difference from just over 18,000 people aged 16 to 24 and 538,000 persons between the ages of 25 and 54 who are also in that situation[140]. Furthermore, among all age groups, the 55–74 cohort shows the highest correlation between education and ICT usage – as much as 79.2% of people in this age group with lower education have never used the Internet, while the respective figures for people with secondary and higher education are 36% and only 3.2%[141]. By comparison, the general population percentages of persons with lower, secondary and higher education who have not used the Internet are 27%, 16.7% and 0.6%, respectively[142]. Here, the relationship between the level of education and the use of ICT is definitely noticeable, but the contrast between the least- and best-educated is less pronounced. Thus, the 55–74 age cohort (but also the 74+ age group) is not only the most affected by digital exclusion but is also the best example of the relationship between this phenomenon and the aforementioned mental resources (education, computer skills) and social resources (relationships and support networks that enable appropriate access to new technologies or the acquisition of relevant skills)[143]. A similar trend can be observed in Spain, Italy and Czechia, where the 55+ age group is also most affected by digital exclusion[144].

136 Federacja Konsumentów (Polish Federation of Consumers), *Wykluczenie cyfrowe podczas pandemii*, 2021, p. 5.
137 *Ibid.*
138 Eurostat, *Households – reasons for not having internet access at home*, https://ec.europa.eu/eurostat/databrowser/view/isoc_pibi_rni/default/table?lang=en (accessed on: 21.04.2021).
139 Data for 2020 – based on research by Polish Central Statistical Office, https://stat.gov.pl/obszary-tematyczne/nauka-i-technika-spoleczenstwo-informacyjne/spoleczenstwo-informacyjne/wykorzystanie-technologii-informacyjno-komunikacyjnych-w-jednostkach-administracji-publicznej-przedsiebiorstwach-i-gospodarstwach-domowych-w-2020-roku,3,19.html (accessed on: 14.04.2021).
140 *Ibid.*
141 *Ibid.*
142 *Ibid.*
143 Notably, many seniors who were able to do so during the COVID-19 pandemic sought the assistance of, for example, younger family members in using ICTs.
144 Eurostat, Households....

In the context of skills to use new technologies, it is worth recalling the DESI index annually published by the European Commission. Based on 37 different factors, the index presents the level of digital advancement of a given country. Out of 28 EU countries[145], Poland occupies a distant 23rd place in this ranking, obtaining its lowest score in the digital competence category[146]. This assessment seems to be confirmed by a study conducted by the Central Statistical Office (GUS). Of those who have used the Internet at least once in the last three months, as many as 31.5% have low digital skills – i.e. they lack one to three of the digital skills (information, communication, problem-solving or software skill)[147]. Moreover, among the experienced Internet users, 5.8% do not have any information literacy skills, i.e. they have not performed any of the following activities: copy or move a file or folder; using online storage space to save documents, images, music, video or other files; using the Internet to interact with government entities by searching for information on their websites; performing an online search for information about goods or services or health-related information (e.g. about injuries, diseases, nutrition, health improvement, etc.)[148]. 7.3% of the experienced Internet users do not have any communication skills (i.e. they have not performed any of the following actions: sending and receiving e-mails; using social networking sites; communicating online and/or using a webcam for video calls; uploading texts, photos, music, videos, software, etc., that they have created)[149]. On the other hand, as many as 31.4% of the persons who have used the Internet in the last three months do not have any software skills[150] – i.e. they have not used text processors (e.g. MsWord), spreadsheet applications (e.g. MsExcel), graphic editors, audio or video editors; create presentations or documents combining text, pictures, tables or graphs, code in a programming language; use advanced spreadsheet functions to organise and analyse data. The last percentage is particularly alarming.

However, hard barriers cannot be trivialised as they remain a very important obstacle. According to data provided by the United Nations Educational, Scientific and Cultural Organisation (UNESCO), only 55% of households in

145 The ranking includes the United Kingdom.
146 Federacja Konsumentów, *Wykluczenie*..., p. 21.
147 Główny Urząd Statystyczny, *Społeczeństwo*..., p. 156.
148 *Ibid.*, p. 158.
149 *Ibid.*, p. 159.
150 *Ibid.*, p. 162.

the world have access to the Internet; in the most deprived countries, this percentage falls to 20%[151].

In Poland, nearly one in ten households (9.6%) does not have access to the Internet[152]. By comparison, in other countries examined in Chapter VII, 85% of households in Italy, 87% in Czechia and 91% in Spain had access to the Internet in 2019[153]. Notably, as many as 99.5% of Polish households with children have an Internet connection. For those without children, the percentage is 85.9%[154]. The above statistics show that an important factor motivating Poles to invest in new technologies is having school-age children and the willingness to provide them with appropriate conditions for development (and also to protect them from social exclusion)[155]. The same trend can also be observed in Italy, Spain and Czechia, where the absence of Internet access, or non-use of the Internet, is much more common among households without children[156]. Only a decade ago, there were considerable infrastructural barriers related to the degree of urbanisation and the region of residence – e.g. noticeably fewer people had access to the Internet in the eastern part of Poland and rural areas[157]. At present, the situation has evened out significantly, although differences still exist - the percentage of households with Internet access in western and central Poland is about two percentage points higher than the figure for eastern Poland[158], and the difference between large cities and rural areas is three percentage points[159]. More than 2 million inhabitants of rural (less urbanised) areas have recently declared that they never use the Internet[160]. As GUS points out: "In 2020, the highest share of households with Internet access at home was observed in highly urbanised areas in western Poland (93.4%). The lowest share of such households was found in less urbanised areas in the eastern part of the country (87.3%)."[161] In 2019, a greater stratification could be observed in this respect in Italy, where the differences

151 Cited in O. Wilcox, *Visualazing the Global Digital Divide*, https://dt-global.com/fr/company/blog/march-4th-2021/visualizing-digital-divide (accessed on: 14.04.2021).
152 Główny Urząd Statystyczny, *Społeczeństwo*..., p. 132.
153 Eurostat, Households....
154 Główny Urząd Statystyczny, *Społeczeństwo*..., p. 132.
155 Similar observations were made by Batorski already in 2009, see Batorski, *Wykluczenie*..., p. 235.
156 Eurostat, Households....
157 Batorski, *Wykluczenie*..., 239–241.
158 Główny Urząd Statystyczny, *Społeczeństwo*..., p. 132.
159 *Ibid.*
160 Data for 2020, see footnote 139.
161 Główny Urząd Statystyczny, *Społeczeństwo*..., p. 132.

in internet access between urban and rural areas were 88% and 82%, respectively, and in Spain (93% and 85%)[162].

Among households in Poland with access to the Internet, as many as 99.1% used broadband connections, i.e. connections that allow transmitting high-quality pictures, films, streaming, online teleconferencing and using other advanced online services[163]. The disparities in broadband access levels based on place of residence have also decreased[164]. However, analyses of these differences must consider substantial difficulties in capturing regional disparities in statistical studies: it is impossible to analyse the situation at the sub-national level, and the situation in a village located on the outskirts of a large city is very different from that in a village located in a remote area[165]. However, a much greater problem is the lack, or non-use, of appropriate computer equipment, which affects more Poles than the lack of access to or non-use of the Internet. In 2017, as many as 19% of Poles declared that they had never used a computer[166]. This percentage was higher than the figure for Spaniards or Czechs (18% and 11% respectively) but much less than the relevant percentage of Italians (a significant 32%)[167]. On the other hand, 73% of Polish Internet users use mobile devices[168], which, however, do not allow them to undertake more complex ICT activities particularly relevant for this report.

Low-end income households (those with a net income of less than PLN 2,500)[169] remain the most vulnerable to digital exclusion. More than half of the respondents pointing to the cost of equipment and access as a barrier to using ICTs are members of such households[170]. Notably, although soft barriers are most problematic for the most affected 55+ age group, members of this group tend to rank costs as the third reason for not using ICTs[171].

162 Eurostat, Households....
163 Główny Urząd Statystyczny, *Społeczeństwo*..., p. 133–134.
164 *Ibid.*, p. 134–135.
165 Batorski, *Wykluczenie*..., 241.
166 Data for 2017 based on Eurostat studies; cited in Federacja Konsumentów, *Wykluczenie...*, p. 5.
167 Eurostat, Households....
168 Federacja Konsumentów, *Wykluczenie*..., p. 5.
169 Approx. EUR 557 – as of 25 May 2021.
170 Federacja Konsumentów, *Wykluczenie*..., p. 18.
171 Federacja Konsumentów, *Wykluczenie*..., p. 29.

Persons with disabilities are the second most vulnerable group to digital exclusion in Poland, next to seniors. Of more than 3 million individuals with a legally certified disability[172], approx. 603,000 – one-fifth – declare having never used the Internet[173]. Moreover, they account for roughly the same proportion of all those admitting that they have never used the Internet. The reasons for this state of affairs are complex, but the barriers to accessing the Internet or computer equipment indicated by this group are not significantly out of the norm. Nevertheless, it is worth emphasizing that a significant number of persons with disabilities remains economically inactive, which means that they belong to another group particularly vulnerable to digital exclusion. The described situation may also be affected by the need to adapt tools enabling the use of ICTs to the specific needs of persons with disabilities[174]. In this respect, the state of digital accessibility of public websites, mobile applications and e-services in Poland still leaves much to be desired[175]. It is also particularly worrying how badly Poland performs in terms of digitally excluded persons with disabilities in comparison with other EU countries. The latest research, conducted in 2012, indicated that the difference between persons with disabilities with access to the Internet and the general population (to the disadvantage of the former) in Poland differed by as much as 15 percentage points from the EU average[176]. This is an especially pressing problem, as information and communication technologies seem to be an ideal medium that can, among other things, facilitate the social participation of persons with disabilities, improve their access to justice and activate them vocationally.

Besides the two aforementioned groups (seniors and persons with disabilities), another two groups, already indicated above, that remain particularly vulnerable to digital exclusion are persons living in areas with a low degree of urbanization (especially rural areas)[177] and members of households with a net income below PLN 2,500. Another two factors influencing the occurrence of digital exclusion are the low level of education and vocational inactivity.

172 However, it should be remembered that the real number of persons with disabilities in Poland is much higher (4–7 million); see e.g. https://www.gov.pl/web/popcwsparcie/ile-jest-osob-z-niepelnosprawnosciami-w-polsce (accessed on: 14.04.2021)
173 Data for 2020, see footnote 139.
174 See Chapter II.
175 See Fundacja Widzialni, *Raport Dostępności 2020*, 2020, https://widzialni.org/container/aktualnosci/raport-dostepnosci-2020.pdf (accessed on: 14.04.2021).
176 Federacja Konsumentów, *Wykluczenie*..., p. 45.
177 Federacja Konsumentów, *Wykluczenie*..., pp. 35–42.

Incidentally, it should also be noted that the COVID-19 pandemic exacerbated the problem among schoolchildren and students[178]. However, this group is not, in ordinary circumstances, particularly vulnerable to digital exclusion, and the specifics of the barriers they currently face (e.g. the insufficient number of computer devices, preventing their simultaneous use by all schoolchildren living in a household) fall outside the spectrum of considerations made for the purposes of this report.

5. Summary

In conclusion, it should be stressed that the problem of digital exclusion is much more prevalent in Poland than the general public realises. Moreover, it is commonly associated with infrastructural or financial barriers. In Poland, however, a much greater obstacle is the lack of skills to make appropriate use of ICTs. This report does not attempt to formulate recommendations for tackling, addressing and preventing digital exclusion. Such detailed recommendations should be a result of much more extensive and in-depth analyses. Nevertheless, it seems reasonable to repeat the diagnosis repeatedly stated in this report: the digitisation of the justice system cannot be limited only to legislative activities. Indeed, practical activity is essential in the context of digital exclusion. However, such an activity cannot be limited to addressing material differences. What is also needed is educational activities aimed at increasing the digital competences of Poles and making members of the society aware of the benefits resulting from wider use of ICTs, also in interactions with the courts.

178 See e.g. Helsinki Foundation, *Human Rights...*, chapter 6. Federacja Konsumentów, *Wykluczenie...*, pp. 22–49.

IV.

Means of electronic communication in the practice of international courts and other dispute resolution bodies

1. Introduction

This chapter will present the changes that are taking place in the procedural practice of several international courts and other dispute resolution bodies. A feature of procedures before such bodies is the distance – sometimes very considerable – between the physical location of the court (dispute resolution body) and those of the litigants. The possibility of lodging and receiving pleadings and procedural documents electronically would facilitate and speed up proceedings.

The ongoing legal changes regarding communications and the exchange of documents with international courts (bodies) are introduced by low-level procedural rules and regulations. If the introduction of changes allowing for the use of new channels of communication required amending principal international instruments (conventions, treaties, statutes or agreements), state parties would have to enter into negotiations and then make a new rule binding on them via the appropriate procedures laid down in national law.

2. European Court of Human Rights

At the beginning of 2021, there were 62,000 applications submitted to the European Court of Human Rights ("ECtHR", or "the Court"). That is a large number, although 10 years ago there were many more of them – almost 160,000. As the Court cannot expect any substantial changes in the application review procedure or an increase in its budget, the ECtHR attempted to develop changes within the existing procedural regime that would allow for the faster examination of applications.

The key change, applicable from 1 January 2016, is the requirement to lodge an application on the "official form"[179]. At the same time, Rule 47 of the Rules of Court[180], specifying the contents and form of the application requested, has been modified. In its current wording, Rule 47 is very extensive and detailed. In principle, an applicant's (or their legal representative's) submissions

179 Communication of the Head of the Chancellery of the Constitutional Court of 1 December 2015.

180 ECtHR, Rules of Court, https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c= (accessed on: 14.04.2021).

made in the application may not exceed the size of the application form. This means, among other things, that the statement of facts and the statement of the alleged violation(s) must be no longer than three and two pages, respectively. The applicant may however supplement this information by way of an appendix not exceeding 20 pages. All relevant parts of the application form should be completed and the application form should be accompanied by copies of any decisions or measures issued in a given case.

Applications may be completed in any of the 37 official languages of Member States of the Council of Europe. An electronic version of the application, with the active fields indicating any missing information, is available on the Court's website[181]. However, it is not possible to send an application electronically. It must be transmitted to the Court in a traditional paper form.

The applicant (the applicant's representative) do not have to attach an electronic version (copy) of the application to its paper original. However, where there are more than ten applicants, the representative should – according to Practice Directions: Institution of proceedings[182] – provide a table setting out for each applicant the required personal information. Where the representative is a lawyer, the table should also be provided in electronic form (paragraph 15). In addition, in the case of "large groups of applicants", applicants or their representatives may be directed by the Court to provide the text of their submissions or documents by electronic or other means (paragraph 16). The application examination procedure is, or may be, subject to a change interesting from the perspective of the subject-matter of this analysis, once the application has been communicated to the "respondent" state by the Court. At the same time, the situation of states and applicants is somewhat different. The State may – as is now the rule – choose to exchange communications with the Court electronically. Documents should be uploaded on a secured website administered by the Court. The above rules also apply to the communication of the application. The rules on the use of electronic means of contact with the Court are laid down in Practice Directions: Secured Electronic Filing by the Governments[183].

181 https://www.echr.coe.int/Pages/home.aspx?p=applicants/pol&c= (accessed on: 14.04.2021).
182 The current version of the document is dated 25 January 2021, available at: https://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf (accessed on: 18.05.2021).
183 The current version of the document is dated 5 July 2018 and is available at: https://www.echr.coe.int/Documents/PD_electronic_filing_ENG.pdf (accessed on: 18.05.2021).

Applicants' representatives may file pleadings electronically to, and receive them from the Court after the application is communicated to the Government. The applicant's lawyer must accept the use of the Court's Electronic Communications Service (ECS/eComms). Making such a declaration is very simple. This can be done already in the application by entering an e-mail address in the relevant field of the application related to the representative's authority to act on behalf of the applicant in the proceedings. Access to the ESC is available from https://ecomms.echr.coe.int/. The rules on the electronic means of contact between the applicant (their representative) and the Court are set out in Practice Directions: Electronic Filing by the Applicants[184]. There is one category of cases and one type of documents that cannot be filed electronically with the Court. All written communications in relation to a request for interim measures must be sent by fax (there is a special fax number for such requests) or by post. Attachments, such as plans, that may not be "comprehensively viewed in an electronic format" must also be filed by post to the Court. Moreover, the Registry of the Court may request that a paper document be submitted by post.

Applicants (their representatives) using ECS/eComms are required to have the necessary technical equipment enabling them to communicate electronically with the Court and to follow the eComms User Manual sent by the Court[185]. They must inform the Court of any filing of a document with the Court by other means (fax or post), stating the name of the document, the date of dispatch and the reasons why the document could not be filed electronically. Unsigned letters and written pleadings filed electronically will not be accepted by the Court. The name of a document should be prefixed with the application number and the name of the application and contain an indication of the contents/type of the document (e.g. that it relates to the issue of admissibility, merits of the application or just satisfaction). The date of filing the document, which is important especially for the purposes of observing procedural time-limits, is the date and time of uploading the document to the ECS server (according to "Strasbourg time", i.e. the time zone of Strasbourg). The ECS does not permit the modification of a filed document. If the need arises to modify a document, a new document should be filed with a clear indication of the modification made and information about the earlier document

184 Available at: https://www.echr.coe.int/Documents/PD_electronic_filing_applicants_ENG.pdf (accessed on: 18.05.2021).

185 The Manual is also available at https://www.echr.coe.int/Pages/home.aspx?p=ecomms/help&c= (accessed on: 14.04.2021).

which is being replaced. Where more than one version of the same document has been filed, the latest version is taken into consideration (unless the President of the Chamber decides otherwise).

Pleadings filed electronically should be in PDF format, preferably in a searchable PDF. Users of the ECS should regularly check their e-mail accounts (to which notifications about documents provided by the Court are sent) and log into the ECS.

Practical guidance contained in Practical Directions: Written Pleadings[186] apply to the very form and content (structure) of the documents transmitted to the Court.

The above rules regarding electronic submissions to the Court apply equally to applicants (legal representatives) as well as the States.

Several years ago, the Court tested the possibility of lodging applications electronically. This seemed to be a prelude to the embracing of an electronic application procedure. However, such a scenario was not pursued. Perhaps it was concluded that the traditional form of drafting and sending an application is more effective to maintain the requirements regarding the form and size of the application. Furthermore, the mere lodging of an application does have to be effected by a lawyer.

3. Court of Justice of the European Union

For the first time, the CJEU allowed electronic means of communication in its decision of 13 September 2011 on the lodging and service of procedural documents by means of e-Curia[187]. The decision provided for the creation of the e-Curia computer application, common to the then-operating three EU courts, and defined the conditions of its use.

That decision was replaced by the decision of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia[188], setting

186 Available at: https://www.echr.coe.int/documents/pd_written_pleadings_eng.pdf (accessed on: 18.05.2021).
187 OJ C 289/7, 1.10.2011.
188 OJ L 293/36, 20.11.2018.

out the basic rules relating to the two EU courts, the Court of Justice and the General Court.

Users of the e-Curia application must create an access account on the application and have their personal ID and password. The conditions for opening an account are different depending on whether a user follows the standard procedure or the special procedure. The standard procedure enables the submission of a request to open an account for the exchange of procedural documents with the Court of Justice or the General Court. It is available to a representative of a party ("representative" account) or, in the context of a request for a preliminary ruling before the Court of Justice, a person acting on behalf of a court of a Member State ("court" account) or a person who is not a lawyer but is authorised by virtue of national procedural rules to represent a party before the courts of their State ("authorised person" account). It takes several days to process the request. The special procedure applies to urgent situations and allows an account to be opened provisionally for the lodging of procedural documents with the General Court only.

A document lodged with the use of a personal user identification and password is considered an original document lodged in the proceedings. If a procedural document refers to any attachments, it must be accompanied by such attachments and a schedule listing the attachments. Procedural documents are deemed to have been lodged upon the validation of lodging of that document by the person lodging the document. The relevant time of lodging is the time in the Grand Duchy of Luxembourg.

The e-Curia IT application is used to effect the service of procedural documents, including orders and judgments, on the parties (or the legal representatives of parties) to the proceedings or a person acting on behalf of a court of a Member State. Procedural documents are served on the Member States, other states which are parties to the Agreement on the European Economic Area and institutions, bodies, offices or agencies of the Union that have accepted this method of service.

The intended recipients of the documents are notified by email of any document served on them by means of e-Curia. A document is deemed to have been served at the time when the recipient requests access to that document. If there is no request for access, the document is deemed to have been served on the expiry of the seventh day following the day on which the e-Curia notification email was sent to the user.

The decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia[189] is essentially in line with those of the decision of the Court of Justice of 16 October 2018 save for one significant difference. The use of the e-Curia application to file procedural documents is mandatory in proceedings before the General Court. Accordingly, the decision of the General Court contains specific rules on the technical impossibility of submitting a document electronically by e-Curia. If it is technically impossible to lodge a procedural document by e-Curia, the user must notify immediately the Registry of the General Court by email (GC.Registry@curia.europa.eu) or by fax (+352 43032100), indicating: (a) the type of document the user wishes to lodge, (b) where appropriate, the relevant time limit for the lodging of that document, (c) the nature of the identified technical impossibility, for verification by the staff of the institution if it is due to the unavailability of e-Curia (Article 7).

If such a "critical situation" occurs and the legal representative is bound by a time limit, they must transmit a copy of the document to the Registry of the General Court by any appropriate means (by the lodging of a paper version or transmitting it by post, email or fax). However, such transmission must be followed by the lodging of the document by e-Curia as soon as it is again technically possible to use the application. Similar rules on the "emergency" service of documents and the "post-failure" transmission by e-Curia apply to documents originating from the General Court.

A document setting out the conditions for the use of the e-Curia application and the User Guide are available on the CJEU website[190].

4. United Nations inspection bodies

International human rights treaties of a general nature (most notably the International Covenant on Civil and Political Rights[191]) and specialized treaties (e.g. the Convention on the Elimination of All Forms of Discrimination against Women[192]) have emerged within the framework of the United Nations. In addition to periodic review procedures, these instruments enable individuals to submit communications, which are considered by the relevant committee

189 OJ L 240/72, 25.9.2018.
190 https://curia.europa.eu/jcms/jcms/P_78957/en/ (accessed on: 14.04.2021).
191 Journal of Laws of 1977 No. 38, item 167.
192 Journal of Laws of 1982 No. 10, item 71.

and result in the adoption of a decision on the matter named a "view". However, such a procedure is optional and requires acceptance by a State concerned.

The filing of communications and procedural submissions does not require the sending of the documents by post. On the contrary, UN inspection bodies prefer the use of electronic means of communication by individuals. Documents and pleadings should be sent to a dedicated email address (petitions@ohchr.org). The use of the Model Complaint Form is suggested. National judgments issued in the case and other documents should be attached as scans and attachments to the communication.

5. International Criminal Court

There are three equivalent methods of submitting notifications and written communications to the International Criminal Court: by post, by fax and by e-mail (to otp.informationdesk@icc-cpi.int). Under Regulation 26 (3) of the Regulations of the Court, the electronic version of filings is preferred and considered authoritative[193].

Differently from many courts and international bodies, the International Criminal Court conducts no written proceedings. Instead, the ICC holds trials that include the taking of evidence. In accordance with Regulation 26 (4) of the Regulations of the Court, evidence other than witness ("live") testimony must be presented in an electronic form whenever possible. Detailed and highly technical provisions for the electronic submission of evidence are contained in a document entitled *Unified Technical Protocol ("E-court Protocol") for the Provision of Evidence, Witness and Victims Information in Electronic Form*[194].

6. Conclusions

Currently, the most "de-formalised approach" is taken by the control bodies established by treaties created within the framework of the United Nations.

193 The Regulations are available at https://www.icc-cpi.int/resource-library (accessed on: 14.04.2021).

194 Unified Technical Protocol ("E-court Protocol") for the Provision of Evidence, Witness and Victims Information in Electronic Form, https://www.icc-cpi.int/RelatedRecords/CR2021_01159.PDF (accessed on: 18.05.2021).

The UN practically allowed the electronic submission of notices and subsequent pleadings, which are sent to a special e-mail address and has done so without amending the procedural rules of the relevant authorities. On the other hand, the European Court of Human Rights and the Court of Justice of the European Union created dedicated electronic platforms that may or must be used for sending or receiving procedural documents by the parties to and the participants in proceedings. The emergence of these solutions at the ECtHR and CJEU was preceded by changes in procedural regulations. An intermediate solution can be found in the International Criminal Court, which created an electronic channel of communication (a dedicated e-mail address) as an addition to traditional methods of service of process (mail and fax). At the same time, the new channel is considered the main and preferred method of communication.

International courts and bodies increasingly more frequently use electronic communication in their dealings with litigants for the purposes of transmitting and serving procedural documents and judgments. However, the "use of electronics" varies depending on a number of factors such as the number of complaints/proceedings, requirement of legal representation ("compulsory legal assistance"), type of the proceedings concerned and the nature of the court or body concerned (regional or universal). Yet legal proceedings are largely written, which creates favourable conditions for the increasing use of electronic channels and applications. Electronic forms of filing and serving documents also reduce the costs of proceedings.

The move away from traditional forms of communication used for the filing and service of procedural documents and judgments is fostered by the fact that such procedures are regulated by low-level enactments created by courts and bodies authorities (rules of procedure, decisions or practice directions) that do not require the participation of state actors, which is necessary for the modification of international treaties. Therefore, it can be expected that electronic communication will become more frequent and, as access to e-technologies becomes more widespread, recommended, or even mandatory, in dealings with international courts or bodies.

V.

The European Union and the justice system of tomorrow

1. Introduction

Innovative technologies are, and will certainly continue to be, an important line of action for the European Union, also in the field of justice. This Report, therefore, draws on EU sources to chart the course of developments we can expect in this area in the near future.

The European Union obviously recognises the existing and future relevance of modern technologies to contemporary justice systems. There is a good reason why the 2019–2023 Action Plan European e-Justice[195] identifies, among other things, the use of artificial intelligence (AI) and distributed ledger technology (DLT) as priority areas of development in the field. To avoid duplicating the descriptions of solutions given elsewhere in this Report, this section is intended only to summarise the main developments highlighted by the EU.

2. The road towards the justice system of tomorrow

2.1 Development areas

The 2019–2023 Action Plan identifies three general areas in which innovative technologies will play a key role: (1) access to information, (2) e-communication in the field of justice and (3) interoperability (possibility of effective interaction between different national justice systems).

The European e-Justice portal, currently under development and available as a beta version, is to be a pillar of the first of the above areas[196]. Ultimately, the portal is to become an electronic one-stop-shop for European e-justice. At present, it only serves as a source of information with still relatively limited, albeit regularly growing, functionality. However, the portal is to be developed to become a place where national public registers relevant to the proper functioning of justice – both domestically and at the EU level – can be collated and accessed. Furthermore, it will eventually serve as a judicial auctioneering access point for all auctions taking place across the Member States.

195 See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019X-G0313(02)&rid=6 (accessed on: 27.05.2021).
196 See https://beta.e-justice.europa.eu/?action=home&plang=en (accessed on: 27.05.2021).

At present, EUR-Lex, an electronic database of EU legal acts, plays a crucial role in this area[197]. Plans have been made to improve it in the coming years. These efforts are to be supported by an increasingly broader implementation of the ECLI and ELI solutions. ECLI, the European Case Law Identifier, includes five elements (the ECLI acronym, the country code; the court code, the year of the judgment, a unique identification number). Its purpose is to facilitate user access to European case law databases. ELI, or the European Legislation Identifier, is a system enabling the online sharing of legislation in a standardised format so that it can be accessed, exchanged and reused across the EU. It includes technical specifications on legal URI identifiers[198] for legal information, metadata specifying how the legal information is described and a specific language for exchanging legislation in a machine-readable format[199]. Access to data is also to be increased through another interesting project, namely the creation of an instrument that will use AI to automatically anonymise/pseudonymise judicial decisions so that they can be used in the open data space. AI-based solutions are also planned to be used for the processing of judicial decisions issued by individual Member States. Also, a special AI chatbot is being developed for the European e-Justice portal for communication with the portal's users.

When looking at the second general area of the 2019–2023 Action Plan, e-communication in the field of justice, one should first and foremost realise that any introduction of cross-border electronic proceedings must be preceded by the taking of measures to guarantee the secure exchange of data between public authorities and practitioners. Undoubtedly, such measures will need to be taken in two dimensions: practical and legislative.

The following projects certainly stand out among the activities undertaken in the field of secure data transmission:

- *iSupport,* a system for the communication with competent national authorities via the eJustice portal;
- a system for the electronic payment of court fees (to be ultimately embedded in the eJustice portal);

197 EUR-Lex can be accessed at https://eur-lex.europa.eu/homepage.html?locale=en (accessed on: 27.05.2021).
198 URI (Uniform Resource Identifier) is a web standard enabling easy identification of data on a network. A URI is most often a string of characters written according to the syntax specified in the standard. The widely known URL is a special instance of a URI that not only identifies a resource but also indicates how to access it.
199 See https://eur-lex.europa.eu/eli-register/about.html (accessed on: 27.05.2021).

- a system for the electronic authentication of identity (including the verification of professional qualifications, which is expected to ensure the operability of the findalawyer search engines available at the e-Justice portal);
- a system for the electronic exchange of data in criminal proceedings.

The idea of using distributed ledger technology for this purpose, which is still being studied, also seems extremely interesting. A flagship project in this area, EBSI (European Blockchain Services Infrastructure)[200], aims to create a common infrastructure of blockchain technology to be used for the secure provision of e-services by national authorities[201].

The interoperability of the Member States' national legal systems is to be based on the e-CODEX project (and its planned continuation, Me-CODEX), which aims to ensure secure access to various legal procedures across Europe for different user groups. The project includes a number of minor technology solutions (such as e-signature and e-identity), which have the crucial feature of being scalable across the Member States.

It is particularly noteworthy that the European Union, through the aforementioned ELI and ECLI identifiers, analyses of sets of legal "big data" and open data, controlled vocabulary[202], and AI-based solutions, attempts to tackle the semantic obstacles to the functioning of systems enabling the interoperability of Member States' judicial authorities.

2.2. Development rules

One should not only recognise the opportunities offered by innovative technologies and use such technologies to develop expansive plans for the future but also attach at least equal importance to the identification of the risks that such technologies present and the development of appropriate standards and protective instruments. It is therefore encouraging to note that

200 The project is implemented within the framework of the European Blockchain Partnership (EBP) by the European Commission, all EU Member States, as well as Norway and Liechtenstein; see https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/EBSI (accessed on: 30.05.2021).

201 See https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/2019/10/11/European+Blockchain+Infrastructure+presented+at+the+European+Court+of+Justice (accessed on: 30.05.2021).

202 See, for example, https://eur-lex.europa.eu/browse/eurovoc.html?locale=en (accessed on: 30.05.2021).

the focus of the relevant EU policies is precisely on the human rights risks associated with the use of innovative technologies. This is especially evident in the EU's approach to the use of AI.

A landmark document in this respect is without doubt the White Paper on Artificial Intelligence[203] adopted by the European Commission in February 2020. The White Paper notes at the outset that along with the opportunities offered by AI, such as improving healthcare, increasing agricultural yields, and increasing the security of Europeans, Artificial Intelligence also entails risks, including "opaque decision-making, gender-based or other kinds of discrimination, intrusion in our private lives or being used for criminal purposes"[204]. Accordingly, the following are among the main tenets of this document:

- adoption of a risk-based approach, tailored to the needs of specific areas;
- identification of areas where the use of AI poses the highest risk;
- implementation of new legislation imposing appropriate requirements and ex-ante controls to ensure that high-risk AI technologies meet the requirements of safety, integrity and adequate data protection before they are brought to the market[205].

The above assumptions are expressed in more concrete terms in a regulation laying down harmonised rules on AI, which was proposed by the European Commission in April 2021[206]. The regulation differentiates between completely prohibited uses of AI, strictly regulated high-risk uses and low-risk uses that do not require a rigid legal framework.

Social scoring systems[207] and systems allowing real-time biometric identification[208] are classified as prohibited.

203 See https://ec.europa.eu/info/sites/default/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf (accessed on: 31.05.2021).
204 *Ibid.*
205 See M. MacCarthy, K. Propp, *The EU's White Paper on AI: A Thoughtful and Balanced Way Forward*, https://www.lawfareblog.com/eus-white-paper-ai-thoughtful-and-balanced-way-forward (accessed on: 31.05.2021).
206 See https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence (accessed on: 31.05.2021).
207 A solution of this type is currently being introduced in the People's Republic of China. The Chinese social scoring system assigns a certain number of points to a citizen and then adds or subtracts points depending on the activities undertaken by a given person. This use of AI raises serious controversies due to, among other things, a very high degree of interference with the private lives of citizens.
208 It is worth noting at this point that this limitation is, in fact, much less restrictive than it might appear, as the use of real-time biometric identification technology would be permitted on pre-collected images.

On the other hand, certain AI-based systems that may be used e.g. by the courts, law enforcement or during immigration checks were assessed as posing a high risk[209]. According to the European Commission's proposal, "high-risk" technologies will be required to be sufficiently transparent to enable users to understand and control how a given system produces its output. Such requirements are to prevent, among other things, "algorithmic bias"[210]. "High-risk" technologies will also have to meet the requirement of high accuracy.

The proposed regulation first and foremost obliges the manufacturers of AI solutions to prove that such solutions meet the relevant requirements ex-ante, that is before they are commercially launched. National entities are to perform "first line" control in this respect. However, the proposal also provides for the establishment of an appropriate EU-level body, the EAIB (European Artificial Intelligence Board), whose tasks would include issuing opinions, identifying best practices and developing harmonised technical standards. The regulation proposed by the European Commission as a natural follow-up to the White Paper on Artificial Intelligence, combined with other measures, such as those related to the Regulation of the European Parliament and of the Council on the Single Market for digital services[211], demonstrate that the EU has clearly chosen a direction which should generally be assessed favourably from the perspective of attention to the appropriate human rights guarantees. However, given the purpose of this report, one should also note certain shortcomings of the proposal. It must be noted that, relative to the provisions on the assessment of the accuracy of the technologies concerned, the proposed regulation is seriously lacking in detailed solutions to prevent algorithmic bias in practice. In addition, the data enabling the verification of whether or not a technology meets the relevant requirements will not be publicly available; they are only to be presented to the relevant control body. As a consequence, the individual, i.e. an entity whose rights may be compromised by the operation of a given AI system, will have very limited means of obtaining such information, which in practice may also lead to certain abuses.

209 See M. MacCarthy, K. Propp, *Machines learn that Brussels writes the rules: The EU's new AI regulation*, https://www.brookings.edu/blog/techtank/2021/05/04/machines-learn-that-brussels-writes-the-rules-the-eus-new-ai-regulation/ (accessed on: 31.05.2021).

210 Algorithmic bias occurs when a data set used to "train" an algorithm is insufficiently representative. This problem has arisen, for example, in the Netherlands (see Chapter VII).

211 See https://eur-lex.europa.eu/legal-content/pl/TXT/?qid=1608117147218&uri=-COM%3A2020%3A825%3AFIN (accessed on: 31.05.2021).

3. Summary

The EU declarations outlined above provide clear evidence of its understanding of two, sometimes more or less conflicting, aspects. First, the European Union demonstrates a deep understanding of the important role that innovative technologies will play in all spheres of our lives, including justice, in the future. The opportunities they offer certainly have not gone unnoticed. On the other hand, the EU is aware of the dangers to fundamental human rights associated with new technologies.

This broad perspective means that the above-mentioned instruments show a desire for the EU to adopt its own approach to new technologies, different from that adopted by, for example, the United States. The Union is thus demonstrating its desire to create future digital infrastructure which may be developed without detriment to the fundamental rights of the people. This is a positive signal, especially in the context of the digitisation of justice. However, it will take several years following a period of intensive legislative and practical activity on the part of the EU, before one can assess how successfully the Union has managed to reconcile the protection of these two values, i.e. maintaining appropriate human rights standards and creating a system of justice worthy of the Europe of tomorrow.

VI.

New technologies and arbitration proceedings

1. Introduction

New technologies have been used in arbitration proceedings for a long time, both in Poland and abroad. Due to their informal nature and predominant use in commercial matters, the use of electronic service or conducting all or part of proceedings remotely was already popular before the outbreak of the Covid-19 pandemic.

In the era of the global pandemic, the conduct of arbitration in a remote form gained popularity. This chapter presents examples of the use of new technologies in arbitration proceedings, benefits and risks associated with them, and examples of good practice issued by arbitration institutions that may also inspire courts.

Modern technologies influence the functioning of arbitration bodies that conduct fully remote proceedings (especially online arbitration courts) as well as traditional ones (or conduct them in a hybrid form) but with remote elements.

2. Online arbitration courts

The development of new technologies has also contributed to the creation of arbitration courts, which operate only online.

The following "electronic arbitration courts" already operate in Poland: Ultima Ratio[212], the Online Expert Arbitration Court for Business (CODR)[213] and Online Arbitration Court (OAC)[214]. The OAC is the first online arbitration court and has been operating since 2019. It is based on the full digitisation of proceedings and, consequently, on speed and low costs. In accordance with the Fee Regulations of Online Arbitration S.A.: (Fee Regulations)[215], the following fees are collected: registration fee for the opening of a user account in the amount of EUR 25, administrative fee and arbitration fee in a 1:3 proportion (fee for

212 Source: https://ultimaratio.pl/ (accessed on: 21.05.2021).
213 Source: https://codr.pl/first/(accessed on: 21.05.2021).
214 Source: https://www.sadarbitrazowyonline.pl/ (accessed on: 21.05.2021).
215 The Fee Regulations are available online: https://serwer1899720.home.pl/userfiles/editor/pliki/Regulamin_oplat_OA_S.A..pdf (accessed on: 21.05.2021).

proceedings before the arbitration court)[216], fee for the defence of set-off, fee for issuing an additional copy of the ruling, fee for access to archived transcript from a closed case, fee for an expert's opinion. The proceedings are conducted with the use of the OAC website[217], through which pleadings are filed electronically. Delivery of pleadings is made in the same way – the parties are informed of the publication of pleadings on the website by e-mail and SMS. Where a hearing is required, the panel of arbitrators may order that the proceedings be conducted over a video link[218].

Online arbitration institutions can be found worldwide. JAMS[219] or Arbitration Place[220] are examples of such institutions.

3. Use of new technologies by ordinary arbitration courts

Ordinary arbitration courts, though they are not online courts, are increasingly making use of new technologies and conduct proceedings remotely, in whole or in part.

The Netherlands is one of the first countries that allowed arbitration proceedings to be conducted entirely remotely. Already in 2015, an amendment to the Dutch arbitration law introduced provisions enabling disputes to be settled online – Article 1072b of the Dutch Code of Civil Procedure allows the parties to lodge pleadings and other documents and to take evidence from the testimony of witnesses, parties and expert witnesses electronically[221]. This provision also indicates that an arbitration award may take an electronic form with an electronic signature.

In Poland, in accordance with Art. 1184 § 2 of the Code of Civil Procedure, an arbitration court may conduct proceedings in such manner as it deems

216 In accordance with § 2 of the Fee Regulations, the fee is calculated according to the value of the dispute and is, e.g.: EUR 276 (value of the dispute up to EUR 2,200); EUR 133 plus 6,5% of the value of the dispute (not less than EUR 143) (value of the dispute between EUR 2,201 and EUR 4,500); EUR 10,922 plus 0,3% of the amount over EUR 2,325,600 (value of the dispute over EUR 2,325,601).
217 The website can be found at: https://www.oacourt.com/Login. The registration fee is EUR 25 (accessed on: 21.05.2021).
218 E. Kosa, "Pierwszy w Polsce Sąd Arbitrażowy Online", *Monitor Prawa Handlowego,* (1) 2019.
219 Source: https://www.jamsadr.com/arbitration (accessed on: 21.05.2021).
220 Source: https://www.arbitrationplace.com/ (accessed on: 21.05.2021).
221 R. Morek (Ed.), *Funkcjonowanie sądów polubownych w systemach prawnych wybranych państw europejskich*, Warszawa 2018, p. 68.

appropriate (subject to the provisions of the Act and in the absence of any other agreement between the parties). Therefore, it should be acknowledged that an arbitration court may conduct proceedings remotely if it deems this to be appropriate.

An increasing number of rules of arbitration worldwide allow proceedings or parts thereof to be conducted remotely. This practice is not a novelty, because already before the Covid-19 pandemic, new technologies were widely used in arbitration proceedings.

Already in 2005, the International Chamber of Commerce (ICC)[222], within which one of the world's leading arbitration institutions operates, i.e. the International Court of Arbitration at the International Chamber of Commerce, launched the so-called ICC NetCase Project[223]. The platform offered parties dispute management tools, i.e. an opportunity to communicate and store documents in the cloud[224]. Similar solutions are also offered by other arbitration institutions. For instance, the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Center[225] uses the ECAF platform[226], while the American Arbitration Association (AAA)[227] uses the WebFile platform[228].

The innovation of arbitration lies not only in the online storage of documents but also in the admissibility of electronic service of process. The service of process is governed by the rules of procedure of arbitration courts. Parties may also choose to set their own rules on this issue, which is specifically recommended[229].

It has been also possible to examine witnesses and expert witnesses via teleconference or videoconference. The examination of a witness may also take the form of testimonies typed via an online chat, i.e. in messaging applications

222 International Chamber of Commerce (accessed on: 21.05.2021).
223 ICC Commission Report: Information Technology in International Arbitration, s. 2, https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf (accessed on: 21.05.2021).
224 ICC Commission Report: Information Technology in International Arbitration, s. 2, https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf (accessed on: 21.05.2021).
225 World Intellectual Property Organization
226 Source: https://www.wipo.int/pressroom/en/prdocs/2005/wipo upd 2005 257.html (accessed on: 21.05.2021).
227 American Arbitration Association
228 Source: https://www.adr.org/aaawebfile (accessed on: 21.05.2021).
229 A. M. Arkuszewska, "Doręczenia elektroniczne w arbitrażu" [in:] *Informatyzacja postępowania arbitrażowego*, Warszawa 2019.

allowing simultaneous real-time communication, or the recording of the witness's testimony on audio or video[230]. Admissible forms of examining witnesses and expert witnesses are determined in each case by the rules of a given arbitration court. The parties may also set their own rules in this respect. New technologies are also used in evidentiary proceedings involving documentary evidence. An example of a tool used for this purpose is Relativity, software which enables the analysis of e-mail correspondence exchanged between parties[231].

It is a standard practice in arbitration proceedings to hold a "case management conference", during which the litigants, among other things, make arrangements as to the timetable of proceedings, pleadings to be submitted, discovery of documents, as well as determine the rules governing evidentiary proceedings. Even before the outbreak of the Covid-19 pandemic, case management conferences were often held remotely. According to the Polish Arbitration Survey 2019, as many as 91% of respondents are in favour of holding a preliminary hearing in the form of a teleconference or videoconference[232]. This helps to streamline proceedings and, in the case of complex or international disputes, significantly reduces time and costs. This solution was also advocated by the ICC in its 2018 report on the costs and duration of arbitration proceedings[233].

In response to the growing demand for online proceedings, a number of arbitration institutions issued recommendations and guidelines for the remote conduct of arbitration proceedings. It is also becoming increasingly common for the parties to agree on virtual hearing protocols specifying in detail the course of a hearing and how to participate in the hearing, technical requirements, the obligation to test the equipment and platform on which the hearing is to take place before it begins, and even the appointment of a person responsible for reporting technical problems. Such virtual hearing protocols also specify precisely the parties to the arbitration proceedings that may take part therein and also the guidelines for the testimony of witnesses.

230 A. M. Arkuszewska, "Przeprowadzanie dowodów na odległość" [in:] *Informatyzacja postępowania arbitrażowego*, Warszawa 2019 (accessed on: 21.05.2021).
231 Source: https://www.relativity.com/blog/email-threading-101-an-introduction-to-an-essential-e-discovery-tool/ (accessed on: 21.05.2021).
232 Source: https://badaniearbitrazu.pl/wp-content/uploads/2019/04/badanie-arbitrazu-2019-pl.pdf, s. 13. (accessed on: 21.05.2021).
233 Techniques for Controlling Time and Costs in Arbitration, p. 9, https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf (accessed on: 21.05.2021).

For example, they may indicate what documents can be placed in front of the witness, how the camera should be positioned, and (if necessary) how testimonies of witnesses who testify in a language other than the language of the arbitration proceedings will be translated.

In Poland, such recommendations were issued by the Court of Arbitration of the Lewiatan Confederation (Lewiatan) and the Court of Arbitration at the Polish Chamber of Commerce (Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej, SAKIG). Lewiatan has prepared the Collection of Good Practices for conducting online hearings (the "Collection"). It explains that the Rules of Procedure of the Arbitration Court at the Confederation of Lewiatan allow for a hearing to be held by videoconferencing. It is recommended in the Collection to discuss with the arbitrator candidate whether he or she has experience in online hearings and the use of information technology and to inform the arbitration panel of parties' willingness to conduct online proceedings before or at a preliminary hearing in order to schedule the proceedings accordingly. The Collection also provides that the arbitration panel may, on its own initiative, encourage parties to agree to an online hearing and even order a remote hearing in the event of disagreement between the parties[234]. According to the recommendations of SAKIG, a hearing is held over a video link based on a decision of the arbitration panel. During the proceedings, the parties may request technical assistance from court clerks and IT specialists. According to the recommendations, SAKIG makes a test connection at least 3 days before the date of the proceedings[235].

The ICC has prepared a checklist for online proceedings, which provides for specific issues that should be agreed upon before the hearing, such as the principles of online etiquette (identifying main speakers, not interrupting the speaker, prohibiting recording), evidentiary issues (such as displaying evidence), issues related to the use of chat and separate deliberation rooms, etc.[236] Another example is a protocol issued by the Chartered Institute of Arbitrators (CIArb), an international arbitration organisation[237]. It contains

234 Source: https://www.sadarbitrazowy.org.pl/Content/Uploaded/files/Zbi%C3%B3r%20dobrych%20praktyk.pdf (accessed on: 21.05.2021).
235 Source: https://sakig.pl/wp-content/uploads/2020/04/Rekomendacje-SAKIG-do-wideorozpraw.pdf (accessed on: 21.05.2021).
236 Source: https://iccwbo.org/content/uploads/sites/3/2020/12/icc-checklist-cyber-protocol-and-clauses-orders-virtual-hearings-english.pdf (accessed on: 21.05.2021).
237 Source: https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf (accessed on: 21.05.2021).

recommendations on how to conduct online proceedings, including those related to the preparation of documents also in an electronic form, or adhering to the rules related to cybersecurity. In addition, CIArb has published a checklist of issues that should be agreed upon before the hearing. For instance, the parties should choose the appropriate platform to conduct the hearing, provide appropriate technical support, test the possibility of sharing the screen, etc.

4. Benefits and risks

Remote arbitration proceedings have many advantages. It can speed up the course of proceedings and reduce their costs (in particular as regards international arbitration where traditional hearings require long journeys). The possibility of holding a hearing over a video link is also an advantage in view of litigants' reduced mobility caused by the global epidemiological situation. The reduced length of proceedings is particularly important given the increasing backlogs in common courts resulting from the Covid-19 pandemic. In common courts, hearing dates are set up to a year in advance (and still tend to be postponed)[238].

The main threat associated with remote arbitration proceedings is an increased risk of cyberattacks. This risk applies specifically to arbitration proceedings, which is a consequence of characteristics of parties who choose this form of dispute resolution such as international corporations, public figures or state actors[239]. An example of such a cyberattack is the attack on the arbitration proceedings that were taking place between the Philippines and China in the matter of the South China Sea region. During the third day of the proceedings, the portal of the Permanent Court of Arbitration in The Hague was hacked, exposing the institution to the loss of sensitive information relating to the proceedings[240].

238 Source: https://www.prawo.pl/prawnicy-sady/koronawirus-w-sadach-rosna-zaleglosci-mniejsze-restrykcje,508097.html (accessed on: 21.05.2021).

239 C.M. de Westgaver, *Cybersecurity In International Arbitration A Necessity And An Opportunity For Arbitral Institution*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security (accessed on: 21.05.2021).

240 Source: http://thediplomat.com/2015/10/did-china-just-hack-the-international-court-adjudicating-its-south-china-sea-territorial-claims/ (accessed on: 21.05.2021).

Another threat is the issue of infringement of the right to a fair trial. Doubts arise as to the conduct of remote arbitration proceedings in the event that one of the parties does not agree to such a form of proceedings. This issue has not been definitively resolved. However, in 2020, when examining the request for exclusion of an arbitrator, the Supreme Court of Austria decided that the arbitration court had the right to conduct proceedings at its discretion and may decide to conduct proceedings remotely. The holding of a traditional hearing was not possible due to the outbreak of the pandemic[241].

5. Summary

There is no doubt that the extensive use of new technologies in arbitration proceedings is possible due to the specific nature of these proceedings: the wide case management powers vested in the parties themselves, the participation of experts and the general requirement of professional legal representation. The commitment of an arbitration body (such as the ICC or SAKIG) is also important, especially given the considerable administrative resources the body can offer.

The pandemic has certainly accelerated the digitisation of arbitration proceedings and encouraged parties to make greater use of legacy tools. The manner in which new technologies are used in arbitration proceedings, as described above, may inspire the state-operated justice system.

Given the private and confidential nature of arbitration, the remote conduct of proceedings (in whole or in part) does not also entail the risks that may be present in proceedings remotely conducted before common courts – e.g. violations of the right to a public hearing.

241 M. Scherer, "In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns", Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold--remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/ (accessed on: 21.05.2021).

VII.

New technologies in domestic justice systems – a common direction or diverse routes to digitisation?

1. Introduction

The use of modern technology by courts cannot be seen merely as a proposal or purely futuristic consideration. A more or less advanced process of digitisation of the judiciary is already underway in many countries of the world; the COVID-19 pandemic has only accelerated this process.

While working on this report, the Helsinki Foundation for Human Rights (HFHR) thus decided to investigate to what extent the courts in certain jurisdictions resort to modern technologies to dispose of the cases they hear. To this end, we developed forms that we distributed among selected respondents from offices of Clifford Chance located outside Poland, and it is their responses that provide the primary basis for this analysis. Each of the forms contains the same set of 34 questions relating to the different forms of the judicial use of modern technologies and problems that may potentially arise in this area. The questions are divided into six parts:

(1) modern technologies at the pre-trial stage (here, questions covered mainly ADR/ODR mechanisms),
(2) the court proceedings proper (primarily, the legal and practical aspects of remote hearings, but also the possibility of making electronic submissions of pleadings and remote access to court files),
(3) the use of tools based on artificial intelligence,
(4) the existence of courts operating entirely online,
(5) procedural guarantees in remotely conducted proceedings (including the relevant jurisprudence, judicial education, modern technologies and vulnerable groups),
(6) other problems not addressed in the previous sections which the respondents considered particularly important.

In addition, slightly modified forms were sent to selected foreign non-governmental organisations. These forms were customised to better fit the specific line of NGO work. The answers from this group of respondents were used complementarily in the drafting of this report.

As far as the selection of respondents is concerned, we were, first and foremost, guided by the need to obtain information from countries from different continents and with different levels of economic development. We also wanted to find out about the situation in countries generally considered as

technologically advanced, such as the US or Japan, as well as the UK, which, as we pointed out earlier in this report, is currently implementing a programme of modernisation and digitisation of courts.

Ultimately, we received responses from respondents based in the following countries: England and Wales, Czechia, Spain, Japan, USA and Italy. We have also used data provided by the Dutch Clifford Chance office. The forms were accurately completed and contained a lot of extremely interesting information, which allowed us to achieve our research objective. Auxiliary data, on the other hand, obtained with the help of foreign NGOs came from Armenia[242], Kazakhstan[243], Kyrgyzstan[244], Russia[245] and Hungary[246][247].

2. Remote ADR

Alternative dispute resolution (ADR) methods are mechanisms for resolving legal conflicts outside court proceedings. They can take various forms, but the most popular solutions are certainly negotiation, mediation and arbitration. As ADR is inherently based on the voluntary participation of the parties of a legal relationship, these mechanisms are, in principle, highly informal. It should certainly be noted that certain types of cases cannot be resolved through such conciliation measures[248]; in the surveyed jurisdictions, ADR cannot be used in criminal or divorce proceedings in the Czech Republic[249], for example. However, according to the legal maxim *quod lege non prohibitum, licitum est*, in the vast majority of the respondent countries permitting ADR, such proceedings may also be conducted online. The two exceptions[250] to

242 Helsinki Citizens' Assembly-Vanadzor (HVAC).
243 Public Association Dignity "Kadyr-kassyet".
244 Justice.
245 Man and Law and Citizens' Watch.
246 Hungarian Helsinki Committee (HHC).
247 Responses were also received from non-governmental organisations operating in the Republic of Tajikistan. However, Tajik NGOs noted that despite the theoretical possibility of using new technologies to enable, for example, remote participation in trials, new technologies are used very rarely used due to serious infrastructural obstacles.
248 Similar restrictions are established under Polish laws, see, for example, Article 10 of the Code of Civil Procedure.
249 J. Dobrý, Czech Republic, Reply of March 2021, para. 1, http://bit.ly/ntnj-czechia
250 In this context, it is worth noting that the Polish civil procedure does not prevent online mediation. However, mediation in criminal proceedings is more problematic. In the Regulation of 25 May 2015 on mediation proceedings in criminal cases (Journal of Laws of 2015, item 716), the Minister of Justice uses the term "meeting" (*spotkanie*). Although it is possible to interpret this term as including online meetings, the court overseeing the mediation process may not recognise mediation conducted in this way.

this rule are Japan[251] and (to an extent) the United States[252]. In Japan, ADR proceedings can be conducted remotely (by telephone or over a video link) subject to the court's approval but the participants must be physically present in the court building. In contrast, US respondents, referring to selected regulations of domestic law, pointed out that in the state of New York no online ADR proceedings are conducted. However, it should be noted that such online ADR is allowed under the federal rules of civil procedure.
In conclusion, in view of the considerable discretion associated with the use of ADR methods, in almost all of the surveyed jurisdictions which allow for conciliation activities, the law does not prevent them from being conducted online.

3. "E-TRIALS"

3.1 Remote participation in trials

Before engaging in a discussion on remote participation in court proceedings, one should first make a distinction between trials conducted entirely (or almost entirely) by remote means and those in which only certain steps, such as the examination of a witness, are carried out by means of remote communication.

In the surveyed group, the former legal model exists in Spain, Kazakhstan, Kyrgyzstan[253], England and Wales, Armenia, Italy and Russia. However, it should be noted that in most cases that model has been introduced or extended only in connection with the outbreak of the COVID-19 pandemic.

Thus, in April 2021, prior to the arrival of the ongoing pandemic crisis, in such countries as Armenia or Spain, only remote *participation* was possible (in the circumstances defined by the legislator), while laws enabling the conduct of "full" online trials were introduced only as part of measures aimed at preventing the spread of the virus. It is worth adding that the Spanish lawmakers,

251 T. Kamiyama, N. Sugihara, M. Ishii, Japan, Reply of 27 November 2020, para. 1, http://bit.ly/ntnj-japan
252 C. Koeleveld, United States, Reply of 15 December 2020, para. 1, http://bit.ly/ntnj-usa.
253 In Kyrgyzstan, although criminal trials may be conducted also over a video link in connection with the COVID-19 pandemic, the respondents indicated that the physical presence of prosecutors or parties' legal representatives in the courtroom was still necessary.

while introducing the rule that court proceedings during the crisis, if possible, should be conducted remotely, maintained the requirement that the accused should be physically present in the courtroom. This rule applies to all cases concerning serious crimes and may be invoked, at the request of the accused, at pre-trial detention hearings or in cases of indictments that carry a prison sentence in excess of two years[254].

A similar change introduced to address the spread of the coronavirus has been made in England and Wales. The local justice system has tested measures of remote participation in court proceedings several times in previous years. Initially, a pilot programme focusing on criminal proceedings was carried out in two magistrates' courts in May 2009. In the pilot, defendants detained at a police station would appear in the first court hearing in their case over a video link[255]. Finally, in 2019, a proposal was made to permanently introduce remote proceedings in relation to certain types of cases heard in magistrates' courts. However, a special parliamentary committee considered the tests carried out in this respect to be insufficient to determine whether such a procedure could be applied in more complex cases. In this connection, the committee recommended that additional, independent studies should be carried out before a wider roll-out of remote hearings[256]. Attempts to employ videoconferencing as a measure of conducting civil proceedings were first made in the First-tier Tribunal (Tax Chamber) in 2018 and in civil and family courts in Manchester and Birmingham in 2019. These pilots were a part of a wider effort to modernise the justice system[257]. In the wake of the COVID-19 pandemic, the option to remotely conduct all trials and hearings in all types of civil cases has become fully available[258].

The situation in Russia and Kazakhstan is somewhat different: no new rules have been introduced in these countries to allow for remote court hearings. Instead, both countries more frequently apply the rules predating the

254 F. Irurzun, Spain, Reply of 10 February 2021, para. 2, http://bit.ly/ntnj-spain.
255 Ministry of Justice, *Virtual Court pilot: Outcome evaluation*, December 2010, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/193633/virtual-courts-pilot-outcome-evaluation.pdf (accessed on: 4.12.2020) cited in J. Robbins, J. Sherlock, England and Wales, Reply of 12 February 2021, para. 2, http://bit.ly/ntnj-england-wales.
256 Robbins, Sherlock, England..., para. 2.
257 Dr M. Rossner, M. McCurdy, *Implementing Video hearings (Party-to-State): A Process Evaluation*, 2018, p. 4, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740275/Implementing_Video_Hearings__web_.pdf (accessed on: 4.12.2020) cited in Robbins, Sherlock, England... para. 2.
258 Robbins, Sherlock, England..., para. 2.

outbreak of the pandemic. However, as the Kazakh respondent pointed out, the sudden and significant increase in the practical use of remote hearings without additional in-depth legislative action has had a negative impact on many aspects of judicial proceedings. The respondent mentioned, among other things, cases of restricting public access to proceedings, the absence of rules for the recording of the trial, and the fact that trials and hearings were more time-consuming due to technical difficulties.

Two surveyed countries, Japan and Hungary, only allow certain judicial procedures to be conducted remotely. In Japan and Hungary, the simultaneous transmission of audio and video is used to obtain testimonies from witnesses, experts or parties. When deciding if such remote hearings can be used, the court is guided primarily by the principles of procedural expediency. In Japan, a preparatory hearing, during which the parties may present their preliminary submissions in order to determine the facts in dispute, may also be held remotely. This phase of the proceedings may be conducted over a video link (but only between courts) or by telephone. Since February 2020, Japanese courts have been using the MS Teams application for this purpose[259].

The situation is similar in the United States. US federal law allows remote testimony of witnesses but only as an exception to the rule[260]. At the same time, the accused in criminal proceedings has the right to be physically present in the courtroom and the use of videoconferencing in proceedings requires the consent of the accused. However, in federal civil trials, parties may make their oral submissions via simultaneous audio and video transmission. Nevertheless, an analysis of norms of New York state criminal law leads to the conclusion that remote participation in trials is always optional and is only permissible by way of derogation from the general rule – for example, the accused in custody may take part in the trial electronically if they waive their right to be physically present in the courtroom, and minors testifying as witnesses in cases of sexual offences may give evidence remotely.

In the Czech Republic, there is an intermediate form between the aforementioned two types of remote participation. Under Czech law, it is possible to

259 Kamiyama, Sugihara, Ishii, Japan..., para. 2.

260 Relevant limitations in the criminal procedure have their origin, inter alia, in the Supreme Court's interpretation of the US Constitution in *Coy v. Iowa*, according to which the Confrontation Clause of the Sixth Amendment requires that the accused must be guaranteed an opportunity to confront a person giving testimony in their case "face-to-face".

attend court proceedings remotely by videoconferencing. In civil proceedings, if a party so requests or the court deems it appropriate, a witness, the party or an expert may remotely participate in the proceedings provided that they are unable to attend the proceedings on-site, for example, because of the state of health of the person concerned or them being abroad. Similarly, the remote procedure may be used in criminal proceedings only to protect the rights of a given person, in particular because of their state of health, age or safety. However, such activities cannot be described as a remote trial. However, it should be noted that due to the outbreak of the pandemic, remote technology is currently being more widely used in the Czech Republic in criminal proceedings, in particular, for holding detention hearings or even those of the main trial[261].

3.2 Rules on the course of e-trials

The review of the responses received leads to the conclusion that no separate procedural framework has been put in place that would specifically govern remote trials or hearings, which are subject to the general legal rules. As a result, many aspects remain unaddressed. The outbreak of the COVID-19 pandemic, which is associated with a considerable uptake of remote procedures, has highlighted that the lack of more thorough legislation in this area has the potential to leave room for undesirable developments in practice.
Thus, for example, none of the surveyed jurisdictions has adopted any specific rules concerning the location of a person participating remotely in court proceedings. In the vast majority of cases, it was not necessary to regulate this issue as the location of "remote litigants" was a consequence of the very circumstances in which the remote procedure was used (for example, in case of detained or hospitalised persons) or the procedure was conducted exclusively through a videoconferencing platform, the use of which required a litigant's appearance in the building of another court. On the other hand, following the liberalisation of methods of remote participation in court proceedings, e.g. the enabling of participation via a private computer, the matter was, as a rule, left without any detailed regulation. This problem was partially addressed by the Italian legislation, which provides that a party may take part in remotely conducted proceedings but only from the same location as that

261 Dobrý, Czech Republic..., para. 2.

of its legal representative[262]. In Spain, on the other hand, it is recommended that all participants in proceedings who are not licensed lawyers use the appropriate infrastructure in a court building[263].

While describing the issues related to the location of a remote participant, it is noteworthy that the majority of legislators have failed to adopt legal regulations that would prevent remote participants from having more limited opportunities to follow what other participants are doing and saying during the trial as compared to the opportunities existing during traditional trials. Although the surveys show that such difficulties usually do not occur (save for Kazakhstan which allows for specific procedures of remote participation, described in more detail further in this chapter), the issue seems to be too important to be left without an appropriate legal framework. Problems resulting from such an approach to the described problem were reported e.g. by the Hungarian respondents who pointed out, among other things, that cameras used by remote participants who are in detention are situated very far from the person being recorded, which prevents the reading of their facial expressions. They also stated that, in their view, the fact that the judge is deprived of the opportunity to observe certain non-verbal signs divulged by the parties, which are essentially a form of metacommunication, may have a negative impact on the chance of making the accurate ruling. On the other hand, during proceedings conducted over a video link in the Netherlands, as a rule, the parties' representatives are always visible whereas the parties themselves appear on screen only when they speak. However, one should point to the example of good practices in this area shown by the Criminal Division of the New York Supreme Court, which deals with cases where the defendant participates in the proceedings remotely from their place of detention. In such an instance, separate cameras are focused on the defendant, the judge, the defence attorney, the prosecutor and the part clerk, and the microphones and split-screen monitors are appropriately located, while an additional monitor is mounted on the wall to allow the public to follow the proceedings[264].

In virtually every country surveyed, remote participation in court proceedings requires the simultaneous transmission of video and audio. In Japan and England and Wales, it is also possible to carry out certain steps by telephone

262 D. Ferrero, I. D'anselmo, Italy, Reply of 18 December 2020, para. 3, http://bit.ly/ntnj-italy.
263 Irurzun, Spain..., para. 3.
264 Koeleveld, United States..., para. 2.

only. Japanese law permits the telephone to be used, inter alia, in the course of preparatory judicial proceedings, as mentioned above, as well as for the communication of an expert opinion or the testimony of a witness in small claims cases[265]. In England and Wales, case management conferences, concerning the procedural or administrative aspects of a given proceeding, are conducted by telephone, as a rule only if the resolution of a given issue takes no more than one hour[266].

A different approach has been taken in the US federal civil procedure, which allows for different forms of remote participation and has not created an exhaustive list of permissible types of remote communication. Furthermore, under the pandemic measures introduced in the State of New York, litigants may attend trials solely by means of telephone communication. Telephone attendance is also allowed in proceedings before federal bankruptcy courts[267]. However, the US respondents reported that in other types of proceedings of the US legal systems videoconferencing is the technology used for remote appearance purposes.

At this point, one should also note an alarming development that has taken place in Hungary. The Hungarian criminal procedure generally provided for remote participation in the trial over a video link, subject to minor exceptions according to which the hearing of witness testimonies and the delivery of interpretation services could be ensured by means of an audio link alone. Pursuant to current pandemic legislation, the described limitations have been lifted and audio-only transmissions may now be used in all steps of criminal proceedings. Interestingly, more stringent rules apply to civil and administrative proceedings conducted in Hungary, in which the simultaneous transmission of audio and video must be used.

As regards the software used for videoconferencing, it is once again necessary to distinguish between the rules in force before and after the outbreak of the COVID-19 pandemic. Almost all countries surveyed have notably created a list of applications that can be used for videoconferencing as part of their efforts to deal with the spread of the coronavirus. Such lists generally include commercially available software, such as MS Teams, Skype for Bussiness, BT MeetMe or Cisco Webex. Even the Japanese legislation, which, as

265 Kamiyama, Sugihara, Ishii, Japan..., para. 2.
266 Robbins, Sherlock, England..., para. 6.
267 Koeleveld, United States..., para. 6.

indicated above, generally requires that litigants must be present in a court building to be able to participate in trials over a video link, introduced a rule in December 2020 according to which lawyers can use MS Teams to participate in civil proceedings before one of the 50 district courts or the Intellectual Property High Court[268].

In Russia and Kazakhstan, on the other hand, the generally applicable legal rules allowed considerable freedom in the choice of such software even before the pandemic. Especially in Kazakhstan, the regulatory blanket approach in this respect, combined with the absence of requirements as to the location of remote participants, has led to a situation where some persons were communicating with the court via Whatsapp while golfing or driving.

In addition, respondents noted that in Hungary, Czechia, Spain, Kyrgyzstan, Russia, England and Wales and Russia videoconferencing platforms had been used in courts already before March 2020. However, the respondents from Czechia notably observed that each Czech court has usually only one courtroom with videoconferencing facilities, which causes practical problems resulting from conflicting remote hearings dates.

Another area clearly lacking subject-specific legislation is the possible obstructions of remote trial procedures. None of the surveyed countries has put in place a legal procedure to deal with an intentional disconnection by a participant in a remote trial. Only the Czech legislation explicitly provides for an appeal procedure offering a remedy against the poor quality of a remote litigant's connection. Nonetheless, one should note a solution implemented by some US federal courts in civil proceedings, whereby a remote litigant can phone the person in charge of the technical aspect of the video conference to report technical problems. The manager reports this to the presiding judge and the trial is suspended until the connection with the litigant is re-established. In addition, connection quality, microphones and video framing are tested before the trial begins[269]. Similar measures (the possibility of emergency contact with a court employee) have been proposed by the Italian Bar Council, but at the date of the respondent's reply, they have not yet been implemented[270].

268 Kamiyama, Sugihara, Ishii, Japan..., para. 5.
269 Koeleveld, United States..., para. 32.
270 Ferrero, D'anselmo, Italy..., para. 32.

One of the most serious consequences of the lack of sufficiently detailed legislation of e-trials is that it hinders confidential communication between clients and their counsel. This aspect has not been regulated in the vast majority of the surveyed jurisdictions, which may pose a serious threat to the procedural rights of parties to proceedings. Respondents confirm that this problem is acknowledged, however, due to the lack of a legal framework, attempts are currently being made to resolve it only at the practical level. For example, in Czechia, judges allow counsel to leave the courtroom to phone their clients remotely participating in the trial[271]. It should be noted, however, that the Czech criminal procedure prohibits the conduct of the trial by videoconferencing if the accused does not have the possibility to confidentially communicate with their lawyer. A similar solution is used in England and Wales (although, notably, the pilot programme of remote appearance of persons detained at police stations featured a dedicated video link for confidential communication between the accused and their defence counsel[272]. The Hungarian criminal procedure requires that the accused be provided with an opportunity to communicate confidentially, at least over an audio link, with their defence lawyer. However, the country's rules of criminal procedure do not specify how this communication should be maintained. As in other aforementioned cases, it appears that such communication is enabled on an as-needed basis – there is no permanent line of communication maintained for that purpose.

Also in the United States, this aspect remains largely unregulated. Among the presented procedural frameworks, only the rules of the Criminal Division of New York Supreme Court governing the proceedings involving detained persons ensures confidential telephone communication between the defence lawyer and the accused[273].

A positive exception in this area is the Italian criminal and civil procedure, which introduced in May 2020 a private and encrypted audio link for communication between the parties and their legal representatives[274]. It seems that the Italian solution should serve as a model for legislators in other jurisdictions which have significantly expanded the availability of "e-trials" in recent months.

271 Dobrý, Czech Republic..., para. 8.
272 Ministry of Justice, Virtual Court pilot..., p. 1 cited in Robbins, Sherlock, England... para. 8.
273 Koeleveld, United States..., para. 8.
274 Ferrero, D'anselmo, Italy..., para. 8.

Another interesting solution is the Spanish idea of 'virtual rooms' for private, even if solely chat-based, conversations between litigants[275].

A similar situation exists with regard to the possibility of submitting pleadings in the course of a remote trial, which is governed by the general rules of procedure. This means that virtually all surveyed jurisdictions establish the requirement that submissions should be made before the remote trial begins. Optionally, a document may be read out and thereby submitted orally for the record[276]. Again, an exceptional solution can be found in the Italian procedure, where the submission of documents is possible during the remote trial via the videoconferencing platform used, e.g. by sharing a screen or sending a document as a chat attachment. Any such submission of a letter/document must be approved by the judge[277].

3.3 Public access to e-trials

As shown by the national studies presented in Chapter VIII.3. of this report, the state's failure to establish a detailed legislative framework may in practice lead to the emergence of the very dangerous phenomenon of de facto exclusion of public access to remotely conducted hearings or trials. Unfortunately, the analysis of the responses received leads to the conclusion that a similar lack of legal framework can also be observed in other jurisdictions. Particularly worrying signals have been received from Kazakhstan, where employees of a local NGO report cases of observers being prevented from accessing online hearings without any legal grounds for such a decision being given.

The Czech respondents subscribe to the observations made in Chapter VIII, identifying the legislator's passivity in this aspect as a real threat to the principle of public access to court proceedings. Practitioners from Czechia suggested that trials should be recorded and publicly accessible or that an online "space" should be designated for potential audience upon the setting up of remote hearings and trials. However, these recommendations have not yet been implemented by the country's legislator.

275 Irurzun, Spain..., para. 8.
276 See e.g. Dobrý, Czech Republic..., para. 9.
277 Ferrero, D'anselmo, Italy..., para. 9.

In US federal civil proceedings, this problem has been partially addressed by the publication of audio recordings of oral submissions by the federal courts of appeal. Moreover, all registered users of the Public Access to Court Electronic Records (PACER) service have access to, among other documents, transcripts of trials pending before US (federal) bankruptcy courts as well as US district courts and courts of appeal[278].

Among the countries surveyed, only Spain and Italy – which have adopted contrasting approaches to this issue – have regulated the subject matter discussed in this subparagraph.

In Spain, the default rule is that members of the public can personally follow the course of a remote trial by arriving at the courthouse and observing the proceedings in a courtroom where the adjudicating panel is sitting, or in another room in which the live feed of the proceedings can be followed on a screen. If public access must be restricted for epidemiological reasons, those who are not allowed in court may use the case details available on a virtual bulletin board to log on to the relevant platform using a password or an invitation provided by the court (following virtual and physical authorisation) and follow the remote trial as the audience[279]. For cases of particular public importance, the court may also order a full public broadcast of the entire proceedings[280].

On the other hand, considering the importance of public access to proceedings for the fairness of a trial, certain decisions made by the Italian legislator may be somewhat surprising. Under the measures implemented in response to the COVID-19 pandemic, the public may participate in any civil trial (and thus one concluded remotely) only in the phase of closing arguments exchanged before the judicial panel. At the same time, neither civil nor criminal procedure in Italy has been subject to any modifications that would enable the public to observe remote trials. As a result, public access to such proceedings has been effectively excluded[281]. This problem (as well as the mere admissibility of the remote conduct of criminal cases) is vigorously debated by Italian legal scholars and commentators.

278 Koeleveld, United States..., para. 21.
279 Irurzun, Spain..., para. 21.
280 *Ibid.*
281 Ferrero, D'anselmo, Italy..., para. 2.

3.4. Remote hearings and trials – guidance and training

Insufficiently detailed regulation of "e-trials" is not the only shortcoming commonly found in the legal reality of many jurisdictions. The increased use of remote hearings and trials, in its current form, is a new solution, alien to many practitioners. For this reason, the modernisation of justice will only be fully effective if accompanied by training and technical support provided, first and foremost to the judges who will have to carry out the new duties necessary to ensure the proper conduct of judicial proceedings. Such activities will be useful not only from the point of view of legal professionals but also ordinary citizens.

Thus, for example, in a study conducted by the Nuffield Family Justice Observatory, English judges claimed that a lack of sufficient IT training significantly impeded their ability to adequately manage the conduct of remote trials[282]. They noted that due to a failure to provide any training programmes, they had to seek such support on their own[283]. A judge confided that the lack of appropriate IT skills and knowledge, which became necessary overnight to practise the judicial profession, led him to a crisis of self-confidence at the professional level[284].

Unfortunately, similar conclusions result from the analysis of the situation prevailing in Polish courts (presented in Chapter VIII.3), as well as data received from foreign respondents.

The responses provided show that only Czechia, Italy and Spain have taken a centralised effort in this area. In the remaining countries, as the above example shows, there are no such training programmes or they are a grassroots initiative of practitioners or judges. The US respondents pointed out that the New York Supreme Court provides instructional videos on such issues as participation in court proceedings via Skype for Bussiness or MS Teams, but they are addressed to the general public and not intended as specialist assistance for lawyers.

The situation is similar for publicly available guides explaining aspects of remote participation in online hearings and trials. Publications of this type, at the initiative of national entities, have only appeared in England and Wales

282 The report is available at https://www.judiciary.uk/wp-content/uploads/2020/05/remote--hearings-rapid-review.pdf/; cited in Robbins, Sherlock, England..., para. 28.
283 *Ibid.*
284 *Ibid.*

and Spain[285]. However, it should be highlighted that, as respondents point out, in the case of England and Wales, this information is "scattered" across different websites and has not been compiled in a structured and comprehensive manner[286]. In the Netherlands, insofar as it is possible to conduct remote proceedings or submit pleadings electronically, the courts prepare general recommendations and rules (as well as case-specific instructions) concerning this matter. In the remaining countries surveyed, such publications are either unavailable or produced solely by individual courts (such as the New York Supreme Court – although, in this case, the guides only deal with technical, not legal aspects[287]), bar associations or NGOs.

3.5. "E-trials" and the phenomenon of digital exclusion

In the pursuit of an otherwise necessary modernisation of the justice system, we must not forget about the phenomenon of digital exclusion, and thus the fact that there are groups in society that, due to their material situation or other factual circumstances, do not have the technical possibility to benefit from a digitised form of court proceedings. The universal right to a court is one of the cornerstones of a democratic state ruled by law, and it is, therefore, the duty of each state digitising its justice system to ensure that this process does not lead to a restriction of the rights of these persons. Allowing such a situation to arise could potentially lead to discrimination.

Considering the above, it is all the more worrying to note that none of the examined countries implemented legal mechanisms aimed at solving the problem. As a direct cause of this situation, respondents named the fact that remote proceedings are optional (it is possible to carry out the same procedure in the traditional form) and that COVID regulations introducing such a possibility are temporary.
Although the Spanish legal order imposes an obligation on the state administration to ensure that all citizens have electronic contact with the court,[288] respondents indicated that the said obligation has not entailed any specific legal measures in this regard.

285 The Spanish Guide to Remote Proceedings *(Guía para la celebración de actuaciones judiciales telemáticas*), published on 27 May 2020, seems to deserve special attention as an example of good practice.
286 Robbins, Sherlock, England..., para. 31.
287 Koeleveld, United States..., para. 31.
288 Irurzun, Spain..., para. 20.

In contrast, the US federal civil procedure before US courts of appeal, where a party represented by a licensed lawyer is required to submit their pleas electronically, exempts, among others, digitally excluded persons from this requirement provided that they show a sufficient cause[289].

In a future in which the ongoing modernisation and digitisation of the justice system seem inevitable, it is necessary for states to take action, both on a legislative and practical level, so that justice systems keep up with the realities of the modern world.

3.6. Standards of fairness of remote trials in the case law of individual domestic courts

Standards related to the fairness of online judicial proceedings were commented on by the highest courts of three of the countries surveyed, namely those of the Czech Republic, the United States and Spain. Their key arguments are presented below. Presumably, the lack of more detailed national case law in this area is primarily due to the relatively recent surge in the use of remote proceedings. It seems that the practice of prolonged use of such arrangements, linked to the ongoing COVID-19 pandemic, may lead to a change in this regard.

The Czech Republic[290]

In its case law, the Czech Constitutional Court has indicated that the specific nature of the videoconference connection meets the basic requirements of oral and public hearing pursuant to Article 96(2) of the Constitution of the Czech Republic, Article 38(2) of the Charter of Fundamental Rights and Freedoms of the Czech Republic and Article 6 (1) of the European Convention on Human Rights[291].

289 Koeleveld, United States..., para. 20.
290 Dobrý, Czech Republic..., para. 23.
291 See judgment of the Constitutional Court of the Czech Republic No. I. US 2852/14 of 23 February 2015; judgment of the Constitutional Court of the Czech Republic No. I. US 983/15 of 14 April 2015.

The United States[292]

To the extent relevant for the issues under review in this report, the US Supreme Court has only admitted a derogation in exceptional circumstances from the principle expressed in the Confrontation Clause[293].

Spain[294]

In 2005 the Spanish Supreme Court held that:

- the rigour of the basic standards of judicial proceedings may differ in a situation where, for example, an expert witness is questioned remotely from that in which the defendant participates in the trial because the party must be able to speak freely or to maintain continuous communication with their defence lawyer;
- since, in the Supreme Court's opinion, it is not possible to preserve the full integrity of online proceedings, courts, when considering whether to allow the defendant to participate in the trial by videoconference, must weigh, in accordance with the principle of proportionality, the standards of procedural fairness thus sacrificed against the circumstances which make the application of such a measure advisable;
- accordingly, in particular where the defendant takes part in the proceedings, the use of the online procedure is justified only where it is absolutely impossible for the defendant to appear in person;

In conclusion, the Supreme Court rejected the possibility of a broad interpretation of the admissibility of online trials.
Spanish respondents noted, however, that due to technological developments and the recent pandemic, the quoted case law reasoning may have been outdated[295].

292 Koeleveld, United States..., para. 23
293 See para. 3.1., see also *Maryland v. Craig*, 497 U.S. 836, 848 (1990).
294 Irurzun, Spain..., para. 23.
295 *Ibid.*

4. "Full" online proceedings and "e-courts"

For the purposes of compiling this report, respondents were also asked to indicate what proceedings in their respective jurisdictions are conducted entirely online.

According to the responses received, there are virtually no such proceedings. Only the Czech respondents indicated a procedure very similar to the summary order for payment procedure *(postępowanie upominawcze)* governed by the rules of the Polish civil process. As part of this procedure, the court may issue an electronic order for payment provided that the claimant has filed a statement of claims in an electronic form seeking to recover a monetary claim in the amount not exceeding CZK 1,000,000 (approx. EUR 38,000). A statement of opposition against the order for payment may also be lodged electronically. An unopposed order for payment is deemed a final enforceable court decision. The forms of the order for payment and statement of opposition, the completion of which is necessary to adhere to the requirement of the electronic form, are available on the official website of the Czech Ministry of Justice[296]. Nevertheless, it should be remembered that similar procedures exist in many other legal systems – the Polish legislator, when developing the Electronic Summary Order for Payment Procedure followed solutions adopted in foreign jurisdictions (e.g. in Germany and Austria).

That being said, one should not forget Spanish, English and Welsh solutions referred to in paragraph 3, which, although introduced as part of measures to prevent the spread of the coronavirus, currently allow judicial proceedings to be conducted almost entirely online.

5. Electronic submission of pleadings and remote access to case files

5.1 Possibility of electronic submission of pleadings

All replies from Clifford Chance offices (in Czechia, United States, England and Wales, Japan, Italy and Spain) confirmed that the possibility of electronic submission of pleadings exists in these countries. Interestingly, in the

296 Dobrý, Czech Republic..., para. 17.

Netherlands pleadings may be submitted electronically to the Supreme Court (via a dedicated Supreme Court's platform), whereas the attempt to introduce a similar solution at the level of first instance courts and appellate courts has failed. An analysis of other data shows that e-submissions are also accepted in Russia, Kyrgyzstan and Hungary[297]. Obviously, there are certain differences between specific national regulations concerning such aspects as types of proceedings in which pleadings may be filed electronically or persons who can submit pleadings in this way. However, it can be stated that in respect of the jurisdictions covered by Clifford Chance replies, whenever e-submission is possible, there is at least a special platform for the electronic submission of pleadings. Moreover, even if certain provisions applied in the surveyed jurisdictions establish mandatory e-submissions, this requirement never applies to non-professionals – at most, it is an alternative solution they may use.

There are many similarities between the Czech arrangements and the relevant measures adopted in Polish legislation. In all procedures (i.e. criminal, civil and administrative) it is possible to lodge pleadings to the local equivalent of the electronic mailbox. All public administration bodies and the legal persons registered in the Czech commercial register (again – an equivalent of the Polish National Court Register) are obliged to have such an inbox. Private entities, on the other hand, have the right to have one. The identity verification process is carried out during its creation, then it is sufficient to use the indicated credentials. In addition, pleadings signed with a qualified electronic signature can be emailed or send via an interface of the Ministry of Justice ("ePodatelna"). In administrative and civil proceedings, it is also possible to submit a pleading in a simplified manner, i.e. by simple e-mail or fax, but it must then be confirmed by delivering a hard copy to the court within three days[298].

The discussed issues are particularly interesting in Spain. Under Spanish law, pleadings *must* be submitted electronically in almost all types of proceedings. However, as indicated above, self-represented persons are not required to submit pleadings electronically but they are certainly free to make e-submissions, and if they decide to do so, judicial authorities will accordingly provide them with the necessary standardised electronic forms[299]. Electronic pleadings are lodged via platforms called "electronic access points" – LexNet is the most popular of them. In addition to enabling the submission of pleadings, the

297 See https://birosag.hu/en/electronic-procedures (accessed on: 9.04.2021).
298 Dobrý, Czech Republic..., para. 11.
299 Irurzun, Spain..., para. 10.

transmission of copies or the sending of notices or reminders, it also ensures, through appropriate encoding, that pleading data are securely stored in the system. Identity verification is performed by requiring each user of the platform to have a qualified electronic signature[300]. Interestingly, despite the widespread digitisation of court files in Spain, as a rule, only the court has remote access to them[301]. This issue will be discussed in more detail in the next subparagraph.

Likewise, the rules of civil procedure applicable to the New York Supreme Court also establish a broad obligation to lodge pleadings electronically, but again only for parties represented by licensed lawyers. Electronic submissions are mandatory in the case of many specific proceedings, including medical malpractice tort cases, special proceedings in the field of election law or civil forfeiture cases[302]. In federal civil proceedings, litigants may also file pleadings electronically via the Case Management Electronic Case File system (CM/ECF), a dedicated platform operated by federal courts[303]. In order to use it, a litigant must set up a Public Access to Court Electronic Records (PACER) account[304] and obtain special access granted by a specific court. Upon creating such an account, appropriate identity verification is also carried out[305]. NYSCEF (New York Courts Electronic Filing System) is a similar platform used in civil proceedings pending before the New York Supreme Court, to which litigants can log in using their personal ID and password obtained upon successful identity verification[306].

Electronic submission is not generally available in any of the criminal procedures presented[307]. Nevertheless, it should be noted that in the face of the COVID-19 pandemic, the New York Criminal Court has allowed for the possibility of electronic submissions of pleadings in already pending cases, which is done through EDDS (Electronic Document Delivery System)[308].

300 Irurzun, Spain..., para. 11.
301 Irurzun, Spain..., para. 12.
302 For the full list, see Koeleveld, United States..., para. 10.
303 See United States Courts, *Electronic Filing (CM/ECF)*, https://www.uscourts.gov/court-records/electronic-filing-cmecf.
304 PACER, *How to File a Cas*e, https://pacer.uscourts.gov/file-case/how-file-case (accessed on: 23.03.2020) cited in Koeleveld, United States..., para. 10.
305 *Ibid.*
306 See NYSCEF, *Frequently Asked Questions*, N.Y. State Unified Ct. Sys., https://iappscontent.courts.state.ny.us/NYSCEF/live/faq.htm#MandatoryCases.
307 Koeleveld, United States..., para. 10.
308 See https://www.nycourts.gov/LegacyPDFS/COURTS/nyc/criminal/EDDS-instructions.pdf. (accessed on: 9.04.2021)

The submission of pleadings through a dedicated telematics system is obligatory also in the Italian civil procedure. However, respondents did not indicate whether self-represented entities are exempt from this requirement[309]. Such a possibility also appeared, on an ad hoc basis, in Italian criminal proceedings as part of measures aimed at preventing the spread of the coronavirus[310].

The e-submissions solution operating in England and Wales, the CE File system, has a noteworthy feature that enables the online payment of courts fees, 24 hours a day, 7 days a week (and hence outside court hours). The use of CE File is mandatory only for professional counsel appearing before the courts included in an exhaustive list; it can be used by non-professionals on a non-mandatory basis[311].

However, as a rule, the use of the CE-File system is not available in appeal proceedings[312].

Another online tool available for English and Welsh legal practitioners (and only for them) is MyHMCTS. It allows for the submission, payment and management of online case applications for e.g. probate and divorce cases or immigration and asylum appeals[313].

5.2 Remote access to case files

Platforms such as CE File in England and Wales, PACER and NYSCEF in the United States or the telematics system in Italy[314] allow for remote access to court files. Remote access to case files is also available in Hungary through a dedicated online platform for proceedings initiated after 1 January 2020[315]. However, access to case files is subject to certain restrictions. Kyrgyz

309 Ferrero, D'anselmo, Italy..., para. 10.
310 *Ibid.*
311 Robbins, Sherlock, England..., para. 10.
312 *Ibid.*
313 HM Courts & Tribunals Service, *MyHMCTS: online case management for legal professionals*, 22 October 2020, https://www.gov.uk/guidance/myhmcts-online-case-management-for-legal-professionals (accessed on: 10.11.2020) cited in Robbins, Sherlock, England... para. 10.
314 As a side note, remote access to files of Italian criminal proceedings is provided through a dedicated web portal and not the aforementioned telematics system due to the temporary nature of the solutions put in place in the face of the COVID-19 pandemic (see paragraph 5.1).
315 See https://eakta.birosag.hu/. (accessed on: 9.04.2021)

respondents also mentioned the possibility of remote access to case files but did not specify the form in which this would take place.

By contrast, in the Czech Republic, access to case files can generally be obtained remotely only through access points located in court buildings. An exception to this rule has been established in bankruptcy proceedings whose files are publicly available on the website justice.cz[316]. Also the Czech Constitutional Court provides remote access to its files through the NaSpis portal[317] (but only for cases initiated after 1 January 2016 and only to lawyers)[318]. Under the examined US law, electronically submitted pleadings can be remotely accessed at a later stage of the proceedings. The only exception is the criminal proceedings pending before the New York Supreme Court, the records of which cannot be accessed remotely as the possibility of electronic submission of pleadings was introduced only exceptionally, due to the prevailing epidemiological situation[319].

An example of good practices, embraced in the rules of procedure for England and Wales, is the obligation to create "e-bundles" of documents submitted electronically, which generally applies in the case of remote hearings. This greatly improves, among other things, the possibility of editing and working with any document included in an e-bundle. In addition, Crown Court Digital Case System, operating as part of the English and Welsh criminal process, allows parties, court staff and judges, to remotely access, create and present information on a given case[320].

In the Netherlands, counsel can remotely access case files of proceedings pending before the Supreme Court.

As already highlighted in the previous subparagraph, remote access to files is, as a rule, not available to Spanish litigants. This possibility is also not provided for by Japanese legislation[321].

316 Dobrý, Czech Republic..., para. 12.
317 See https://naspis.usoud.cz/. (accessed on: 9.04.2021)
318 Dobrý, Czech Republic..., para. 12.
319 Koeleveld, United States..., para. 12.
320 HM Courts & Tribunals Service, *Crown Court Digital Case System Guidance*, 23 May 2018, https://www.gov.uk/guidance/crown-court-digital-case-system-guidance (accessed on: 21.12.2020) cited in Robbins, Sherlock, England... para. 12.
321 Kamiyama, Sugihara, Ishii, Japan..., para. 12.

5.3 Digital tools facilitating the submission of e-pleadings

Unfortunately, there are very few publicly available digital tools designed to facilitate the submission of pleadings, especially for non-professional entities. The existing tools usually take the form of electronic fillable forms. Such forms are available, for example, on the websites of US courts for certain types of civil cases[322]. Similarly, some lower courts in Italy have implemented SIGP@Internet, a service for the online completion of forms of objections against imposed administrative penalty and appeals against injunctions[323]. However, in both cases, it is necessary to subsequently lodge the pleadings so created in accordance with the general procedural rules.

Slightly more advanced solutions have been created in England and Wales. First of all, the aforementioned CE File system allows for the submission of relevant documents and pleadings around the clock and outside court hours[324], which can undoubtedly facilitate court procedures. It is also worth noting the two portals operating in England and Wales: www.moneyclaim.gov.uk and www.possessionclaim.gov.uk/pcol. The former aims to facilitate the recovery of debts, the payment of which is avoided by a given debtor, and the procedure available through this portal is very similar to the procedures mentioned in paragraph 4. The latter, on the other hand, can be used in cases of rent claims or mortgage arrears.

6. Modern technologies and persons with disabilities and "particularly vulnerable persons"

Modern technologies, and especially those that enable distance communication, can measurably increase access to courts. It seems natural that the justice system should take advantage of modern technologies specifically to "get closer" to people for whom participation in legal proceedings can be exceptionally difficult for various reasons.

Undoubtedly, technologies allowing for, for example, the remote submission of pleadings, obtaining information on a case or remote participation in a trial can make it easier for people with specific disabilities. However, studies

322 Koeleveld, United States..., para. 15.
323 Ferrero, D'anselmo, Italy..., para. 15.
324 Robbins, Sherlock, England..., para. 15.

presented in Chapter II of this report – show that digital tools need to be additionally adapted to the specific needs of persons with disabilities (e.g. visually impaired persons) in order to fulfil this role.

Similarly, the modernisation of the justice system can help people for whom in-person participation in a trial might turn out to be too traumatic – i.e. children, victims of sexual violence and other serious crimes, or persons who repeatedly constitute the target or victim of the crimes in question.

The needs of both groups presented above have been regulated in radically different ways in the surveyed countries.

Virtually in each of the surveyed countries, particularly in criminal proceedings, participation in the trial is facilitated for "particularly vulnerable persons" through the possibility of testifying via videoconferencing (in England and Wales it is also possible to record testimonies and then reproduce them in court)[325]. The only exception is Italy, where new technologies are not used in any way to reduce the stress that people from those groups may feel when attending a hearing[326].

On the other hand, none of the respondents indicated any solutions used in their country to facilitate access to any legal measures for which it is necessary to use a computer.

7. Artificial intelligence working for the justice system

This report (as well as the questionnaires sent out as part of the survey process) intentionally uses the term Artificial Intelligence (AI) without providing its precise meaning. In this way, the notion can cover the widest possible range of technologies used by the justice systems of the surveyed countries, including database-based AI automatically performing specific tasks or machine learning software algorithms (and many others). In the absence of criteria that would narrow this range, respondents were able to refer to a broad spectrum of solutions used in a given jurisdiction.

325 Robbins, Sherlock, England..., para. 29.
326 Dobrý, Czech Republic..., para. 29.

The vast majority of the respondents' replies show that the courts operating in a given jurisdiction make use of certain tools incorporating technological solutions which, to a greater or lesser extent, can be described as Artificial Intelligence. The selected AI solutions are presented below, broken down by country[327].

Czechia

Czech judges have access to advanced speech-to-text conversion tools and software that helps them efficiently compile court documents[328]. However, as the respondents emphasise, judges rarely make use of these tools in practice[329].

Notably, discussions are currently taking place in Czechia on the automation or semi-automation of activities that usually do not require human input, such as the collection of court fees or issuance of certificates. The possibility of automating certain judicial decision-making processes, such as the issuance of orders for payment, is also considered. Another option considered is the future (full or partial) automation of the process of anonymisation of court records through the implementation of appropriate software[330].

United States

The U.S. Department of Justice (DoJ) uses AI-based translation and transcription software to process audio and/or video materials. In addition, the DoJ, together with the Federal Bureau of Investigation (FBI), uses AI investigative tools, e.g. biometric data processing systems or Big Data solutions employed to detect financial fraud[331].

327 The full set of data collected on this subject is available on the website of the Helsinki Foundation for Human Rights at https://www.hfhr.pl/publikacje/nowe-technologie-nowa-sprawiedliwosc/. (accessed on: 15.07.2021)
328 Dobrý, Czech Republic..., para. 13.
329 *Ibid.*
330 *Ibid.*
331 Koeleveld, United States..., para. 14.

England and Wales

It should first be noted that the sitting Lord Chief Justice appointed a new consultative body, named "LCJ AI Advisory Group", in 2019 to keep abreast of the latest AI technologies. The Advisory Group is led by Professor Richard Susskind[332].

One of these technologies is machine learning-based software used to facilitate the procedural stage of reviewing documents for disclosure in a DRD, or Disclosure Review Document. The software operates on the basis of algorithms "trained" by legal experts specialising in a particular field. In addition, the use of predictive coding to facilitate the disclosure process and the creation of comprehensive datasets was recommended by the High Court in 2016 in *Pyrrho Investments v MWB Property Ltd v BCA Trading*[333].

AI in England and Wales is also used for the process known as "e-discovery". E-discovery is a process by which electronic data is identified, collected and processed with the use of a machine learning process employed in response to an evidence request submitted in criminal or civil proceedings. Predictive coding systems use AI to learn from human reviewers so that the systems "know" which documents will be the most useful in the future. Lawyers for both parties in the proceedings will define the scope of e-discovery, successively identify and preserve the relevant information, and then make e-discovery requests and challenge those submitted by the opposing party. Once the limitations of e-discovery are set, information is collected, analysed and formatted for use in court[334].

As a side note, respondents notably pointed out that some general counsel, law firms and hedge fund analysts use the Premonition database which uses AI to estimate the chance of success in specific court proceedings[335].

332 Courts and Tribunals Judiciary, *Lord Chief Justice sets up advisory group on Artificial Intelligence*, 4 March 2019, https://www.judiciary.uk/announcements/lord-chief-justice-sets--up-advisory-group-on-artificial-intelligence/ (accessed on: 4.11.2020) cited in Robbins, Sherlock, England... para. 14.

333 Damian Taylor, Natalie Osafo, "Artificial intelligence in the courtroom", *Law Gazette*, 9 April 2018, https://www.lawgazette.co.uk/practice-points/artificial-intelligence-in-the-courtroom-/5065545.article (accessed on: 17.12.2020) cited in Robbins, Sherlock, England... para. 14.

334 Jan Hill, "The growth of e-discovery", *All About Law*, 3 May 2019, https://www.allaboutlaw.co.uk/commercial-awareness/commercial-insights/the-growth-of-e-discovery- (accessed on: 4.12.2020) cited in Robbins, Sherlock, England... para. 14.

335 Taylor, Osafo, Artificial intelligence... cited in Robbins, Sherlock, England... para. 14.

As an example of the use of AI by other law enforcement agencies, one can note that Durham Constabulary, a UK local police department, since 2017 has been using a system that, based on the analysis of 34 different types of data, predicts whether suspects are at a low, moderate or high risk of committing further crimes in a two years period. This information is then used to decide whether a suspect should be released, kept in detention, or made eligible for a local rehabilitation programme[336]. However, in 2018, the operation of the system was significantly altered upon discovering, among other things, that its evaluations discriminated against people living in more impoverished areas[337].

London Metropolitan Police use the NeoFace Live Facial Recognition technology, which analyzes images recorded by CCTV cameras and compares them to images of people on a watchlist that has been entered into the system. NeoFace primarily performs detailed measurements of the structure of recorded faces, including the distance between eyes, nose, mouth and jaw. Where it finds a match with the image of a person on the watchlist, the system automatically sends an alert to the police officers present in a given area. The system stores images that have generated an alert for up to 31 days or until an investigation or judicial proceeding is concluded. According to the declarations, the images of those who do not cause an alert are automatically deleted[338]. It is worth noting at this point, that a similar system was used by South Wales police, for example, during the 2017 Champions League final in Cardiff. However, the Court of Appeal ruled that the automatic facial recognition technology used by the Welsh police violated Article 8 of the European Convention on Human Rights because "too broad a discretion" was left to police officers in applying the technology. The Court also held that South Wales police had breached their public sector equalities duty by failing to

336 The Law Society, *Technology and the Law Policy Commission - Algorithms in the Justice System*, 27 June 2019, https://www.lawsociety.org.uk/campaigns/lawtech/guides/public-policy-technology-and-law-commission (accessed on: 3.12.2020) cited in Robbins, Sherlock, England... para. 14.

337 Matt Burgess, "UK police are using AI to inform custodial decisions – but it could be discriminating against the poor", *Wired*, 1 March 2018, https://www.wired.co.uk/article/police-ai-uk-durham-hart-checkpoint-algorithm-edit (accessed on: 4.12.2020) cited in Robbins, Sherlock, England... para. 14.

338 Metropolitan Police, *Live Facial Recognition*, https://www.met.police.uk/advice/advice-and-information/facial-recognition/live-facial-recognition/ (accessed on: 4.12.2020) cited in Robbins, Sherlock, England... para. 14.

properly investigate whether the facial recognition algorithms were biased in terms of race or sex[339].

Spain

Spanish courts use AI-based software named Language Technologies for the automated processing of large amounts of data extracted from textual and oral sources[340].

In addition, justice authorities in Spain use AI to profile geographical area--specific data as part of forensic intelligence activities. Although these AI tools have not yet been officially revealed, respondents have mentioned two systems of this kind:

- Eurocop, used to create a risk map of criminal activity in a particular section of the city, at a particular point in time; and
- Predictive Police Patrolling (P3-DDS), which uses an AI algorithm to direct police patrols to high-risk locations identified based on historical data on criminal activity in a given area.

The Netherlands

In the Netherlands, AI-based solutions are widely used. However, some of them have raised valid practical concerns.

Serious doubts arose regarding the use of a model estimating the risk of an incorrect submission of applications for child benefits. The model was programmed to detect an increased risk of error based on the factor of dual nationality. As a result, the algorithm was more often singling out dual nationals as those who are more likely to submit an incorrect application. The Dutch data protection authority ruled that the model operated in a discriminatory

339 Dan Sabbagh, "South Wales police lose landmark facial recognition case", *The Guardian*, 11 August 2020, https://www.theguardian.com/technology/2020/aug/11/south-wales-police-lose-landmark-facial-recognition-case (accessed on: 4.12.2020) cited in Robbins, Sherlock, England... para. 14.
340 Irurzun, Spain..., para. 14.

manner and the whole affair was met with a public uproar. Consequently, the use of the solution has been discontinued.

Similar objections were raised regarding the SYRI system. In February 2020, Dutch Employee Insurance Agency started utilizing the system to predict benefit frauds. Unfortunately, the algorithm was trained with data from neighbourhoods relatively frequently inhabited by persons with a non-Western migration background. As a result, the system "learnt" that those persons are more likely to commit benefit frauds. Because of that, the use of SYRI was banned by a court's decision already in February 2020.

Similar controversies surround the use of police models predicting the probability of committing violent crimes which are based on such factors as demographic characteristics or socio-economic background.

On the other hand, the Dutch justice system is testing a number of AI solutions whose operations may be evaluated positively. E.g. a pilot programme allowing the automatic anonymization of judgments has begun in 2020 in Dutch courts. Another pilot project, a system that assists judges in the preparation of judgments in traffic offences cases, was implemented in the District Court of Oost-Brabant. The system's algorithm provides a judge with access to relevant decisions issued in similar cases and applicable laws.

The Netherlands operates another pioneering AI system for analysing cases of suspected online fraud. The system advises persons who may be victims of online fraud on legal remedies that are most suitable to their case (reporting the fraud or initiating civil proceedings).

8. Conclusions

The above analysis allows us to conclude that the process of digitisation of the judiciary is relatively underdeveloped in most of the examined jurisdictions. None of the surveyed jurisdiction operates fully-fledged online courts, as defined in this report, or widely uses technologies based on Artificial Intelligence. Perhaps surprisingly, even in Japan, a country widely perceived as a leader in modern technologies, the justice system has so far been only digitised to a limited extent.

The COVID-19 pandemic has obviously forced states to introduce more options for the judiciary to use new technologies, especially to handle remote hearings and trials. Notably, in this respect, the majority of the surveyed jurisdictions enable trials to be conducted remotely by means of distance communication technology, whereas the availability of such remote proceedings was often only extended during the pandemic. On the other hand, remote proceedings, by and large, remain not regulated by law.

This lack of legal framework is particularly problematic for aspects such as public access to proceedings, which is considered an element of the right to a court guaranteed by Article 14 of the International Covenant on Civil and Political Rights, which has been ratified by all the states we have surveyed. The legislative lacuna extends to many other seemingly key aspects of remote trials, such as requirements as to the location of participants, procedures applicable in the event of technical failures, and measures to ensure that participants can communicate freely and confidentially with their legal representatives. To a certain extent, these issues can certainly be resolved through the application of general legislation. However, it seems that the legislators should directly address some problems specifically related to the use of new technologies for conducting judicial proceedings.

Furthermore, since in most of the surveyed jurisdictions there have not yet been any landmark court decisions specifically addressing the fairness requirements of remote proceedings, it is still difficult to speak of the emergence of any lasting and consistent standards in this area. Nevertheless, the above comparative analysis may be helpful in identifying good practices and formulating proposals for the authorities. The examples of such practices are the aforementioned Italian rules on the confidentiality of communications between litigants and their legal representatives or the Spanish arrangements on public access to judicial proceedings. Other noteworthy solutions adopted in several of the respondent countries are those enabling the electronic submission of pleadings. Several European countries embraced the good practice of providing training and guidance to judges on the use of new technologies, which is a need also highlighted in the section of the report describing the situation in Poland.

One can also identify areas where such good practices are simply lacking. One of the most pressing issues in this area is that of ensuring access to the courts for digitally excluded persons. The fact that, in most cases, remote

proceedings are not mandatory, at least for self-represented litigants, provides only a partial explanation for the lack of legislation and systemic solutions in this area. It would indeed appear that in certain cases, particularly in a pandemic situation, proceedings conducted remotely may in fact be the only recourse an individual has to exercise their right to a court, and it would be crucial to provide adequate support also to those who are unable or insufficiently skilled to use a computer or access the Internet. None of the respondents was also unable to identify any specific measures that would be capable of adapting remote court proceedings to the specific needs of persons with disabilities, whereas the obligation to implement such mechanisms arguably arises, inter alia, from Article 14 (2) of the Convention on the Rights of Persons with Disabilities.

VII.

Judiciary in Poland and new technologies – the beginning of a journey or a stop on a road towards digitisation

The discussion presented in this report will focus on Polish digital solutions in justice. The analysis will be carried out on several levels. First, the constitutional considerations related to the right to a court will be presented. The constitutional analysis will serve as an introduction to the presentation of domestic legislative arrangements currently in place, as well as the legislative path leading to their introduction. The discussion about the law will be complemented by an analysis of practical aspects. The latter will include information on the functioning of remote trials in Polish common courts in the times of the pandemic and opinions of practitioners (lawyers, prosecutors and judges) on the state of implementation of solutions based on new technologies.

1 . Digitisation of the Courts in Poland – Constitutional Aspects

Reforms related to the digitisation of courts must undoubtedly comply with constitutional standards. In particular, it is important to respect the principles arising from the constitutional right to a court (Article 45 of the Constitution of the Republic of Poland), the constitutional provisions concerning the justice system and the status of a judge (Articles 173–182), as well as the principle of a democratic state ruled by law (Article 2), which implies many important requirements for the lawmaking process and the quality of law.

First of all, it should be emphasized that any changes in the organisation of the judiciary such as those brought about by the digitisation of courts, should be introduced by statutory law. The above requirement results not only from the general principles applicable to the system of sources of law but also from Article 176 (2) of the Constitution, according to which "[t]he organizational structure and jurisdiction, as well as procedure of the courts, shall be specified by statute". This rule may seem obvious, but the practice of the pandemic period, described in Chapter VIII. 3., shows that it is not necessarily followed. Indeed, in the absence of a statutory framework for remote hearings or remote communication with the court, these matters have been regulated by way of internal rules and orders issued by governing bodies of individual courts. Such a situation poses a threat to the principles of legal certainty and equality before the law, as it leads to a significant diversity of rules followed by different courts in different areas of Poland. Importantly, the key rules governing the digitisation of the courts should be laid down in a statute, and only certain purely technical issues could be covered by secondary legislation (regulations). On the other hand, courts "house rules", such

as orders of presidents of courts, should set out standards only for courts' employees and in no case may interfere with the sphere reserved for legal instruments classified as the sources of generally applicable law.

The development and implementation of a reform of the judicial system must also comply with the standards of a fair legislative process. Such reforms cannot thus be adopted in a hurry but should be preceded by appropriate consultations, analyses and impact assessment. In this context, it is important to examine both the technical aspects of the ongoing reforms and their impact on access to the courts, in particular for digitally excluded individuals.

Without a doubt, the process of digitisation of the courts must also be fully compliant with the standards derived from Article 45 (1) of the Constitution. In this context, the constitutional standards largely coincide with the standards under international law discussed later in this report. They will therefore be discussed only briefly.

According to the case law of the Polish Constitutional Court, "the constitutional right to a court includes in particular: (1) the right to initiate court proceedings, (2) the right to a properly structured judicial procedure, guided by the principles of fairness, openness and two-tiered proceedings, (3) the right to obtain a binding resolution of the case; (4) the right to the appropriate organisation and position of judicial authorities."[341] As already indicated in the part devoted to international standards, the digitisation of the courts does not seem to pose a particular threat to the independence of judges. By the same token, the equipping of the courts with modern technology would not have a negative impact on the "right to obtain a binding resolution". In the following discussion, I will thus focus on the first two elements of the constitutional right to a court.

As regards the right of access to the court, understood as "the possibility of initiating an appropriate jurisdictional procedure"[342], the Constitutional Tribunal emphasised that it may be violated not only when the judicial route is closed for procedural reasons, but also when legal provisions establish excessive barriers or difficulties hindering access to justice – for example, excessive court fees[343]. The digitisation of judicial proceedings must therefore

341 Judgement of the Constitutional Court of 18 March 2014, case no. SK 53/12.
342 Judgment of the Constitutional Court of 2 October 2013, case no. SK 10/13.
343 See e.g. the judgment of the Constitutional Court of 15 April 2014, case no. SK 12/13.

be carried out in a way that does not create new "technical" barriers to access to courts. However, as indicated later in the report, one obviously cannot assume that the wider use of modern technology by the courts will have an unequivocally negative impact on the individual's right to a court. On the contrary, in many cases the improved availability of technology can have positive effects, facilitating communication between the parties and the court or, as it is the case for remote hearings, enabling the parties to participate more easily without having to physically appear in the court building. In extreme circumstances as those of a pandemic, modern technologies may even make it possible to carry on with a trial that otherwise would not be completed.

However, judicial reforms must not lead to depriving digitally excluded persons of access to the courts. The legislator is therefore obliged to implement appropriate solutions enabling such persons to obtain, for example, legal assistance from a legal aid lawyer or other appropriate assistance with the electronic submission of pleadings or participation in an online hearing. In its jurisprudence, the Constitutional Court has notably drawn attention to the constitutional obligation of the state to provide assistance to parties to proceedings who are unable to bear the costs related to the engagement of a lawyer: "Access to a court must be guaranteed in consideration of the constitutional principle of equality before the law, which prohibits discrimination on any ground, including financial status. As noted in the literature, from the constitutional perspective legal representation may also be treated as an element of the implementation of the right to social security arising from Article 67 of the Constitution. The legislator may consider legal representation as a form of the exercise of this right (see G. Rząsa, 'Konstytucyjne aspekty pomocy prawnej udzielanej osób ubogim', *Przegląd Legislacyjn*y, vol. 3–4/2005)."[344] In my opinion, the same arguments can be raised to prove the existence of a constitutional obligation for the authorities to assist digitally excluded persons in accessing the courts. This obligation is additionally strengthened by the wording of Article 77 (1) of the Constitution, according to which "Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights." As legal commentators aptly note, this provision imposes on the lawmakers not only a (negative) obligation not to adopt laws directly excluding judicial remedies for violations of freedoms or rights, but also a positive obligation "to grant protection to a person whose rights have been violated by a court in court

344 Judgment of the Constitutional Court of 16 June 2008, case no. P 37/07.

proceedings. It is thus necessary to design judicial proceedings in such a way as to enable the establishing, examination and assessment of such a violation"[345]. Therefore, if the lawmakers decided to introduce far-reaching digitisation of court proceedings, then, under Article 77 (1) of the Constitution, they should also take additional measures to prevent digitally excluded persons from being deprived of a judicial remedy.

As far as the right to a fair trial is concerned, according to the jurisprudence of the Constitutional Court, this concept "has no strictly defined meaning" but it implies three basic guarantees: the right to be heard, "an obligation to clearly state the reasons for the decision, intended to prevent the decision from being arbitrary", and "to ensure that the conduct of the proceedings is foreseeable for the participant"[346]. The right to be heard presupposes, among other things, that "an individual must be allowed to present their case and make submissions of evidence. Another important element of a fair judicial procedure is the party's right to personally take part in procedural steps"[347]. Proceedings conducted by means of remote communication may arguably meet the relevant constitutional standard. Indeed, the notion of "personal participation in procedural steps" is arguably not confined the mere physical participation in the trial by being present in the courtroom. If a party to remotely conducted proceedings is given a real opportunity to participate by being allowed to speak, examine and cross-examine witnesses and experts, etc., one could hardly speak of a violation of the right to be heard. Nevertheless, it appears that in certain categories of cases, remote participation alone could be insufficient, and the participants and the court should be able to communicate face-to-face, which is also a conclusion present in the case law of the ECtHR. Participants' physical presence in court would be particularly relevant in proceedings related to the involuntary placement or extension of placement in closed institutions[348].

A discussion about the standards of fairness should also focus, as it does in the context of international standards, on certain differences between criminal proceedings (which should be assessed under Article 45(1) of the Constitution read in conjunction with Article 42 of the Constitution) and other

345 M. Florczak-Wątor, *Komentarz do art. 77 Konstytucji*, in: P. Tuleja (Ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd edition., LEX/el. 2021.
346 Judgment of the Constitutional Court of 20 November 2007, case no. SK 57/05.
347 Judgment of the Constitutional Court of 28 June 2016, case no. K 31/15.
348 For standards applicable in such proceedings, see judgment K 31/15 (cited above) and the judgment of the Constitutional Court of 22 March 2017, case no. SK 13/14.

types of proceedings. The need to ensure the right to a defence of the accused person may prevent a criminal trial from being conducted remotely in the situation where the remote trial would, for example, result in impediments to communication between the accused person and their defence lawyer[349]. Furthermore, as already pointed out, the Constitutional Court derives the obligation to ensure the foreseeability of proceedings from the right to a fair trial. As the scholarly literature has noted, this foreseeability "should be related to the existence of clear, predetermined rules, which apply to different proceedings and allow for conducting such proceedings from the beginning until completion"[350]. Of course, the above principle is also important in the context of the digitisation of proceedings as it means that the rules governing the remote conduct of proceedings should be expressed in a clear and comprehensible manner in statutory law. A situation in which such rules are absent, and any legal loopholes have to be filled in by orders of individual presidents of courts or procedural decisions of courts conducting specific proceedings is certainly not conducive to foreseeability.

As it has repeatedly been indicated in this report, "digital" proceedings are also associated with certain problems concerning the implementation of the open court standard. According to Article 45 of the Constitution, everyone has the right to a public hearing, and the exclusion of the public hearing is allowed only "for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest". Regardless of the permissible extent of restrictions on the public access to proceedings applied in the realities of the struggle with the coronavirus pandemic, it should be stressed that, as a rule, all hearings, including those conducted remotely, must be open to the public. It is certainly permissible to introduce certain restrictions on public access – the scholarly literature indicates, among other things, that "the first sentence of Article 45 (2) allows, to a certain extent, for the handling of matters in camera. However, in deciding to do so, it is necessary to take into account the nature of a given case, its subject matter and the scope of court jurisdiction, as well as the stage of the proceedings in question."[351] That said, it would be unacceptable to adopt a solution whereby any remote proceedings, regardless of their

349 The Constitutional Court expressed its views on, among other things, the importance of providing the suspect/accused with access to a lawyer in the judgment of 11 December 2012 (case no. K 37/11).

350 P. Grzegorczyk, K. Weitz, *Komentarz do art. 45 Konstytucji*, in: M. Safjan, L. Bosek (Eds.), *Konstytucja RP*, vol. I, Legalis 2016/el.

351 *Ibid.*

subject matter, would be conducted without the public being able to follow their course. It is, therefore, necessary to introduce appropriate solutions, preferably embedded in the relevant provisions of universally applicable law (see above). However, as noted in the part of the report on international standards, the arrangements for implementing the principle of transparency must also consider other principles and values such as the privacy of the parties to the proceedings.

The constitutional right to a court also guarantees the right to have one's case heard "without undue delay". Here, the potential positive impact of digitisation can be seen through, *inter alia*, the facilitation of communication between the parties and the court[352], the absence of the need to appear in person at the court building, the possibility of more flexible docket management or the ability to carry on with proceedings in situations where they could not be otherwise conducted (e.g., during a pandemic). The efficiency of proceedings may be jeopardised by technical failures preventing the start or continuation of a remote hearing. To mitigate this risk, appropriate technical solutions and specific emergency rules need to be introduced.

It is also worth noting that the digitisation of proceedings, manifested, for instance, by the holding of remote trials, may also lead to interferences with the privacy of litigants and witnesses. Such a situation may arise, in particular, when a "remote" witness testifies from their family home, thereby revealing to the court the conditions in which they live and perhaps even certain aspects of their family life. Such interference may be aggravated by the fact that the hearing is transmitted online so as to ensure that the principle of public access to the trial is observed. It would therefore be necessary to introduce certain safeguards, for example by setting out requirements related to the physical location of a witness giving evidence by means of remote communication.

352 Cf. P. Pietrasz, *Prawne determinanty informatyzacji postępowania sądowoadministracyjnego*, in: *Informatyzacja polskiego postępowania przed sądami administracyjnymi a jego zasady ogólne*, LEX/el. 2020.

2. An accelerated evolution or already a revolution? New technologies – the permanent and temporary solutions in Poland

2.1 Introduction

The COVID-19 pandemic has greatly accelerated the introduction of online access to justice tools in Poland. The lawmakers have adopted certain solutions only for the times of the pandemic but also enacted some measures that should become a permanent feature of judicial procedures. In the following chapter, we present both types of solutions.

In any case, the starting point for this analysis is the legislation in force before March 2020 because it determined, to a large extent, the subsequent legislative actions, as well as the problems that both lawyers and litigants faced at the beginning of the pandemic.

2.2 Remote court proceedings

a. Criminal proceedings

Solutions adopted before March 2020

Participation in criminal proceedings over a video link has been possible for many years in cases strictly defined in the legislation.

The perpetrator and their legal representative (provided the latter present at the same physical location as their client, may take part in the criminal proceedings conducted in the fast-track mode[353]. Similarly, if the presence of an interpreter[354] is necessary, they may participate in the trial at the perpetrator's physical location[355]. Moreover, a court registrar (referendarz sądowy) or judicial clerk (asystent sędziego) employed by the court in whose district the perpetrator is present must accompany the perpetrator during any steps

353 Act of 6 June 1997 Code of Criminal Procedure (Journal of Laws of 2020, item 30, as amended), Article 517 § 2c.
354 *Ibid.*, art. 517b § 2d.
355 *Ibid.*, art. 204 § 1 applicable to cases when the questioned person is deaf or dumb and written communication is not sufficient or when the questioned person does not speak Polish.

carried out over a video link[356]. In such a case, the parties to the proceedings submit oral applications or make statements for the record and the perpetrator's procedural documents, if they could not have been delivered to the court, may be read out[357]. This option was introduced into the Polish legal system in 2011, primarily in order to streamline the proceedings in cases of football hooliganism. The solution was introduced to speed up the process and as a measure for deciding cases "on-the-spot", without the need for a judge to be present at the venue[358].

"Ordinary" criminal proceedings provide for the possibility of witnesses[359], experts or interpreters[360] participating in relevant judicial steps over a video link. Other persons[361], such as a court registrar or official employed in a given court, also take part in the remote examination of a witness by means of simultaneous video and audio transmission. However, those persons are merely responsible for managing the technical and material aspects of the examination, such as ensuring the reliability of communications or verifying the identity of witnesses[362], while the case is substantially managed by the body conducting the main proceedings.

Regulations introduced after the outbreak of the COVID–19 pandemic

One of the most controversial legislative changes implemented in connection with the pandemic was the introduction of a new procedure for holding

356 *Ibid.*, art. 517b § 2b.
357 *Ibid.*, art. 517 ea.
358 K. Eichstaedt [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (Ed. D. Świecki), *Kodeks postępowania karnego: Komentarz aktualizowany*, *t. 2: Art. 425–673*, LEX/el.2021, art. 517(b).
359 Code of Criminal Procedure, art. 177 § 1a.
360 *Ibid.*, arts. 197 § 3 and 204 § 3.
361 Notably, already after the **outbreak of the COVID-19 pandemic**, the Act of 19 June 2020 on interest relief for businesses affected by the effects of COVID-19 and on a simplified procedure for the approval of arrangements in connection with the emergence of COVID-19 (Journal of Laws of 2020, item 1086), expanded the list of officials authorised to manage the technical and material aspects of the remote examination of witnesses by adding Prison Service officers and consular officials to that list. The former may take part in the examination if a witness is detained in a prison or a remand centre, the latter may take part in the examination of a witness is a Polish citizen staying abroad.
362 L.K. Paprzycki, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz*, *t. 1: Komentarz do art. 1–424 K.P.K,* Warszawa 2015, art. 177.

pre-trial detention hearings. The amendment of 19 June 2020[363] to the Code of Criminal Procedure, created the possibility of not conveying a suspect to appear in court thereby enabling remote detention hearings[364]. In such an event, the suspect testimony is given over a video link at the location of their detention. The testifying suspect is accompanied by a court registrar or a judicial clerk or, if the suspect is in prison or remand centre, a Prison Service officer. As a rule, the defence lawyer may attend the remote detention hearing either at the suspect's physical location or in court. However, it is worth adding that a defence lawyer may be required by the court to attend the hearing in court if this is necessary for conducting the hearing before the expiry of the permissible period of the suspect's detention. If the defence lawyer and the defendant are in different locations, a recess is ordered during which they may have a telephone conversation to ensure proper communication. However, if the ordering of a recess jeopardises the determination of the pre-trial detention request before the expiry of the statutory time limit or may disrupt the course of the hearing, the court is obliged to proceed without a recess. The above legislative arrangement has raised serious reservations as to its compliance with the Constitution, the European Convention on Human Rights and EU criminal justice directives in criminal matters. A key source of these concerns is the fact that the legislator has explicitly established that the timely conduct of a detention hearing takes priority over the rights of the suspect, including the rights to a defence, which are of secondary importance[365]. Let us also note that the reading of judgments of the European Court of Human Rights leads to the conclusion that Article 5 § 3 of the Convention[366] requires that the detained person must be physically present before the court[367].

The amendment also introduced a specific form of a criminal trial that takes place simultaneously in two locations – in and outside the courtroom. It should

363 Act of 19 June 2020 on interest relief for business undertakings affected by the effects of COVID-19 who have taken out bank credit and on a simplified procedure for the approval of arrangements in connection with the emergence of COVID-19 (Journal of Laws, item 1086, as amended).

364 Code of Criminal Procedure, art. 250 §§ 3b–3h.

365 See M. Gutowski, P. Kardas, *Epidemia a digitalizacja działalności prawniczej – czyli o pożytkach i szkodach przyspieszonej cyfryzacji polskiego wymiaru sprawiedliwości*, https://palestra.pl/pl/e-palestra/16/2020/epidemia-a-digitalizacja-dzialalnosci-prawniczej-czyli-o-pozytkach-i-szkodach-przyspieszonej-cyfryzacji-polskiego-wymiaru-sprawiedliwosci (accessed on: 1.02.2021).

366 Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended).

367 See e.g *Medvedyev and Others v. France*, no. 3394/03, 29 March 2010.

be emphasized that the possibility of remotely conducting the entire trial is a novelty in the Polish criminal procedure[368]. During the remote trial, the parties communicate with each other by means of equipment allowing the simultaneous transmission of video and audio[369]. If a subsidiary prosecutor, private accuser or defendant is detained, they may take part in the case over a video link. It is this requirement relating to the participant's whereabouts that constitutes the fundamental difference between e-trials in criminal matters and those in civil matters[370]. At such a trial, a court registrar or judicial clerk (and, if necessary, an interpreter) accompanies the defendant, subsidiary prosecutor or private accuser at the prison or remand centre. On the other hand, only the defendant's defence lawyer may physically accompany the defendant during a remotely conducted trial. This right may not be exercised by legal representatives of subsidiary prosecutors or private accusers, who must appear in the courtroom[371]. The prosecutor may remotely participate in the trial if they request to do so.

If the defence lawyer and the defendant remain in different locations, they may contact each other by telephone during a recess ordered at their request. In this context, there are serious concerns about the provision enabling the court to refuse to order such a recess if "the submission of the request clearly does not serve the purpose of exercising the right to a defence, and in particular is aimed at disrupting or unreasonably prolonging the trial"[372]. According to an explanatory memorandum, this amendment aimed at "... extending the possibility of remote execution of selected steps of criminal procedure, which will serve to increase its speed, reduce the costs and inconvenience incurred by the participants in the process due to the need to appear in court, at the same time creating opportunities to reduce the risks resulting from the state of pandemic for persons participating in these

368 Ł. Brzozowski, "Udział prokuratora w rozprawie i posiedzeniu zdalnym", *Prokuratura i Prawo,* (3) 2021, p. 33.
369 Code of Criminal Procedure, art. 374 §§ 3–9.
370 It should also be noted that Article 83 of the abovementioned Act of 19 June 2020 on interest relief for businesses affected by the effects of COVID-19 and on a simplified procedure for the approval of arrangements in connection with the emergence of COVID-19 authorised court presidents to order parties, defence lawyers or legal representatives to take part in trials over a video link while being physically present in another room(s) of the court. This temporary solution certainly deserves to be noted as a specific form of the "remote trial" during which the participants, although appearing in the same court, remain in different physical locations during the trial.
371 D. Świecki [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego*, art. 374.
372 Code of Criminal Procedure, art. 374 § 7.

activities as a procedural body or participant"[373]. This provision also raised serious concerns among academics and practitioners concerning, inter alia, the possibility of maintaining the standards set by the principles of directness and adversarial proceedings. Doubts were also raised as to whether the provision enables the effective exercise of the right of a defence and the fulfilment of the equality of arms requirement, for example, where the prosecutor is physically present in the courtroom[374] and the defence lawyer accompanies the defendant located elsewhere[375]. The Helsinki Foundation for Human Rights noted[376] that the legislative arrangements introduced by the amendment directly infringed the Access to a Lawyer Directive[377], in particular, due to the discretionary nature of the court's decision allowing communication with the defence lawyer and concerning the lawyer's location, as well as the lack of any guarantees of absolute confidentiality of the client-lawyer communications.

Moreover, the relationship between the remote conduct of criminal proceedings and the principle of directness should be considered. The legal scholars and commentators take the view that the "remote" form of conducting the trial described above does not limit the principle of directness, but "only" hinders the exercise of the right to a defence[378]. This view is based on the belief that the court can see, hear and observe a person's behaviour as a result of the direct audio-video transmission. The court's perception of the person's behaviour is therefore considered the same as that the court has during face-to-face contact[379]. However, this belief does not take into account the technical conditions prevailing in the practice of courts or the psychological aspects that may be associated with the participation in the remotely conducted proceedings of a party staying at a detention facility. Therefore,

373 Sejm Paper No. 382, Sejm of the 8th Term, p. 25.
374 C. Kulesza [in:] K. Dudka, M. Janicz, C. Kulesza, J. Matras, H. Paluszkiewicz, B. Skowron, *Kodeks postępowania karnego. Komentarz*, 2nd edition, ed. K. Dudek, Warszawa 2020, art. 374.
375 A. Światłowski [in:] Z. Brodzisz et al., *Kodeks Postępowania Karnego. Komentarz*, ed. J. Skorupka, Warszawa 2020, p. 1337.
376 The complaint is available at https://www.hfhr.pl/wp-content/uploads/2020/06/Pismo-uzupelniajace-skarge-do-KE_skan.pdf (accessed on: 1.02.2021).
377 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.
378 D. Świecki [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego*, art. 374.
379 *Ibid*.

according to the Foundation, the wider use of remote criminal proceedings may also raise serious concerns regarding the fulfilment of the requirement of directness.

On the other hand, a temporary arrangement[380] has been put in place that enables the holding of hearings of penitentiary courts[381] in which a convicted person deprived of liberty may participate over a video link. This arrangement can be used only for the duration of the state of pandemic emergency or the state of pandemic. Penitentiary hearings are conducted orally[382], in the presence of a representative of the prison's or detention centre's administration. A study conducted by the Helsinki Foundation shows that penitentiary courts readily use this measure[383]. As a result, it has been proposed to introduce the arrangement permanently into the Code of Execution of Criminal Sentences[384].

b. Civil proceedings

Solutions adopted before March 2020

Already at the dawn of the pandemic, the Code of Civil Procedure provided for a broader possibility of departing from the principle of directness and enabled remote judicial proceedings. It applied to the situations where court proceedings would have to be conducted elsewhere or where holding a hearing outside the court premises would facilitate the examination of the case or would lead to a significant reduction in the costs of proceedings[385]. However, if a public hearing is conducted remotely, the participants must be present

380 The Act of 2 March 2020 on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies (uniform text published in the Journal of Laws item 1842, as amended), art. 14f.
381 Penitentiary hearings concern, for example, matters related to the execution of a decision granting permission to serve a custodial sentence in the electronic monitoring system and the repeal of such a decision, matters related to the execution of a conditional release decision and on the revocation of the conditional release appropriate or the granting of a break in the execution of the sentence in the event of mental illness or other serious illness preventing the execution of this sentence.
382 Code of Criminal Procedure, art. 517 ea.
383 For example, by the end of 2020, the Regional Court in Bydgoszcz dealt with 1995 such cases and the Regional Court in Wrocław held 3,243 penitentiary hearings (by 11 December 2020).
384 See: https://www.prawo.pl/prawnicy-sady/zdalne-orzekanie-sadu-penitencjarnego-mozna-wprowadzic-na-stale,501292.html (accessed on: 15.02.2021).
385 Act of 17 November 1964 Code of Civil Procedure (uniform text of 2020, item 1575, as amended), Article 151.

in another courthouse (and not in any other location). The persons that may participate in a remote hearing is exactly the same as those eligible to attend other hearings governed by the civil procedure. Similarly, it is also possible to conduct remote evidentiary proceedings if the nature of the evidence so permits[386]. This rule applies to, e.g., the examination of witnesses or testimonies of expert witnesses. Such procedural steps must be taken in the presence of an employee of the court in which they take place.

The only type of court proceedings in Poland that takes place entirely online is the electronic summary order for payment procedure (postępowanie upominawcze)[387]. Such proceedings are conducted by the "E-court", a unit subordinate to the 6th (VI) Civil Division of the District Court in Lublin, and all procedural steps are taken over the Internet. The procedure itself is a more efficient, easier and less costly way of obtaining a ruling known as the "order for payment" (nakaz zapłaty). However, it is worth noting that participation in such proceedings is entirely voluntary, and the proceedings may "return" to the classic form if the respondent so desires. In the initial phase of the electronic summary order for payment proceedings, after the claimant has submitted the claim via an ICT system, the respondent may choose not to file procedural documents through that system. In this case, the case will be disposed by means of traditional proceedings. The possibility of shifting from the online to traditional form appears again at the stage of appeal against the first instance judgment.

Procedural arrangements implemented after the outbreak of the COVID–19 pandemic

The greater flexibility of the civil procedure has allowed for the introduction of temporary rules[388] which make greater use of remote proceedings. These rules apply for the duration of the state of pandemic emergency or the state of pandemic announced due to COVID-19 and within a year of the lifting of either of the states. Under the temporary arrangements, it is possible to conduct a public trial or hearing remotely, over a video link. Persons involved in such proceedings do not have to be present in the court building. They can be at any place that allows for the appropriate use of technical devices

386 Ibid., Article 235.
387 Code of Civil Procedure, arts. 50528–50539.
388 The Act of 2 March 2020 on special measures... (Journal of Laws, item 374, 567, 568 and 695), Article 15zzs1.

(however, this does not mean that certain participants – e.g. witnesses – are prevented from personally appearing in court). The law does not specify what software may be used to conduct the trial. The above rules apply to all cases disposed under the Code of Civil Procedure.

This aforementioned discretion as to the location of litigants taking part in remote proceedings conducted under "Anti-Covid Acts" may prove problematic. This is due to the fact that the legislator has not provided any safeguards that would limit in practice the possibility of influencing, for example, the witness's testimony.

Remote participation in all above-mentioned types of proceedings must take place via technical devices enabling simultaneous audio-video transmission – i.e. over a video link. Before the pandemic, judicial steps were carried out with the use of AVAYA SCOPIA, a client application of a central videoconferencing platform administered by the Ministry of Justice. However, this subject was not regulated in the so-called Anti-Covid Acts. As a consequence, the relevant rules are set in a bottom-up fashion, namely in decisions of the presidents of individual courts. This leads to a great variety of used software, including Webex Cisco, Avaya Scopia, MS Teams or Skype for Business. On the other hand, the above-described variety may constitute an obstacle for litigants. The use of any of the above-mentioned applications requires the adjudicating panel to be located in a room fitted with appropriate devices that record the progress of the trial, in order for it to be recorded.

Despite the calls from the legal community, court files have not been sufficiently digitised, which is an obstacle to a wider "delocalisation" of judicial steps.

Due to the prolonged state of pandemic, further changes had been designed. As an effect of the latest amendment to the Code of Civil Procedure[389], during the state of pandemic emergency or the state of pandemic due to COVID-19 and within a year after either of these states ends, remote hearings have become the rule in civil proceedings. In addition, the new amendment provides, among other things, for the possibility for the president to order an in camera hearing when a remote hearing cannot be held and it is not necessary to hold a public trial or hearing[390].

389 Act of 28 May 2021 amending the Code of Civil Procedure and certain other acts (Journal of Laws of 2021, item 1090).

390 HFHR voiced its objections in this regard during the legislative process - see: https://www.hfhr.pl/wp-content/uploads/2021/03/druk899_uwagi-HFPC_web.pdf (accessed on: 24.04.2021).

c. Administrative court proceedings

Solutions adopted before March 2020

The solutions in place already before March 2020 enabled administrative courts to work remotely to a much greater extent as compared to common (civil and criminal) courts. This was a consequence of the digitisation of court files of administrative proceedings. The simplified court and administrative procedure can also be useful in a pandemic emergency – of course in situations where it may be applied at the request of a party and in the absence of opposition from other parties[391]. In such a case, they voluntarily waive trial, which may be significant facilitation in the face of a pandemic.

Regulations implemented after the outbreak of the COVID-19 pandemic

Currently, provincial administrative courts and the Supreme Administrative Court can conduct trials remotely over a video link. Persons involved in such a hearing do not have to be present in the court building[392]. Such solutions are temporary – they are applicable during the state of pandemic or the state of pandemic emergency or within a year following the end of the last of them. However, according to the lawmakers, the legal solutions already in place are insufficient; therefore, due to the prolonged state of pandemic, further changes within the framework of court and administrative proceedings were implemented. They are similar temporary solutions to those already described in the case of civil procedure[393].

2.3 Use of modern technologies for the submission of procedural documents

Broadly defined new technologies have already been used to some extent in Poland for the filing of pleadings for many years. In the administrative procedure, it is possible to submit a pleading electronically through the so-called "electronic inbox" via the Electronic Platform for Public Administration

391 Act of 30 August 2002 Administrative Court Procedure Act (uniform text Journal of Laws of 2019, item 2325, as amended), art. 119 (2).
392 The Act of 2 March 2020 on special measures..., art. 15zzs4.
393 Act of 28 May 2021 amending the Code of Civil Procedure and certain other acts (Journal of Laws of 2021, item 1090), art. 4.

Services (ePUAP)[394]. In civil proceedings, it is possible to lodge pleadings through this route, provided that the court has the necessary technical facilities[395] and this is the form of correspondence chosen by the party. It should be remembered, however, that pursuant to the jurisprudence of the Supreme Court, the submission of a pleading outside a designated IT system is ineffective[396]. In contrast, proceedings in criminal matters, due to the specific formal requirements involved, still take a traditional form. However, some experts say that the current provisions may be interpreted in such a way that allows for pleadings in criminal proceedings to be filed by fax or e-mail[397] – nevertheless, it should be acknowledged that at present there is no consensus on this issue among legal academics and commentators.

In order to be able to use the above-mentioned Electronic Platform for Public Administration Services, it is necessary to have (1) an electronic qualified signature or a trusted ePUAP profile or (2) an ePUAP account.

On the other hand, the above-mentioned amendment to the Code of Civil Procedure, provides that, during the state of pandemic emergency or the state of pandemic due to COVID-19 and within a year after either of these states ends, procedural documents, notifications, summonses and decisions may be served on lawyers with the right of audience before courts through a Common Court Information Portal[398].

In the electronic summary order for payment procedure, lower security requirements were established than in the case of the Electronic Platform for Public Administration Services. It is not required to have an electronic qualified signature. The only requirement is to set up a profile on a dedicated

394 Act of 14 June 1960 Code of Administrative Procedure (uniform text Journal of Laws of 2020, item 256, as amended), art. 12b.
395 Code of Civil Procedure, art. 125. Observations by the Foundation show that many courts still do not have adequate technical facilities.
396 Resolution of the Supreme Court, case no. III CZP 9/12, published in OSNC 2012/11/128.
397 See: https://palestra.pl/pl/czasopismo/wydanie/3–2020/artykul/o-sposobach-wnoszenia-pism-procesowych-w-sytuacji-ograniczenia-dzialania-organow-wymiaru-sprawiedliwosci (accessed on: 21.04.2021).
398 Act of 28 May 2021 amending the Code of Civil Procedure and certain other acts (Journal of Laws of 2021, item 1090), art. 4; Legal bars and associations have raised numerous objections to those regulations – see e.g. https://kirp.pl/nowe-regulacje-w-zakresie-dokonywania-doreczen-profesjonalnym-pelnomocnikom-za-posrednictwem-portalu-informacyjnego-informacja-obsil-krrp/; http://www.defensoriuris.pl/aktualnosci/apel-w-sprawie-portalu-informacyjnego/ (accessed on: 16.07.2021).

ICT platform[399]. In this procedure, the submission of pleadings via the interface enabling the user to contact the court makes it possible to, among other things, eliminate the problem of a lack of relevant court fees or the existence of formal deficiencies in pleadings. As a consequence, there is no need for a review procedure in this area[400].

Certainly, the Act of 20 April 2021 amending the Criminal Code and certain other acts[401] should also be noted, which introduced, among other things, the possibility to deliver a copy of an indictment to an e-mail address[402]. The recipient is to be notified about the date of delivery and the e-mail address to which the copy was sent by the postal operator (and in justified cases, by telephone).

2.4. Digitisation in the Polish justice system

a. Websites

The Helsinki Foundation for Human Rights has been looking at the accessibility of court websites for a long time, as it recognised their great role in educating citizens about the judicial system. In this context, it is worth noting the research conducted by the Foundation in 2011 regarding the websites of Polish courts. Unfortunately, it has produced unsatisfactory results – above all, court websites have remained inaccessible and unfriendly to the members of the public[403]. A study carried out by the Office of the Commissioner for Human Rights five years later (in 2016), also showed that many courts still did not meet international standards for accessibility of websites for persons with disabilities (WCAG 2.0)[404]. It might seem that this problem will be solved, among other things, thanks to the adoption of the Act of 4 April

399 P. Telenga [in:] J. Bodio et al., *Kodeks postępowania cywilnego, Komentarz aktualizowany*, vol. 1: *Arts. 1–729*, ed. A. Jakubecki, LEX/el. 2019, art. 50531.
400 *Ibid*.
401 The Journal of Laws of 2021, item 1023.
402 https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001023/O/D20211023.pdf (accessed on 21.06.2021).
403 The report is available at https://for.org.pl/upload/Nowy_Wymiar_Sprawiedliwosci/rankingweb.pdf (accessed on: 12.02.2021).
404 The report is available at: https://www.rpo.gov.pl/sites/default/files/Dost%C4%99p%20os%C3%B3b%20z%20niepe%C5%82nosprawno%C5%9Bciami%20do%20wymiaru%20sprawiedliwo%C5%9Bci.pdf (accessed: 2.02.2021)

2019 on the digital accessibility of websites and mobile applications of public entities[405] and the high administrative penalties provided for therein. Unfortunately, the latest research conducted by the Widzialni Foundation proves that after the clear leap in 2017, changes have slowed down significantly, and even some regress can be observed. It should be noted that the epuap.gov.pl website and the website of the Constitutional Tribunal received a failing grade in this study[406].

Currently, there are Court Information Portals at courts in Poland, the purpose of which is to facilitate access to information on the status of cases pending before a given court and steps taken in them by authorised entities (in particular parties to proceedings and their lawyers, as well as judges and prosecutors). As indicated above, it is also planned to introduce the possibility of serving, among other things, procedural documents on licensed lawyers through this information portal[407]. The Portal of Common Courts' Judgments is a publicly accessible information platform, which makes it possible to check, for example by means of a file reference number, such information as the date of issuance, publication and validity of a given judgment, the identity of members of the adjudicating panel, the content of the judgment, the provisions quoted and, in some cases, the reference number of similar judgments. A feature introduced by the District Court for Łódź–Śródmieście in connection with the outbreak of the COVID-19 pandemic, namely the launch of a chat service improving communication with the staff of the Customer Service Desk accessible through the court's website, should definitely be noted as a positive example of pro-active solutions. Arguably, the wider application of similar chat services could bring very positive results.

b. Artificial intelligence

In the Polish justice system, tools using artificial intelligence still remain a technological novelty and are rarely used. Nevertheless, it is worth noting here Ultima Ratio, a project implemented by the arbitration court at the Association of Notaries of the Republic of Poland. This is the first fully electronic

405 Journal of Laws of 2019, item 848.
406 The report is available at https://widzialni.org/container/aktualnosci/raport-dostepnosci-2020.pdf (accessed on: 12.02.2021).
407 As of: 21 April 2021; see: http://orka.sejm.gov.pl/opinie9.nsf/nazwa/899_u/$file/899_u.pdf (accessed on: 21.04.2021).

arbitration court in Poland. The project, using AI-based tools, is planned to be launched in the near future (i.e. within the next two or three years).

It is also worth mentioning a judgment of the Provincial Administrative Court in Warsaw issued in September 2018[408]. In this judgment, the PAC upheld a decision of the National Revenue Administration which was based solely on the risk assessment made automatically by a Clearing House IT System.

c. The random case allocation system

One of the mechanisms that currently raises a lot of concerns is the way in which cases are randomly allocated to judges. Under the current law applicable in Poland, cases are assigned to specific reporting judges (judges and associate judges) at random, according to the division of steps. Cases are allocated with the use of an IT tool based on a random number generator, separately for each register, list or other recording devices. The main criticism levelled at this system is related to the lack of transparency.

In 2017, Citizens Network Watchdog Poland filed an access to public information request, demanding the disclosure of the source code of the system. Unfortunately, the request was denied by the Ministry of Justice. In the HFHR's opinion, the design of the software should be disclosed, as it relates to the functioning of the justice system and the exercise of an individual's right to a court. . This matter is currently pending before the Supreme Administrative Court. As already mentioned above, in a judgment of 19 April 2021, the Supreme Administrative Court ruled that the algorithm of the Random Case Allocation System was public information.

This example shows that although the digitisation process undoubtedly brings many benefits, allowing for greater efficiency of the state, the use of modern technologies by the authorities, and especially by judicial bodies, is not free of risks[409].

408 Judgment of the Provincial Administrative Court in Warsaw of 20 September 2018, III Sa/Wa 2057/18, LEX no. 2571218.

409 See: https://www.hfhr.pl/helsinska-fundacja-praw-czlowieka-przystapila-do-postepowania-w-sprawie-dostepu-do-kodu-zrodlowego-system-losowego-przydzialu-spraw/ (accessed on: 3.02.2021).

2.5. COVID-19 pandemic and the computerisation of Polish courts

As has already been pointed out in the section on remote proceedings, the COVID-19 pandemic has forced increased efforts to further computerise the judiciary and the work of lawyers. Since the very beginning of the pandemic, representatives of professional associations of lawyers have signalled the need to take digitisation measures that had been unduly postponed in previous years[410].

In the first half of 2020, the Helsinki Foundation for Human Rights produced two reports on access to courts in Poland in the era of the pandemic[411]. Their main conclusion was that Polish courts do not use information systems and electronic communications on a large scale. For this reason, the sudden need to switch to such a mode of work resulted in total organisational chaos. The lack of uniform, top-down solutions in this area further aggravated the problems. In practice, for instance, with regard to the filing of pleadings, new solutions emerged that had no legal basis, such as different ways of dating pleadings filed by e-mail. In addition, we observed deficiencies in the information published on courts' websites. The manner in which such information was provided and their form was often misleading for a recipient to the extent where it was completely impossible to read the content of the relevant order. Ultimately, tools adapted to situations in which it is recommended to reduce people-to-people contacts were often used in an insufficient or incompetent manner. In practice, this led to a reduction in access to courts during this period.

The situation described above improved in the following months. However, some problems related to insufficient computerisation of court activities still remained. In May 2020 the Association of Polish Judges "Iustitia" called on the Minister of Justice to, among other things:

- "take steps to unify the level of computerisation of courts by providing all courts with equal access to remote working systems via a VPN connection";
- "the use of interoperability features enabling the integration of many IT systems used by judicial bodies and those that may be necessary to ensure remote working opportunities";

410 See, e.g.: https://www.prawo.pl/prawnicy-sady/informatyzacja-szansa-dla-sadow-w-dobie-koronawirusa,499081.html; https://www.prawo.pl/prawnicy-sady/informatyzacja-sadow-w-polsce-potrwa-nadal-tony-papierowych-akt,503062.html (accessed on: 3.02.2021).

411 Available at: https://www.hfhr.pl/wp-content/uploads/2020/04/Dostep-do-sadu-w-dobie-pandemii2-FIN.pdf; https://www.hfhr.pl/wp-content/uploads/2020/04/Dost%C4%99p-do-s%C4%85du-w-dobie-pandemii-16–04.pdf (accessed on: 3.02.2021).

- "effect the wide-scale implementation of solutions using optical character recognition (OCR) for pleadings submitted via the ePUAP platform (with the use of rule validation and reference database validation), as well as traditionally, and via the above-mentioned solutions and through programs using automated programs based on algorithms that assign pleadings to a specific case while ensuring full integrity with the system of electronic court registers"[412].

In November 2020, the Association signalled the need to "ensure and implement uniform technical solutions allowing all courts to conduct proceedings remotely and provide funds for the purchase of the necessary equipment" and „the need for an urgent legislative initiative to ensure that parties and witnesses can communicate electronically with the courts so that pleadings sent by electronic means have the same effect as paper correspondence (e.g. allow for meeting the deadline for a procedural step)."[413]

The above-mentioned observations confirm the conclusions formulated by the Foundation (described in detail in Chapter VIII.3. of this report). The lack of uniformity affects even such fundamental issues as public access to proceedings per se – here, there were several cases in which it was not fully guaranteed and two cases, in which the departments gave contradictory answers. In the majority of courts, judges and employees of the divisions concerned have not been thoroughly trained in the conduct of remote hearings, despite the fact that some of court presidents request such training.

2.6. Summary

It should be noted that although the COVID-19 pandemic accelerated the computerisation of Polish courts, the justice system has yet to fully embrace this opportunity which, perhaps paradoxically, is a consequence of the risks resulting from the pandemic. The manner in which such solutions are introduced leaves much to be desired. In addition, it is often bottom-up in nature, and therefore not uniform across the country. Moreover, some of the problems diagnosed by the Foundation and other entities in the initial phase of the

412 See. https://www.iustitia.pl/component/tags/tag/ministerstwo-sprawiedliwosci (accessed on: 3.02.2021).
413 See. https://www.iustitia.pl/83-komunikaty-i-oswiadczenia/4028-pandemia-w-sadach--stanowisko-ssp-iustitia-w-sprawie-rekomendacji-podsekretarz-stanu-w-ministerstwie--sprawiedliwosci-z-5-listopada-2020-r (accessed on: 3.02. 2021).

pandemic remain valid many months later. Attempts to introduce restrictions on constitutionally guaranteed rights (e.g. the right to a public hearing) under the pretext of the COVID-19 pandemic also raise serious concerns.

3. E-trials in Polish courts. How Has The COVID-19 Pandemic Affected The Work Of Polish Courts?[414]

The above-described changes in legislation that we have observed in recent months in Poland must be confronted with domestic judicial practice.

3.1. Survey methodology

The conclusions presented below are based on responses to survey forms sent as public information requests to:

- all courts of appeal (11),
- all regional courts (45),
- selected district courts in Łódź and Warsaw (9).

The questions sent to the courts concerned:

- the number of cases heard remotely;
- the number of remote hearings and trials;
- the number of remote pre-trial detention hearings;
- the tools that the courts use to conduct remote hearings and trials (platforms, programmes, the number of appropriately equipped courtrooms);
- the issue of whether remote hearings or trials are open to the public;
- possible complaints and technical problems relating to conducting remote hearings or trials;
- the education and training of judges and court personnel which ensures that remote hearings or trials are properly conducted.

The Foundation received replies from all (65) surveyed courts. The replies concerned the period between 31 March 2020 and the date of a given court's reply – the vast majority of the courts responded in December 2020.

414 For the first time published online at: https://www.hfhr.pl/wp-content/uploads/2021/03/E-rozprawy_Analiza.pdf (accessed on: 18.05.2020)

Below we present the key conclusions drawn from the analysis of the data provided to the Foundation along with a breakdown of the major identified problems. To gain a full understanding of the issues presented, readers of this document should also refer to the accompanying table, which contains the complete data on which the analysis is based.

3.2. The number of remote hearings conducted

There was a significant difference in the number of remote trials conducted by individual courts during the surveyed period.

For example, the District Court for Warsaw's Śródmieście borough remotely heard 69 cases[415], the District Court for Warsaw's Żoliborz borough conducted 15 cases[416], and the District Court for Warsaw's Praga Południe borough heard no remote case whatsoever[417]. Such significant variation occurs, therefore, between courts not only of the same level but also those operating in the same city (the District Court for the capital city of Warsaw[418] in Warsaw remotely heard 431 cases but due to its unique jurisdiction, it was excluded from the above comparison). Similar differences exist between hierarchically equal courts at the appeal and regional levels. For example, the Regional Court in Ostrołęka[419] remotely heard only two cases, the Regional Court in Radom[420] 22 cases and the Regional Court in Przemyśl[421] remotely heard 39 cases, as compared to 669 cases processed remotely by the Regional Court in Słupsk[422], 836 (764 by the end of 2020) cases delt with remotely by the Regional Court in Krosno[423] or 1830 cases conducted remotely by the Regional Court in Katowice[424]. Likewise, there is a notable disproportion between the figures indicated by the courts of appeal, such as the Court of Appeal in Lublin[425] or the Court of Appeal in Łódź[426], which remotely heard one and six (four by the end of 2020) cases, respectively,

415 Response dated 21 December 2020.
416 Response dated 17 December 2020.
417 Response dated 17 December 2020.
418 Response dated 20 January 2021.
419 Response dated 5 December 2020.
420 Response dated 16 December 2020.
421 Response dated 22 December 2020.
422 Response dated 21 December 2020.
423 Response dated 29 January 2021.
424 Response dated 21 December 2020.
425 Response dated 5 February 2021 – data for the period ending on 21 December 2020.
426 Response dated 8 February 2021.

and those given by the Court of Appeal in Warsaw[427] or the Court of Appeal in Szczecin[428], which remotely dealt with 242 and 63 cases, respectively.

Penitentiary divisions of regional courts are by far the most willing to hear cases remotely. An extreme example of this trend was the Penitentiary Division of the Regional Court in Świdnica which remotely dealt with 1075 cases, whereas all divisions of the Court's remotely heard a total of 1090 cases[429]. High numbers of remotely conducted cases were also reported by other penitentiary divisions of regional courts – e.g. that of the Regional Court in Bydgoszcz (2247 cases, including 1995 by the end of 2020)[430] or the Penitentiary Division of the Regional Court in Gorzów Wielkopolski (968 cases)[431].

Significantly less frequently, cases are remotely heard by civil, commercial, and labour and social insurance divisions. To use aforementioned examples, the Civil Division of the Regional Court in Bydgoszcz remotely dealt with 30 cases, while the Labour and Social Insurance Division and the Commercial Division of the Regional Court in Gorzów Wielkopolski remotely heard 15 and 116 cases, respectively.

As a rule, criminal divisions very rarely process cases remotely – for example, the Court of Appeal in Warsaw remotely dealt with 113 civil cases and 128 commercial cases, but remotely conducted only one criminal case.

Only two surveyed courts – the District Court for the capital city of Warsaw and the District Court for Warsaw's Praga Północ borough[432] – each remotely conducted a single pre-trial detention hearing, which must be assessed as a positive trend. Already during the legislative process, the HFHR raised serious objections to the laws allowing the pre-trial detention of an individual who has not been physically brought before a court[433].

427 Response dated 21 January 2021 – data for the period ending on 17 December 2020.
428 Response dated 4 January 2021.
429 Response dated 22 December 2020.
430 Response dated 10 February 2021.
431 Response dated 4 January 2021.
432 Response dated 18 February 2021.
433 https://www.hfhr.pl/zdalne-posiedzenia-w-przedmiocie-zastosowania-tymczasowego--aresztowania-sprzeczne-z-konwencja-zastrzezenia-hfpc-do-ustawy-o-doplatach-do--opercentwania-kredytow-bankowych/ (accessed on: 17.02.2021); see also *Medvedyev and Others v. France*, no. 3394/03, 29 March 2010.

3.3. Technical arrangements enabling the courts to conduct remote hearings or trials

The long-postponed digitisation of the Polish courts and the absence of relevant legislation, resulted, among other things, in the chaotic and inconsistent implementation of emergency measures by the courts in the face of the COVID-19 pandemic. This problem has manifested itself in several areas such as the receipt of letters and documents[434] and the technical aspects of the remote hearing of cases.

There were considerable variations between courts in terms of the software used to conduct remote hearings and trials. According to the received responses, the choice of software was determined by practical considerations. To a large extent, the software was freely selected, which is evidenced by the fact that in courts where more than one platform was used, the choice of a platform depended solely on the preferences of a given judge (it was indicated, for example, that some judges prefer using the MS Teams platform). At the end of 2020, more and more courts started using the Jitsi Meet application, which is currently used by 33 regional courts and almost all courts of appeal (only the Court of Appeal in Wrocław[435] indicated the proprietary software/platforms vc.wroclaw.sa.gov.pl, konferencje.wroclaw.sa.gov.pl and e-konf.wroclaw.sa.gov.pl). The second most popular platform is Avaya Scopia, which is used by six courts of appeal and 33 regional courts. The courts also use the MS Teams platform (two courts of appeal and 11 regional courts), Cisco Webex (nine regional courts), Skype (three regional courts) and Zoom (Regional Court in Legnica)[436].

3.4. Public access to remote trials

An analysis of data on public access to remote trials leads to the conclusion that also in this area no coherent and coordinated action has been taken.

434 The Foundation's reports discussing this matter are available at: https://www.hfhr.pl/wp-content/uploads/2020/04/Dostep-do-sadu-w-dobie-pandemii2-FIN.pdf; https://www.hfhr.pl/wp-content/uploads/2020/04/Dost%C4%99p-do-s%C4%85du-w-dobie-pandemii-16–04.pdf (accessed on: 3 February 2021).
435 Response dated 29 January 2021.
436 Response dated 22 February 2021.

An interested person most commonly receives an "e-trial" link or is simply allowed to appear in person in the courtroom. Some courts ensure both remote and physical access to trials.

An intermediate solution, which comprises of the audience watching the live feed of a remote hearing in another courtroom, is used by the Supreme Court[437], the Court of Appeal in Warsaw, the Court of Appeal in Katowice[438] and the District Court for Warsaw's Wola borough[439].

Notably, many of the surveyed courts pointed out that nobody was interested in observing remote trials. Many courts merely noted the existence of a such possibility without providing any further details or statistical data, which prevented a more detailed examination of the arrangements used by these courts.

Most concerningly, as many as 12 regional courts and two of the surveyed district courts reported that members of the public were unable to participate in the remotely conducted trials[440]. By failing to take any steps to ensure effective public access to proceedings, these courts seem to completely disregard the requirement of public proceedings arising from the general rules of law (the Regional Court in Konin[441] went as far as to point out in its reply that remote trials had been closed to the public due to the absence of relevant legislative arrangements). This phenomenon should be regarded as particularly dangerous, as the principle that courts proceedings are publicly accessible, which originates from the Constitution of the Republic of Poland, constitutes an additional guarantee of the impartiality of the court[442].

437 See § 4 of Order No. 130/2020 of the First President of the Supreme Court of 12 November 2020 on the manner of conducting public hearings or trials before the Supreme Court during the state of pandemic emergency or the state of pandemic announced due to COVID-19, http://www.sn.pl/informacjepraktyczne/SiteAssets/ SitePages/Organizacja_w_SN_SARS_CoV_21_v1/Zarz_PP_SN_130_2020_Covid.pdf (accessed on: 2.03.2021).

438 Response dated 21 December 2020.

439 Response dated 21 December 2020.

440 District Court for Warsaw's Mokotów burough, District Court for Łódź's Widzew, Regional Court in Jelenia Góra, Regional Court in Białystok, Regional Court in Bielsko-Biała, Regional Court in Świdnica, Regional Court in Olsztyn, Regional Court in Opole, Regional Court in Gorzów Wielkopolski, Regional Court in Zamość, Regional Court in Poznań, Regional Court in Piotrków Trybunalski, Regional Court in Konin, Regional Court in Legnica.

441 Response dated 21 December 2020.

442 P. Tuleja in: P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziewicz, P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, Commentary to Article 45.

Some courts, such as the Regional Court in Gdańsk[443], has taken note of the applicable rules of civil and criminal procedure, but leave the decision concerning the physical presence of an audience during a trial conducted over a video link dependent on the decision of the judge rapporteur, due to the risks associated with the COVID-19 pandemic.

In the case of two courts, contradictory information was provided by the court's divisions. In the case of the Regional Court in Kraków[444], the civil divisions of the court replied that members of the public may take part in remote trials, while the Labour and Social Insurance Division declared that is was impossible. A similar disjuncture occurred in the information provided by divisions of the Regional Court in Radom.

3.5. Complaints and technical problems related to the conduct of remote hearings or trials

The replies show that complaints related to the use of remote hearings or trials by the court were extremely rare.

Only four of the surveyed courts (three regional courts and one district court) received such complaints. However, it is worth noting a complaint lodged with the Regional Court in Rzeszów[445], which held a hearing during which no simultaneous connection could be made with two different prisons. Therefore, the accused held in a prison in Rzeszów was brought to court while the other accused attended the hearing over a video link from a prison in Lublin. This resulted in an allegation of unequal treatment of the accused, which led to the cancellation of the remote trial. The District Court for Łódź's Śródmieście borough[446] recorded two complaints questioning the legitimacy of the remote form of the trial.

Technical problems preventing the conduct of a trial occurred much more frequently – the regional courts indicated a total of 59 such cases, the courts of appeal – nine, while the surveyed district courts reported one case of technical problems. The above figure is relatively small compared to the overall

443 Response dated 16 February 2021.
444 Response dated 22 December 2020.
445 Response dated 21 December 2020.
446 Response dated 16 December 2020.

number of remote court hearings and trials. However, it should be noted that some courts, such as for example the Regional Court in Rzeszów, reported frequent technical problems but did not indicate the exact number of adjourned or suspended hearings or trials. At this point, it is worth referring to an observation made by the Regional Court in Rzeszów which noted that technical problems preventing the conduct of penitentiary hearings often occurred on the part of penitentiary facilities. This observation seems to be corroborated by the answers received from other courts. On the other hand, the Regional Court in Wrocław[447] (which, by 11 December 2020, remotely conducted 3,243 penitentiary hearings) informed that penitentiary hearings, conducted over an online video link between the court and the prison, are generally free from any technical problems. Moreover, one should once again note the differences that exist between the courts also in this area.

Many of the surveyed regional courts (22) declared that there was no need to interrupt or postpone a trial. However, in some regional courts such interruptions and postponements were not uncommon (e.g. the Regional Court in Gdańsk reported several such cases; the Regional Court in Koszalin declared that they were occurring "very often"[448]; the Regional Court in Elbląg reported 10 instances of an interrupted and postponed hearing[449]; and the Regional Court in Lublin informed about 18 interrupted or postponed hearings, eight of which were trial sittings[450]).

3.6. Courtrooms equipped with facilities enabling remote hearings or trials

Significant differences can also be observed among courts of the same level in terms of the number of courtrooms equipped with facilities enabling remote hearings or trials. For example, the District Court for Warsaw's Żoliborz borough has 24 such courtrooms, whereas the District Court for Warsaw's Wola borough has only one such courtroom. Even greater disparities can be noted for regional courts: on the one hand, the Regional Court in Warsaw[451] and the Regional Court in Poznań[452] has 107 and 58 appropriately fitted courtrooms, respectively, while, on the other hand, only two such rooms are located at

447 Response dated 18 December 2020, amended on 11 January 2021.
448 Response dated 27 January 2021.
449 Response dated 4 February 2021.
450 Response dated 21 December 2020.
451 Response dated 18 December 2020.
452 Response dated 29 December 2020.

the Regional Court in Płock[453] and three – at the Regional Court in Warsaw's Praga borough[454].

However, the problem of the insufficient number of adequately equipped courtrooms is to some extent mitigated by the possibility of running programmes such as Avaya Scopia, Jitsi Meet or MS Teams on any computer. However, the use of stand-alone videoconferencing platforms gives rise to another problem related to the recording of a given "e-trial". According to the information provided by courts, civil trials are usually recorded with the use of the e-transcript *(e-protokół)* system. This means that even if it is possible to remotely conduct a hearing, for example, via a portable computer running the MS Teams platform, in a situation where the judge is not in a courtroom equipped with facilities enabling the recording of the course of the hearing, the proceedings will not be recorded. Consequently, this may lead to a situation where two similar cases will be conducted based on the same procedural rules but only one will be recorded.

3.7. Training in the organisation and conduct of remote hearings or trials for judges and court personnel

Also in this area, no coordinated action has been taken. The judges and court personnel who had already received training in this area were usually instructed on an ad hoc basis by the staff of courts' IT departments.

As many as 29 regional courts and four courts of appeal have not conducted any appropriate training whatsoever. Notably, the Regional Court in Sieradz[455] indicated that despite the notification of the need for appropriate training for judges and recording clerks sent to the Ministry of Justice by the President of the Court of Appeal in Łódź no such training had been provided.

A noteworthy solution was introduced in the District Court for Warsaw's Praga Północ borough, where a special team was established to provide training to court personnel on how to handle remote hearings and trials.

453 Response dated 21 December 2020.
454 Response dated 8 January 2021.
455 Response dated 18 December 2021.

3.8. Summary

The analysis of the data obtained by the Foundation based on its public information requests indicates a lack of a uniform approach to remote hearings or trials. This leads to substantial differences between courts in many areas. "Digitisation" of judicial proceedings must not be purely legislative but rather should be combined with practical activities (including the provision of appropriate equipment and training). Still, even the legislative aspect of digitisation is marred with shortcomings, which demonstrates the need for the implementation of detailed rules governing the conduct of remote trials or hearings, instead of merely introducing rules that allow the remote conduct of proceedings. Otherwise, it will not be possible to fully exploit the potential of "e-trials" as an extremely useful tool of the justice system[456].

4. New technologies in the Polish justice system as seen by lawyers – the present state and future prospects

4.1. Introduction

A judge's desk with volumes of files, a registered letter with a court date, waiting outside the courtroom door and looking through files in the court reading room are the realities of the justice system to which we have become accustomed. Recent years and, above all, months have demonstrated that one can reasonably ask the following questions:

1. Is this the only possible reality?
2. Or maybe this is one of the possible realities?

456 In April 2021 r. Foundation made the same request to nine district courts – located in various regions of Poland – which had not been surveyed prior. Questions concerned period of time between 31 March 2020 and 1 April 2021, that is a full year of ongoing COVID-19 pandemic in Poland. The aim of the research was to compare its findings with the analysis conducted previously and to verify potential evolution of Polish courts' practice in this regard after a prolonged period of time during which remote proceedings were available. Unfortunately, as the research found, the diagnoses made up to date by the Foundation remain valid. Still, a lack of a uniform approach to remote hearings or trials can be observed. This leads to substantial differences between courts in many key areas such as e.g.: public access to remote hearings, software used to conduct them or how and when the recordings of "e-trials" are being archived. Furthermore, vast majority of the courts surveyed in April hold remote hearings or trials sporadically and there is almost no court among them in case of which an upward trend of exploiting the discussed option occurs.

The above elements of the everyday routine of the courts prompt us, above all, to consider the more technical aspect of the courts' work, which may nevertheless have a direct impact on citizens' access to justice, as well as on the fairness of court proceedings.

This report, apart from analysing the current state of the judicial use of new technologies, will place a special emphasis on the possible and desirable directions of the development of digitisation of justice system bodies. Further discussion is based on the assumption that whenever new solutions are proposed or existing legal frameworks are evaluated, it is essential to take into account international and constitutional standards of procedural fairness as well as the opinions of stakeholders involved in the justice system at various stages of its operation. Their voice must be heard as legislators often fail to recognise and consider their – often differing – views, which results in new solutions not being applied in practice and remaining merely theoretical legal constructs.

4.2. Methodology

The starting point for the discussion will be answers provided as part of a survey. Due to the above circumstances, the survey was conducted among judges, lawyers (*adwokaci* and *radcowie prawni*) and prosecutors.

The survey was based on a standardised questionnaire focusing on three key areas:

- the assessment of the current state of implementation of technologies in courts;
- the impact of the coronavirus pandemic on the introduction of new solutions using tools for the remote or hybrid functioning of the justice system;
- the future of new technologies in justice.

The survey **was made available online from 25 March 2021 to 25 April 2021** and disseminated with the support of professional organisations and associations of legal practitioners.

4.3. Survey determinants

Before proceeding to the detailed presentation of survey results, a brief summary of factors that may have directly or indirectly influenced respondents' answers is in order.

The results may have been influenced primarily by the fact that the research was conducted during the third wave of the coronavirus pandemic, which severely affected Poland. During the period in question, further restrictions were placed on the functioning of the courts[457], which were already facing a growing backlog due to the pandemic that had already lasted for a year. According to a study conducted by the HFHR, "*already in March 2020, the number of trials/hearings held in regional courts was lower compared to March 2019. For example, in the Regional Court in Warsaw 1,160 trials/hearings were held in March 2020 as compared to 2,863 in March 2019. Importantly, the largest decrease in the number of trials/hearings was recorded in April and May 2020. In many courts, no cases related to labour and social insurance law or commercial law were heard. As regards civil cases, in April 2020, the Regional Court in Warsaw conducted only 7 trials/hearings in civil cases as compared to 2,889 (i.e. 412 times more) trials/hearings held in April 2019. A similar situation occurred in the Regional Court in Poznań, where only 32 civil trials/hearings were conducted in April 2020, while the figure for the Regional Court in Wrocław was 55.*"[458] Undoubtedly, this state of affairs has had an impact on the work of practitioners appearing in different roles in the courtroom and, consequently, also influenced their assessment of non-standard technology solutions used in the judicial process.

The study coincided with the widely discussed proposals for changes in the civil procedure, according to which, inter alia, that court correspondence during the pandemic and one year after its end would be directed to an e-mail address of the legal representative and would be considered served on the next day after it was entered into the electronic system[459]. In the course of

457 For example, in accordance with orders of the President of the Regional Court in Warsaw Nos. 205/2021, 213/2021 and 218/2021, due to the increasing epidemiological risk, trials and public hearings in civil, family and commercial divisions of the Regional Court in Warsaw have been held, as a rule, remotely since 24 March 2021.

458 HFHR, *Sądowy kalendarz w dobie lockdownu,* https://www.hfhr.pl/wp-content/uploads/2020/10/covid-s%C4%85dy-cz-3–08-10–2020-v2.pdf (accessed on: 6.04.2021).

459 Proposal of an act amending the Code of Civil Procedure and certain other acts (Sejm Paper No. 899).

legislative works, another solution was found, according to which service would be deemed to take place after 14 days[460].

The respondents' approach may have also been influenced by the way the legislative process was conducted during the pandemic and by the changes it introduced to the justice system[461]. Additional factors that must be noted are the lack of confidence in the reforms of the justice system implemented in recent years by the Ministry of Justice and the resulting crisis of the rule of law.

The opinions expressed by the respondents may also have been a consequence of the excessive length of proceedings, a long-standing unresolved problem[462] that has only deepened in recent years. According to the latest data from the Ministry of Justice, over the last five years, the average duration of proceedings before a court of the first instance increased from about 4 months to nearly 7 months. In the case of regional courts, civil cases are on average resolved within 9 months, while the average duration of criminal cases is over 8 months. The average duration of civil and criminal cases pending before district courts is 7+ months and 4+ months, respectively[463].

Responses obtained from the surveyed judges may also have been influenced by other circumstances related to the daily operations of the courts and, in particular, by understaffing caused by unfilled judicial vacancies and an insufficient number of judicial clerks. According to press publications, the number of judicial vacancies at the end of 2020 was 1048[464].

The perception of the needs related to the digitisation of justice could undoubtedly also have been influenced by the widespread use of remote work in Polish public administration, education as well as the private sector during

460 Act of 28 May 2021 amending the Code of Civil Procedure and certain other acts (Journal of Laws of 2021, item 1090).

461 For a more extensive discussion on this topic, see e.g. J. Gwizdak, W. Wiaderek, *Ustawodawstwo okresie pandemii a wymiar sprawiedliwości i prawa obywatelskie*, https://www.batory.org.pl/wp-content/uploads/2021/03/Tarcze.antykryzysowe.a.wymiar.sprawiedliwo%C5%9Bci.i.prawa_.obywatelskie.pdf. (accessed on: 14.04.2021).

462 For more information, see https://www.hfhr.pl/wp-content/uploads/2021/02/Raport-przewleklos%CC%81c%CC%81–02-14–1.pdf. (accessed on: 14.04.2021).

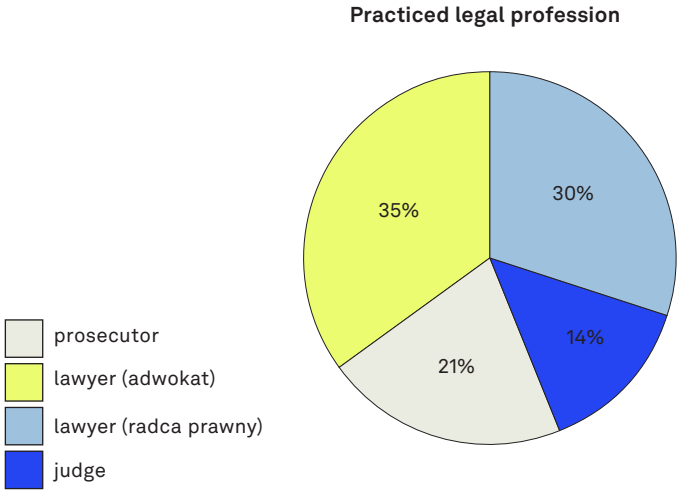
463 Ministry of Justice, https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

464 https://www.prawo.pl/prawnicy-sady/wakaty-w-sadach-sedziow-mniej-wieksze-zaleglosci-dane-z-2020-r,506970.html. (accessed on: 14.04.2021).

the coronavirus pandemic, and the respondents' personal experiences in this regard[465].

4.4. The test sample

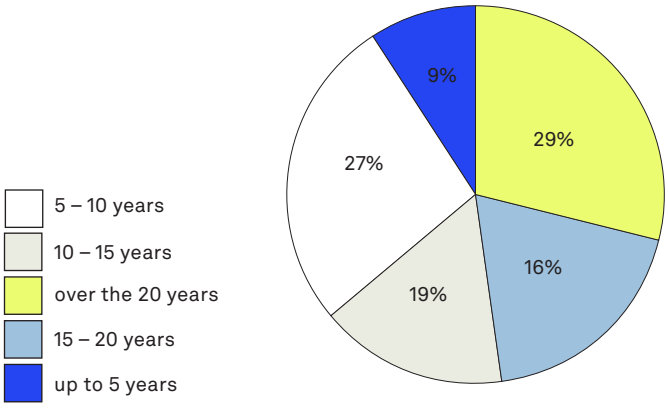
As indicated above, the survey aimed to obtain opinions on the digitisation of the justice system from practitioners of different legal professions. The analysis of the responses received shows that this preliminary objective has been attained. This is because 202 persons responded to the Foundation's invitation to participate in the survey. By far the largest groups of respondents were *adwokaci* (79 respondents) and *radcowie prawni* (62 respondents). However, the conducted survey has managed to take into account the perspective of other legal professionals, including prosecutors (35 respondents) and judges (26).



The vast majority of the respondents based their observations on long-term experience. Nearly 30% of respondents have more than 20 years of professional experience (29%) and 16% have been practising law for a duration of 15–20 years. However, the study conclusions are more reliable since different respondents started their professional practice at different stages of the introduction of IT tools to the work of courts and lawyers.

465 See T. Zalewski, *Wyniki ankiety przeprowadzonej przez Komisję LegalTech OIRP w Warszawie w okresie styczeń-marzec 2021 r.*, https://www.oirpwarszawa.pl/speed-date-z-legal-tech-2/. (accessed on: 14.04.2021).

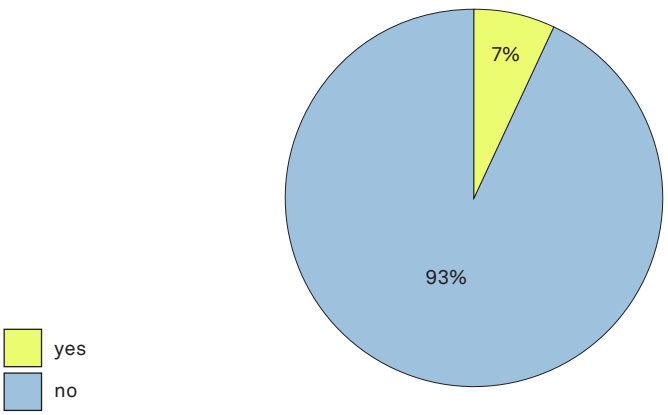
Professional experience (including the period of professional training/apprenticeship)



4.5. New technologies – a remedy or a nuisance for practitioners and legislators?

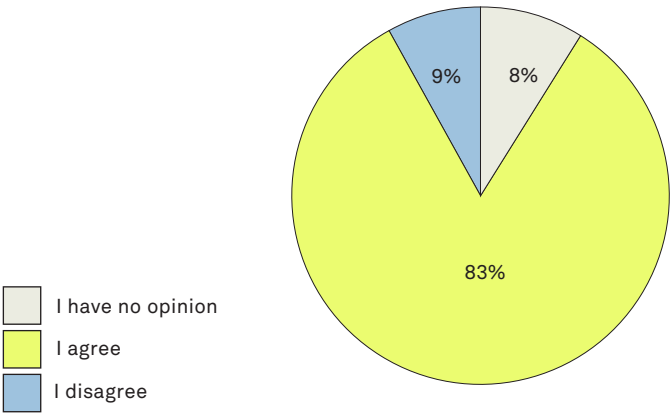
According to practitioners, the Polish justice system does not adequately use new technologies (over 93% of the respondents). Only about 7% of the respondents were of the opposite opinion. It is particularly worth noting that all the judges who took part in the study pointed to shortcomings in this respect.

Does the justice system in Poland make sufficient use of new technologies?



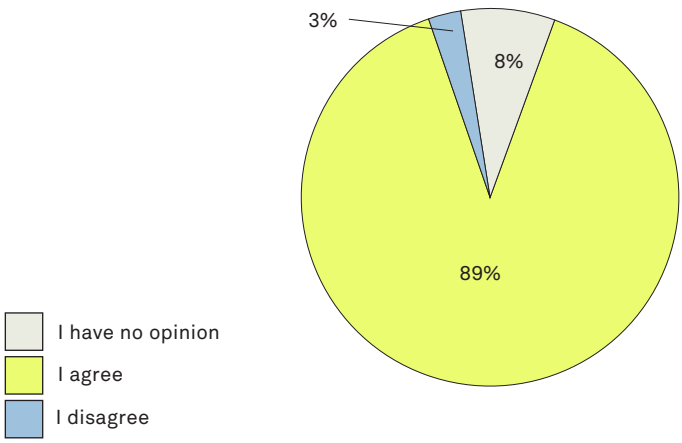
A slightly smaller group agreed that the justice system has not kept up with the development of new technologies. This disproportion is probably due to the fact that nearly 8% indicated that they did not have an opinion in this respect.

The justice system has not kept up with technological developments



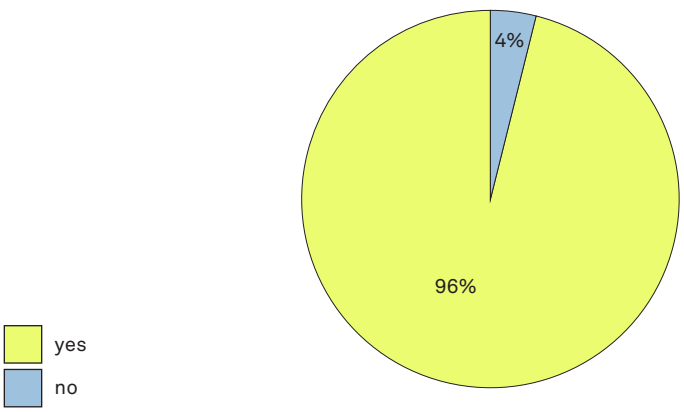
The respondents held similarly unfavourable views when assessing the legislator's consideration of technological changes during the reform of the justice system. The vast majority, almost 90% of them, claimed that the changes introduced during the legislative process have not kept pace with the development of technology.

Legislators fail to keep up with technological developments in reforming the justice system



At the same time, a substantial group, i.e. as many as 96% of the respondents, stated that the implementation of technology-based solutions could improve the functioning of the justice system. It is worth mentioning that all the judges surveyed agreed with such a diagnosis and forecast for the future.

Could new technologies improve the functioning of the justice system?



The practitioners pointed out that new technologies may, to a certain extent, be an opportunity for the justice system and an answer to the problems they have faced in their everyday work for years. In their view, the potential of innovative and digital solutions could lead, in particular, to:

- speeding up proceedings (since it will no longer be necessary to wait for an accessible courtroom and there will be no court calendar conflicts, also the service of documents between the court and the parties will run faster and persons who are not in court will be able to attend court hearings);
- rationalising the use of time by the adjudicating panel (e.g. by dividing cases into the ones that require a hearing in the traditional sense and those that can be heard online), but also rationalising the time of lawyers and parties (as a result of the digitisation of files and the possibility of viewing them outside the court building);
- rationalising the use of time by court staff (especially if the information portal becomes more functional);
- simplifying the handling of cases;

- cost savings (both for the State Treasury and for parties to proceedings, witnesses and lawyers);
- facilitating and speeding up communication with the court, as well as its de-formalisation to a certain extent;
- enabling the parties and witnesses to be heard remotely without the need for legal assistance.

However, of all the above responses, the respondents mentioned the speeding up of proceedings first.

Among the threats that may be associated with the wider use of new technologies in the judiciary, the respondents named mainly:

- insufficient IT systems security, which may lead to unauthorised access to case files, including transcripts of court hearings;
- limiting the availability of the court but also the effectiveness of participation in proceedings due to digital exclusion among parts of the populations or lack of adequate digital skills;
- technical problems (in particular connection breakdowns during e-trials or e-hearings, a lack of full synchronisation, which causes communication difficulties, problems with the delivery of judicial correspondence);
- lack of predictability regarding the quality of the connection, which may significantly affect the duration of a hearing (a need for extension of the hearing) or, on the other hand, make it necessary to terminate it early, which results in disorganisation of the court's work;
- the possibility of manipulating testimonies primarily due to a lack of possibility of their verification, which possibility is relied on by the person participating in a [traditional] trial/hearing, simulation of technical problems, the possibility that persons who could impact on testimonies are present in a room where the suspect or witness testifies, in the absence of such awareness on the part of the court;
- restricting the principle of direct examination of evidence by the judge;
- an increased risk of disclosure of confidentiality as well as of privacy of the parties;
- shifting a large part of the responsibilities on legal representatives/defence lawyers;
- access to all case files by the Ministry of Justice;
- a breach of procedural guarantees (in particular in criminal proceedings)

- inability to fully implement the principle of public access to court proceedings to ensure social control over the justice system;
- violation of the principle of equality;
- enhancing the routine of proceedings and schematisation of evidence;
- reducing the dignity of the court and the resulting inability to control participants in proceedings;

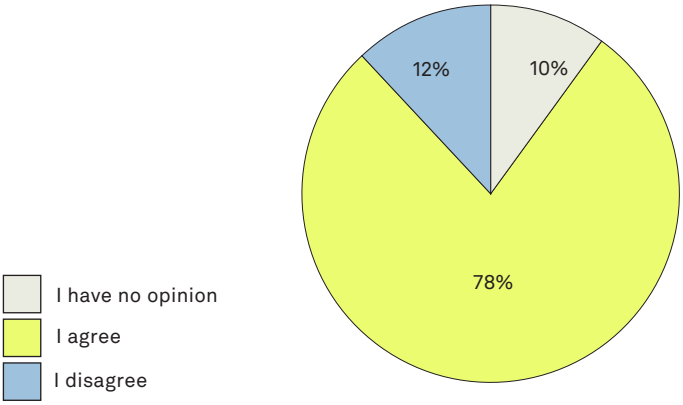
In the case of algorithm-based solutions, the main objection raised was the possibility of a distortion of the adjudication process.

Concerns were also raised about the possible way in which the legislator might implement new solutions in the justice system without taking into account the perspectives of practitioners, as well as the subsequent lack of technical and training support for both judges and parties to proceedings. Doubts were also raised as to the quality of the solutions that the Ministry of Justice would opt for and the rules for subsequent updates, which are inextricably linked to digitisation.

4.6. New technologies in the justice system – can they be assessed using the zero-one method?

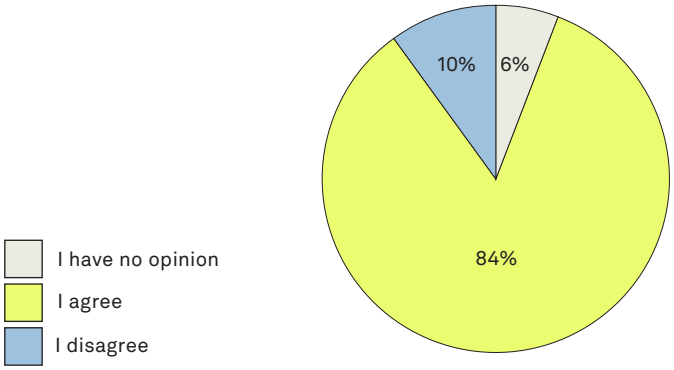
The above comparison of opportunities and threats resulting from the introduction of new solutions suggests that the group of respondents includes both supporters and opponents of greater digitisation of the justice system, as well as people who can be classified as moderate supporters or opponents. The above thesis is proved by the fact that the significant majority of respondents agreed with the statement that new technologies are the future of the justice system. Only 11.9% of the respondents took the opposite view. A rather substantial group of the respondents admitted they had no opinion on the issue. This may suggest that either they do not know in which direction the computerisation of the justice system could go, or this statement is too much of a generalisation for them.

New technologies are the future of justice



An even larger group of the respondents (84.2%) admitted that technological solutions can facilitate access to a court. Around 10% of the surveyed disagreed with this statement.

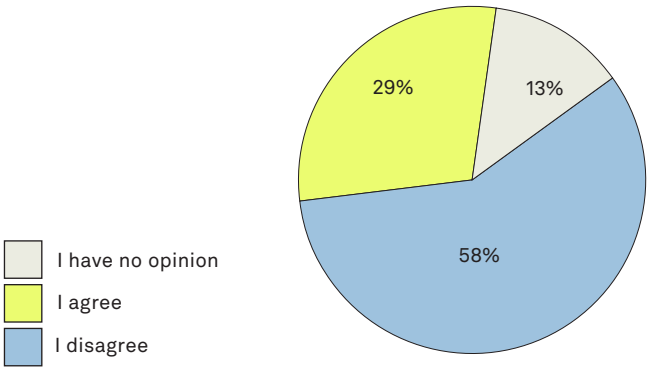
The court's use of new technologies (including remote trials, electronic communication) can improve access to courts



No such consensus could be noted when assessing the statement that the court's extensive use of new technologies (including remote trials, electronic communications) may hinder access to a court for persons not using legal representatives. Although more than half of the respondents, 64%, agreed with this statement, over 22% of them opposed this approach. This number too may suggest that the advantages of accessibility of the justice system associated with greater use of means of distance communication are more palpable than the threats associated with it.

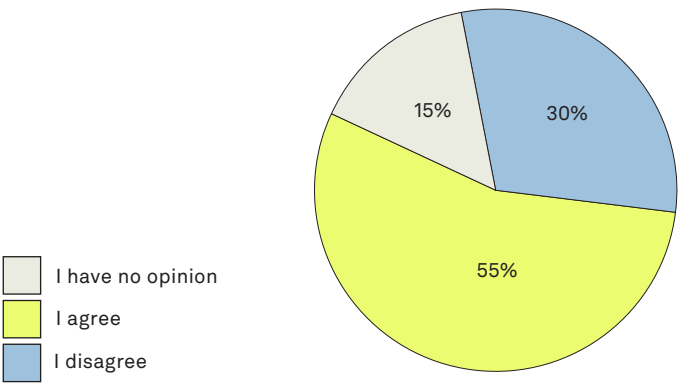
Despite the strong belief of the respondents in the possibilities offered by the increasing digitisation of the justice system, it seems that they may see some limits in this process. More than half of the respondents (57.4%) did not agree with the opinion that courts conducting proceedings entirely online were the future of the justice system.

Courts conducting proceedings entirely online are the future of justice



A sceptical attitude towards such a forecast did not translate directly into an assessment of the ability of proceedings conducted entirely online to meet the requirement of fairness. In this respect, more than half of the respondents agreed with the statement that a court conducting proceedings entirely online could still be a fair and just court.

A court conducting proceedings entirely online can still be a fair and just court



4.7. Coronavirus pandemic – an opportunity or a threat to the effective implementation of new technologies in the justice system?

The general and fairly broad wording presented above had to be compared with the previous professional experiences of the respondents. Given the time at which the study was carried out, it is extremely important to identify what aspects of the functioning of the justice system seemed particularly problematic for lawyers at that time and whether technological solutions could be the answer.

In the respondents' opinion, the biggest problems were:

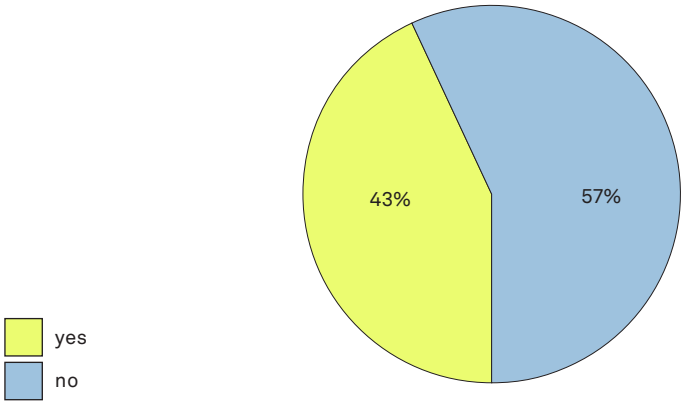
- no access to case files;
- no uniform measures applied in courts in respect of access to court;
- increasing the length of court proceedings.

Consequently, among the problems of a technical nature, lawyers considered the following to be particularly problematic:

- no digitisation of files;
- restricted use of remote hearings/trials by courts;
- no possibility of submitting pleadings by e-mail;
- difficulties in distance communication.

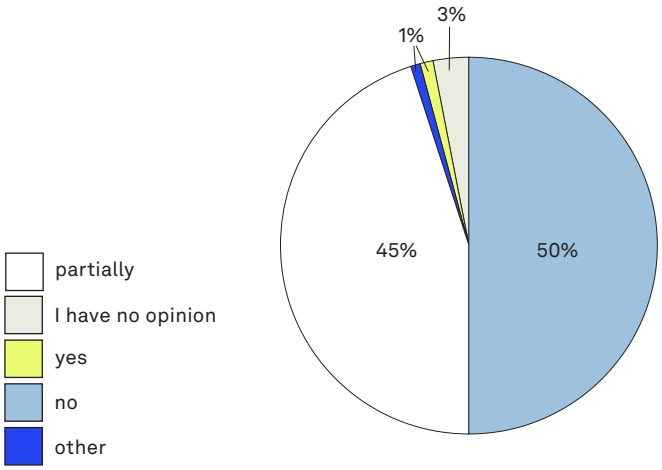
These answers prove that the justice system was not prepared for far-reaching changes in its functioning when the pandemic broke out. Although almost 43% of respondents said that the pandemic accelerated the digitisation of the justice system, nearly 60% of respondents expressed a different opinion.

Has the coronavirus pandemic accelerated the digitisation of justice?



The assessment of recent modifications made by the legislator was also ambiguous. The largest group of respondents (50%) considered that the lawmakers had failed to adequately address the needs of practitioners. However, a substantial number of respondents (45%) indicated that the changes adopted during the pandemic only partially addressed relevant practical requirements.

Have the legislative changes made during the coronavirus pandemic met the needs of the practitioners?



4.8. First steps – evaluation of existing solutions using new technologies

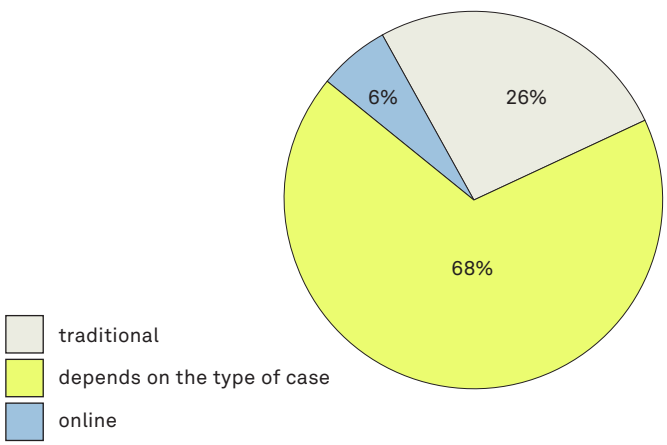
Although the current state of digitisation of the justice system is not advanced, as highlighted by the practitioners who participated in the study, there are areas where we observe some beginnings of using tools based on IT achievements.

a. E-trials

Currently, when we think of technology in the justice system, remote trials come to mind first. Although experts in new technologies and the IT industry protest against equating new technologies with hearings conducted via popular applications and programmes, it is worth mentioning that it is this institution that has changed the image of the justice system to the greatest extent in recent months.

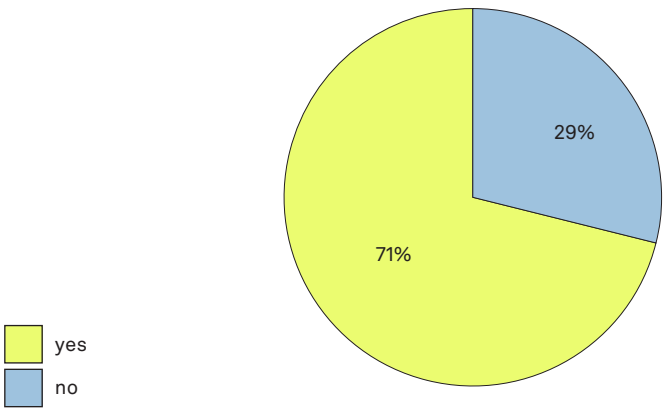
A majority of respondents, i.e. nearly 70%, indicated that it is the type of proceedings that determines the preferred form of a court hearing. However, slightly more than 25% of them claimed that they opt for the traditional way of holding hearings and trials.

What type of judicial proceedings do you prefer?



However, according to more than 70% of the respondents, it is possible to identify cases in which online hearings should not be chosen.

Do you think there are areas/categories of cases where remote trials should never be used?



Criminal, family and guardianship cases were most often included by respondents in this category of cases. However, as regards criminal cases, the answers concerning the extent to which a possibility of remote hearing should be excluded varied widely. Some respondents stressed that remote proceedings should be excluded in their entirety in the case of criminal proceedings, but in the opinion of many respondents, such a reservation should primarily cover cases concerning the most serious offences carrying long--term sentences, cases in which the accused is deprived of liberty, as well as hearings in the matter of pre-trial detention.

Some respondents pointed out that the extent to which remote trials can be conducted and relevant restrictions should be regulated by a code to ensure that there is a uniform standard in this respect.

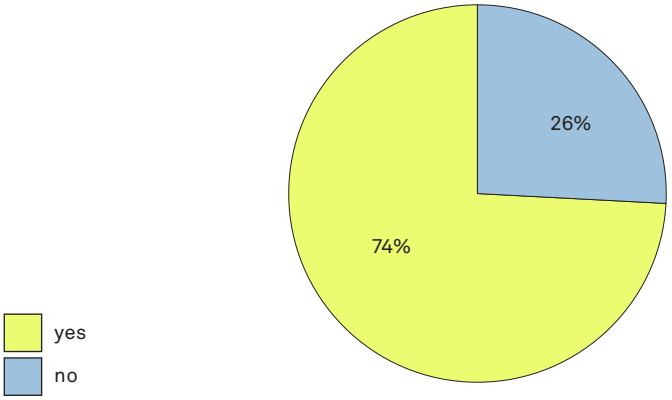
The following circumstances should be considered as grounds for a denial of the request for an online trial or issuing a decision not to conduct an online trial:

- a risk of influencing witness testimony;
- doubts as to whether the party/a witness will be provided with a comfortable, safe environment for testifying;

- a lack of skills and technical infrastructure on the part of the parties to the proceedings;
- the multi-faceted nature of the case;
- the involvement of many parties and/or witnesses.

On the other hand, we asked the respondents whether there were categories of cases in which the potential of remote hearings could be used on a wider scale and as many as 74% of them said yes. By far the most respondents indicated commercial cases and uncomplicated civil cases (and some even all civil cases) as fitting into this category.

Are there categories of cases where judges should use remote trials more often?

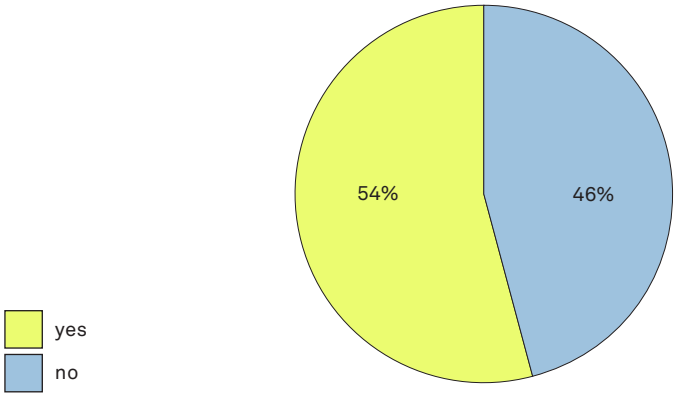


Due to the coronavirus pandemic, some of the respondents have undoubtedly already had the opportunity to participate in remote trials. According to the data collected by the HFHR, there are courts in which this form has become increasingly common over the last year[466].

The majority of the respondents said that remote trials conducted in the age of the coronavirus fulfilled their functions. However, as many as 45.5% were of the opposite opinion. The proportions of responses were very similar for all occupational groups.

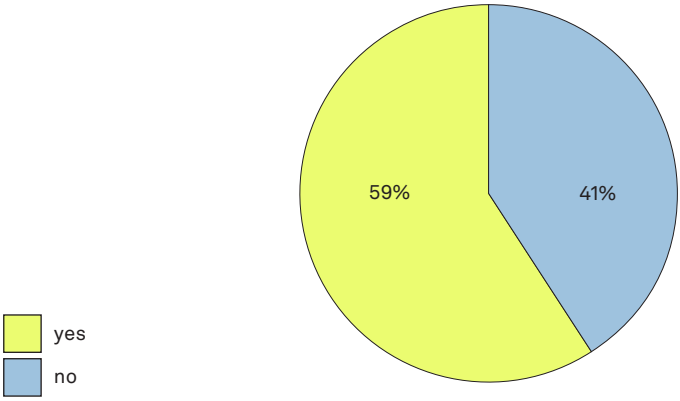
466 For more information, see HFHR, *E-rozprawy w polskich sądach. Jak pandemia Covid – 19 wpłynęła na pracę polskich sądów*, https://www.hfhr.pl/wp-content/uploads/2021/03/E--rozprawy_Analiza.pdf.

Do remote trials conducted in the age of the coronavirus serve their purpose?



There is also no doubt that one important aspect affecting the assessment of the fairness of legal proceedings is the possibility of effective defence or representation. There are concerns that a change in the form of hearings from traditional to remote may affect this aspect of the procedure. According to nearly 60% of the respondents, the online form makes it more difficult for a lawyer to be in contact with their client[467]. It is worth adding that public opinion has been particularly concerned about the potential impact of such a restriction on the course of criminal proceedings. The starting point was, first of all, the regulations introduced in the Code of Criminal Procedure and the regulations regarding the participation of a defence lawyer in pre-trial detention proceedings.

Does the remote conduct of trials impede lawyer's communication with the client?



467 The distribution of responses was the same for all occupational groups.

As a side note, respondents pointed out that the current lack of digitisation of files and the resulting inability to show a particular page to a party during a hearing is a significant impediment.

b. Portal for legal representatives

One of the most important elements affecting the day-to-day functioning of courts and lawyers is the way they communicate with each other. The difficulties in this respect were particularly reported during the coronavirus pandemic. These as well as previous experiences led as many as 69% of the respondents to believe that the portal for legal representatives should be supplemented with new functions, and many suggested its deeper remodelling. Lawyers were more unanimous with as many as 88% of the surveyed members of this group expressing this opinion.

Among the specific demands raised by lawyers were mainly those concerning:

- creating a single coherent system for all courts;
- allowing for access to court files through the portal;
- adding the functionality of sending and receiving correspondence through the portal;
- introducing a more modern and intuitive structure.

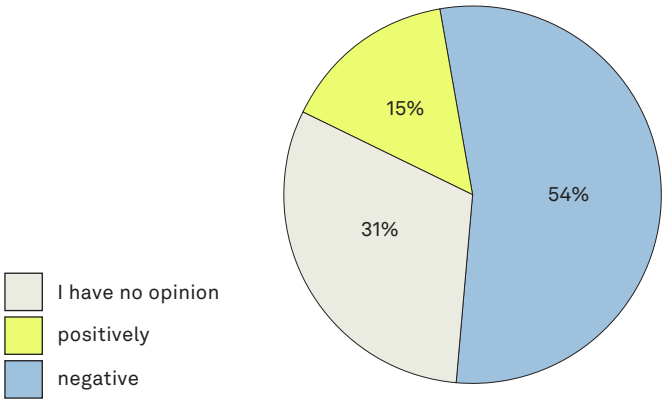
Among the concerns raised by legal representatives was the issue that new functionalities added to the portal may lead to its very intensive use, which, in the absence of sufficiently advanced solutions, may in practice result in interruptions in its operation or even complete paralysis.

c. Random allocation system

One of the mechanisms operating within the Polish justice system in recent years, which is closely related to new technologies, is the system of random allocation of adjudicating panels. It was introduced into the Polish legal system by the Regulation of the Minister of Justice of 18 June 2019 – Common Courts Working Rules and Regulations (*Regulamin urzędowania sądów powszechnych*) (Journal of Laws item 1141).

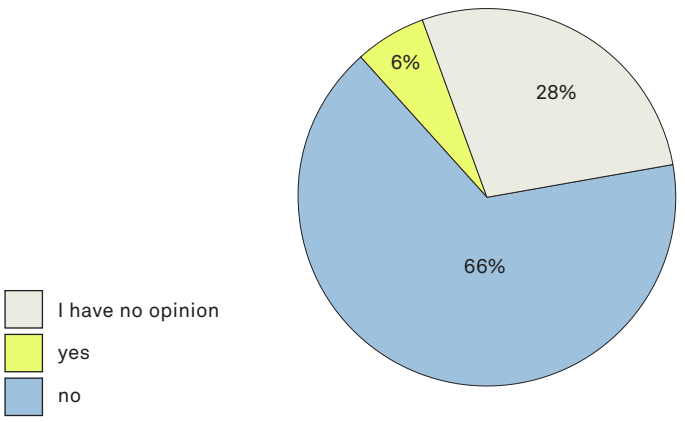
Over half of the respondents assess it negatively and only 14.7% are of the opposite opinion. A large group of the respondents, as many as 31% do not have an opinion on this. It is worth noting that the surveyed judges had a stronger opinion on the subject because 73% of the responses received from this group of respondents were unfavourable.

How do you assess the functioning of the system of random allocation of judicial panels?



An even larger group, over 67% [of the respondents], said that the system did not work transparently (with 80% of the judges giving the same response). Only 5.4% of the surveyed were of the opposite opinion.

Is the way in which the system of random allocation of judicial panels works transparent?

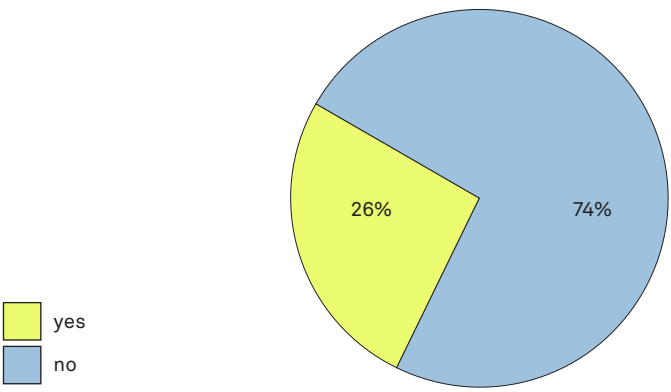


4.9. Preparation for the technological transformation within the justice system

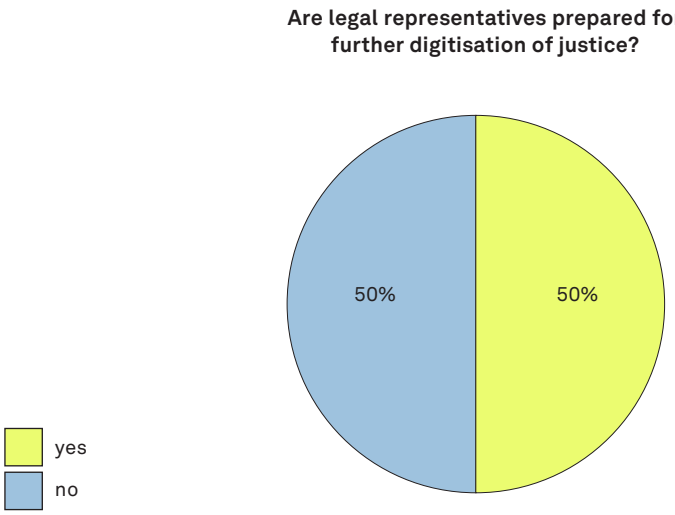
As already indicated at the beginning of the study, most respondents believe that new technologies are the future of the justice system. Observation of changes taking place in other countries also justifies this belief. Moreover, the number of problems faced by the Polish justice system also encourages the search for new solutions, including those that make use of technological developments. This makes it reasonable to ask how lawyers assess their current preparation for these processes and whether they identify obstacles that should be taken into account.

According to over 73% of the respondents, judges are not prepared for further digitisation of the justice system. A similar belief was also expressed by the judges surveyed. Of these, 42% stated they were ready for the transition process in this area. A similar number of the surveyed prosecutors (65%) claimed that judges did not have the skills required to advance the process of judicial digitisation. Lawyers (members of the professions of *adwokat* and *radca prawny*) were even more critical in their assessment: as many as 79% of the respondents from these professional groups considered that judges were not prepared for digitisation changes.

Are judges prepared for further digitisation of justice?



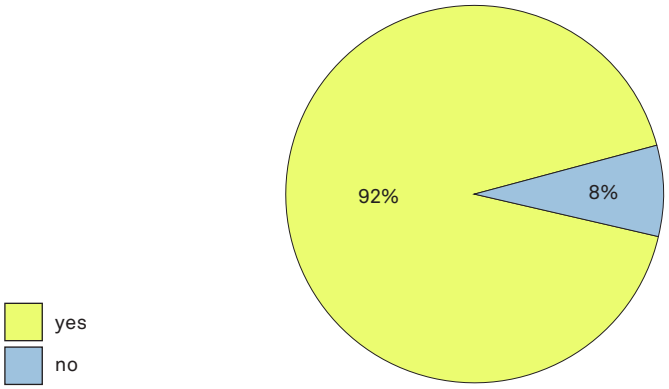
Respondents were more divided in their opinions regarding the preparation of legal representatives. According to 46% of the surveyed lawyers, their professional environment is not prepared for further digitisation measures. Interestingly, 59% of the judges expressed a negative opinion on the digitisation preparedness of lawyers.



However, it is worth noting that it is not only the skills of lawyers that will determine the effectiveness of new solutions and the possibility of gradually expanding their use, and above all their compliance with the standards of access to a court. In many cases it is more important to prepare the parties to proceedings for the changing conditions of the courts so that a change in the form of a hearing does not reduce the procedural guarantees and fairness of the proceedings, but, on the contrary, increases their accessibility. In view of similar concerns, more practical instructions for participants in proceedings are being developed in some countries to explain to them step-by-step the rules under which such a hearing will take place.

In the opinion of the vast majority of the respondents (over 90%), such a guide should be developed also in Poland. All the judges were in favour of such a solution. Experience from other countries has shown that such guides should be written in an accessible way, taking into account the different levels of skills of participants in proceedings. At the same time, they should be easily accessible to the general public and should contain information that is useful irrespective of the court before which a hearing will take place.

Would it make sense to prepare a guide for litigants explaining what an online trial might look like?



A circumstance that must also be taken into account by both the legislator and the judges is the digital exclusion of part of the society. According to the Polish Central Statistical Office, in 2019 13.3% of households in Poland did not have access to the Internet[468], and in 2020, 9.6%[469]. Although this percentage decreases each year, it is still significant and cannot be ignored. Moreover, it is necessary to take into account the lack of basic computer and Internet skills[470].

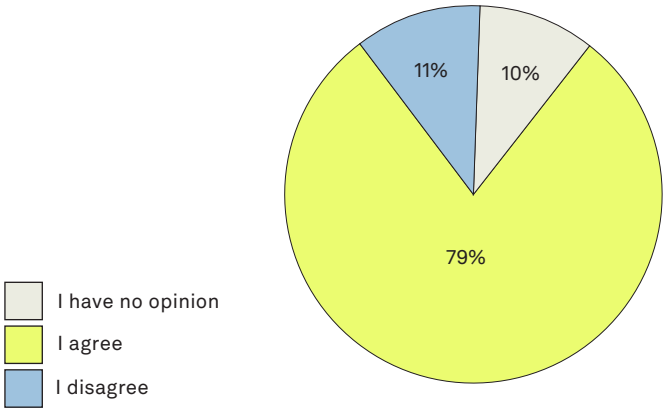
Already when respondents answered the previous questions it was indicated that they are aware of this problem. This is confirmed by the response to the question of whether respondents agree with the statement that digital exclusion in Poland still hinders the introduction of mandatory online courts. More than 78% of the responses agreed with this view. On the other hand, 52% of the lawyers who took part in the survey did not agree with the statement that the level of digital exclusion in Poland should argue for a slower implementation of new technologies in courts. The opposite opinion was expressed by more than 35% of the surveyed lawyers.

468 Główny Urząd Statystyczny (Central Statistical Office), *Społeczeństwo informacyjne w Polsce w 2019 r.*, *informacja sygnalna z 24 października 2019 r.*, https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5497/2/9/1/spoleczenstwo_informacyjne_w_polsce_w_2019_roku.pdf (accessed on: 17.09.2020).

469 Główny Urząd Statystyczny, *Społeczeństwo*..., p. 132.

470 See e.g. B.R. Hough, *Let's Not Make It Worse: Issues to Consider in Adopting New Technology* in: J.E. Cabral et al., "Using Technology to Enhance Access to Justice", *Harvard Journal of Law & Technology* 26 (1), 2012, p. 264.

Digital exclusion in Poland is still a problem that precludes the introduction of mandatory online courts



4.10. Summary

The findings of the study and the conclusions that can be drawn from them can be based on three slogans, which can be a kind of signposts for the process of further implementation of changes. CHALLENGES – PERSPECTIVES – GOALS.

CHALLENGES

The responses of the surveyed show that lawyers, for the most part, believe that the introduction of new technologies is necessary for the justice system to and is a natural consequence of the changing social and legal reality, and may be the only answer to the challenges that the justice system is currently facing. This need has been particularly highlighted by the coronavirus pandemic and the necessary transition of lawyers to remote or hybrid working modes. The up-to-date problems of the justice system, including delays in digitisation, have become increasingly acute during this period and were encountered at various stages of contact with courts.

PERSPECTIVES

Many respondents recognise the potential that comes with implementing solutions using more advanced technologies than before, but, at the same

time, they believe that certain limits should be imposed on full computerisation and, above all, the automation that may be its further consequence. Research shows that when designing such changes, it is necessary to take into account the perspectives of different professional and social groups and factors such as digital exclusion, diverse digital skills, availability of legal representatives in society, procedural guarantees, support for lawyers and parties to proceedings during this transformation.

GOAL

The research shows that digitisation should be carried out first in three areas:

- court communication with legal representatives/parties to proceedings;
- managing case files and making them available to the parties;
- conducting remote or hybrid hearings.

In conclusion, the justice system, like other areas of state activity, needs to adapt to the new conditions. In the case of the justice system, the use of innovative solutions is not only a sign of the times but also a necessity. However, as regards courts (common, administrative as well as the Supreme Court) new solutions should serve not only as a means to increase efficiency and generate image benefits but also, or perhaps above all, to ensure that the rights of litigants are guaranteed by the conducted proceedings. Accordingly, the digitisation of the justice system should be designed to serve a purpose and not implemented merely so that the system can be labelled “modernised”.

IX.

Recommendations, or finding the balance between tradition and innovation

RECOMMENDATIONS TO THE LAWMAKERS

PRE-LEGISLATION STAGE

- A comprehensive agenda of reforms aimed at modernising the judicial system with the use of modern technologies should be developed.
- Digital exclusion should be measured at the national level and measures should be put in place to ensure that the digitisation of justice does not discriminate against digitally excluded persons.
- Organisations representing persons with disabilities should be consulted about the needs of persons with disabilities in terms of access to a court.
- Professional associations of lawyers, judges and prosecutors should be consulted on what needs to be done based on their current practice in using new technologies.

LEGISLATION STAGE

- The rules of conducting remote trials in specific types of court proceedings should be set out in compliance with international standards of the right to a court; in particular, the following aspects should be addressed:
  - types of cases not eligible for disposition by means of a remote trial;
  - guarantees of confidential communication between participants in a remote trial and their legal representatives;
  - public access to remote trials;
  - rules for dealing with technical failures;
  - data protection;
  - setting out clear rules on the recording and archiving of recordings of remote trials.
- Introduction of any further reforms (e.g. the creation of online courts conducting only remote trials, development of electronic means for the exchange of communications between courts and litigants, etc.) should be preceded by a pilot programme designed to identify areas where further work and improvements are needed.
- Parties to remote proceedings must be enabled to communicate securely with the court, which should include the possibility of lodging procedural documents and receiving correspondence from the court by electronic means.

- Parties should be provided with remote access to case files in all types of proceedings through a single central web portal.
- New solutions should be introduced to cater for the needs of persons with disabilities and use modern technologies to facilitate their participation in legal proceedings and communication with the court.

RECOMMENDATIONS TO THE EXECUTIVE

ORGANIZATIONAL AND TECHNICAL ISSUES

- Courts throughout the country should have equal access to the hardware and software necessary to improve judicial proceedings, including that enabling the conduct of remote trials.
- Communication conducted within the justice system should be adequately protected against the risk of malicious interference.
- Websites of courts should be transparent and contain all necessary information presented in a manner comprehensible to non-lawyers; such information should be accessible for persons with disabilities.
- The electronic case list system should be improved; all electronic case lists operated by individual courts should function and contain correct information and, for remotely conducted cases, include information on the implementation of the principle of public hearing;
- The system of electronic databases of court decisions should be improved; steps should be taken to ensure that all courts in Poland enter their judgments in the databases and the database contents should be easily searchable with the use of filters such as keywords, legal acts, etc.
- Websites of courts should include online chat features for better communication with the staff of Customer Service Desks.

DISSEMINATION OF INFORMATION

- Judges should receive training on the use of new technologies.
- Litigants, legal representatives and judges should have access to guidebooks on remote trials and the use of new technologies in communication with the court.

RECOMMENDATIONS TO THE JUDICIARY

- Parties to remote trials should be enabled to participate freely in the proceedings.
- Litigants should have access to appropriate technology tools enabling them to participate effectively in the proceedings both at the beginning of the remote trial and throughout its entire duration.
- Steps should be taken to ensure that the remote conduct of proceedings does not infringe the principle of public hearing; members of the public should be allowed to observe remote trials with the use of existing technology tools.

RECOMMENDATIONS TO BAR ASSOCIATIONS

- Training on remote trials should be provided on a regular basis.
- Legal practitioners should receive day-to-day support in adapting to technological changes in justice.
- Bar associations should monitor the impact of implemented solutions on the practical implementation of the right to a fair trial and effective defence/representation.

Concluding remarks

Concluding remarks

As this report shows, turning one's back on new technologies is obviously a bad idea. Sooner or later everyone will have to look them in the face anyway, and even ask them for help to address other maladies of this world (like the coronavirus). Technological developments should be viewed as new tools that we must be able to use to the best of our ability for the purposes of our choice. It is widely known that each tool itself somewhat shapes the work done with the use of that tool. Naturally, this is also true of the new justice technologies. Therefore, the question must be asked: is it possible to use technological advances in the justice system in such a way that the essence of justice – fairness and equity – is not lost along the way? Undoubtedly, the above question can be answered in the affirmative. However, let us not forget that new technologies should be applied with the full awareness of their advantages and disadvantages and that the latter should be corrected in a flexible way.

For some technological innovations, the advantages so far outweigh the disadvantages that their widespread use in the courts does not seem to raise any doubts. Such dilemmas do not seem to be caused by the need, or perhaps even the necessity, to digitise judicial documents so that they can be easily accessed. The same applies to the digitisation of court communication with the litigants. In contrast, the most controversial issues seem to be trials conducted entirely online and the use of tools based on artificial intelligence. AI tools are very rarely used but are still vehemently criticised. In several cases described in this report, the use of AI tools has even been abandoned. AI is most often accused of making incorrect – and often discriminatory – initial assumptions.

As far as e-trials are concerned, it seems that their widespread dissemination should be preceded by a number of reflections.

First, any fundamental rules governing the introduction of online trials should clearly distinguish between an ideal model and an imperfect practice. This means that while the state-of-art technologies used in experimental conditions may work perfectly, one should remember that they will be used on a massive scale in a standard reality. The realities of justice often involve the lack of appropriate skills on the part of judges and other participants in the judicial process, but also low-end hardware, inappropriate software,

inability to react to the "strange" behaviour of the apparatus, etc. An idealist would of course say that over time such obstacles can be resolved and will not impede the use of modern technology (see Recommendations). As solid as this argument is in the long term, one must remember about "here and now". Any introduction of new technical solutions that would disregard this reality-bound perspective may do more harm than good to justice, further delaying the dissemination of online trials.

Second, as it has been signalled above to an extent, one still needs to remember about a significant level of digital exclusion, both in Poland and in other countries. It would thus seem that an absolutely necessary condition for the implementation of e-trials is that they should be optional. Both litigants and the court should be able to choose whether they want to take advantage of a traditional courtroom trial or prefer the more convenient/cheaper/faster online model. Good practice in this respect can become an encouraging example for judges and clients of the justice system. Coercion, on the other hand, can be discouraging.

Third, one must acknowledge that cases and procedural regimes differ from each other. Perhaps some cases should never be decided in online proceedings, now or in the future. This important caveat stems not so much from prejudice against new technologies, but may rather be a consequence of the importance of a given case combined with difficulties in proving its facts. In those cases where the main (or only) evidence is the testimony of witnesses and the accused, the transmission of likeness and sound through an intermediary is difficult to reconcile with the principle of directness, even if the intermediary is the most advanced online videoconferencing system. Unfortunately, every transmitter distorts the transmission. Moreover, nobody can ever be certain that the person giving testimony is able to freely express themselves, which makes it difficult to assess the reliability of the evidence so given. On the other hand, e-trials seem to be a much more obvious solution in proceedings where the principal (or even all) evidence is physical evidence (in particular, documents) that have already been submitted to the court.

Fourth, decorum. Judging is not, and should not appear to be, a trivial activity. Even in certain petty offences proceedings or small claims civil proceedings – which are, objectively speaking, minor cases – there are parties who put much emphasis on the formal side of the process. It is debatable whether this is a sufficient reason to maintain the traditional forms of judicial

decision-making; after all, online trials would more time- and cost-effective. However, the prestige of the justice system is not only a consequence of the solemnity of judges and their formal attire but also an effect created by the physical premises on which trials are held. There is no comparison between the emotions and feelings that accompany 'appearing in court' in person and those associated with testifying from one's own car or a golf course in a tee time. Litigants may presumably feel less appreciative of (and be less willing to abide by) the judgment if the process itself becomes more and more deprived of judicial decorum.

Last but certainly not least, the judge, as the steward of the trial, is and should be responsible for its appearance. At the end of the day, it is for the judge to assess whether the factors discussed above demonstrate that an e-trial can be held or whether there are grounds for excluding remote proceedings. Such a decision should be a consequence of mature deliberations and a perception of the purpose of the trial that goes beyond merely its time- and cost-effectiveness. That said, the promptness and costs of proceedings are not the factors to be dismissed.

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Clifford Chance is one of the world's leading law firms, with 32 offices in 21 countries. The firm opened its Warsaw office in 1992. Today, it has a team of more than 85 lawyers, including nine partners. The concept of Responsible Business lies at the core of Clifford Chance's strategy. Clifford Chance is committed to supporting local communities where it does business by increasing access to justice, education and funding. The firm works with clients, non-governmental organisations and charities, providing information and pro bono services to representatives of these communities. Clifford Chance staff also devote their time and engage in a range of community activities to provide financial support to charities through the Clifford Chance Foundation.

Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights ("HFHR") is a non-governmental organisation established in 1989 by members of the Helsinki Committee in Poland. Its mission is to develop standards and the culture of human rights in Poland and abroad. Since 2007, the HFHR has had consultative status with the UN Economic and Social Council (ECOSOC). The HFHR promotes the development of human rights through educational activities, legal programmes and its participation in the development of international research projects.

Since 2004, the HFHR has been operating the **Strategic Litigation Programme,** as part of which the Foundation initiates and engages in strategically significant court and administrative proceedings. International human rights bodies are a key focus of the Programme's activities. Through its participation in strategic litigation cases, the Programme aims to obtain ground-breaking judgments, which change practices or laws on specific legal issues that raise serious human rights concerns.

The Programme's activities include the following:

- submitting amicus curiae briefs on behalf of the HFHR, in which we present specific human rights issues that are relevant from the perspective of constitutional and comparative law but do not directly refer to the facts of a case;
- taking part in court proceedings as a third party intervener, which means that representatives of the Foundation have the right to express their opinions and submit motions and statements during a trial;
- representing victims of human rights violations in proceedings before international bodies;
- working with law firms and individual lawyers to procure their pro bono representation and legal assistance for the HFHR's clients.

NEW TECHNOLOGIES – NEW JUSTICE – NEW QUESTIONS

Summary

This report attempts to present the state of implementation of digital solutions in different justice systems. The authors of the report also try to find answers to the following questions: Should the advantages of using new technologies in justice lead to their rapid dissemination? If not, what stands in the way? Is it just the fear of novelty among judges and lawmakers, reluctant to learn how to use technology? An "old habits die hard" approach or unwillingness to leave one's comfort zone? The lack of lawmakers' interest in legislating new justice technologies? Or maybe there are more serious, factual objections that make new technologies less attractive, say, related to the very concept of adjudication or ensuring the fairness of adjudication?

The authors, while not shying away from expressing their own opinions on the subject, asked these questions of justice system professionals: judges, prosecutors and lawyers. After all, it is their opinions that should guide the assessment of where the digitisation of the justice system should go and what problems the courts are facing can be solved by new technologies.

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