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# Remote Hearings – Ensuring Equality in Light of the Phenomenon of Digital Exclusion

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## Abstract

The pandemic has changed the way society functions, affecting the system of justice as well. The need to maintain social distance has accelerated changes in the judiciary. Remote hearings have emerged. The article attempts to answer the question of whether the e-hearings currently taking place are held in accordance with the principle of equality in view of the phenomenon of digital exclusion occurring in Polish society. An empirical study of remote hearings conducted by a student research group and the author's own experience in this field make up the empirical resources documenting the technical issues that occur during remote hearings and problems related to digital exclusion.

**Keywords:** e-hearing, digital exclusion, Internet, equality, right to court, pandemic.

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## Introduction

The COVID-19 pandemic has changed the way in which both individuals and society as a whole function. It has become necessary to transfer many everyday activities to the virtual space. For many people, the use of information and communications technology (ICT) has become a daily routine, and the lack of digital skills or access to digital devices that lets people connect to the Internet has made it difficult or often impossible to work, educate, handle official issues, shop, and even receive medical treatment remotely. The effects of the pandemic have affected the judiciary as well. Hearings and court sessions would be cancelled. Some courts even had to temporarily suspend their operations.<sup>2</sup> Traditional – i.e. courtroom – proceedings would be curtailed and often even postponed.

The restrictions caused by the pandemic triggered a change in the operation of the judiciary. They became an opportunity for its rapid computerisation, including a real advancement in the area of remote communication with those involved in the proceedings.<sup>3</sup> In May 2020, the so-called Anti-Covid Act<sup>4</sup> allowed for holding remote hearings, with simultaneous direct video and audio transmission. Participants of such hearings did not have to be in the court building,<sup>5</sup> but were required

<sup>2</sup> K. Wiśniewska, *Prawo do sądu i rzetelnego postępowania sądowego*, [in:] P. Kubaszewski, K. Wiśniewska (eds.), *Prawa człowieka w dobie pandemii. 10 miesięcy, 10 praw, 10 ograniczeń, 10 rekomendacji na przyszłość...*, Helsinki Foundation for Human Rights, Warszawa 2021, s. 23–25, [https://hfhr.pl/upload/2022/01/prawa-czlowieka-w-dobie-pandemii\\_1.pdf](https://hfhr.pl/upload/2022/01/prawa-czlowieka-w-dobie-pandemii_1.pdf) (access: 21.01.2023). Statistics on the number of hearings and sessions actually held and cancelled in selected district courts during the lockdown period (March–May 2020) in: A. Klepczyński, *Sądowy kalendarz w dobie lockdownu... Analiza HFPC o pracy sądów w pierwszym okresie pandemii*, Helsinki Foundation for Human Rights, Warszawa 2020, <https://hfhr.pl/upload/2022/01/sadowy-kalendarz-w-dobie-lockdownu.pdf> (access: 21.01.2023).

<sup>3</sup> B. Pilitowski in association with Z. Branicka, B. Kociołowicz-Wiśniewska, and Domański Zakrzewski Palinka law firm, *Sądy dostępne przez Internet. Szanse i zagrożenia*, Toruń 2020, p. 3; [https://courtwatch.pl/wp-content/uploads/2020/12/FCWP\\_raport\\_sady\\_dostepne\\_przez\\_internet\\_szanse\\_i\\_zagrozenia.pdf](https://courtwatch.pl/wp-content/uploads/2020/12/FCWP_raport_sady_dostepne_przez_internet_szanse_i_zagrozenia.pdf) (access: 21.01.2023).

<sup>4</sup> Article 15 zzs<sup>1</sup> was added by way of Article 46(21) of the act of 14 May 2020 amending some acts in the field of protective activities in connection with the spread of the SARS-CoV-2 virus, (Journal of Laws of the Republic of Poland of 2020, item 875) amending the act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them (hereinafter: the Anti-Covid Act) as of 16 May 2020.

<sup>5</sup> In the text, a remote hearing is understood as in Article 15 zzs<sup>1</sup> (1) of the Anti-Covid Act as amended by Article 4(1) of the act of 28 May 2021 amending the Code of Civil Procedure and certain other acts (Journal of Laws of the Republic of Poland of 2021, item 1090) as of 3 July 2021: “During the state of epidemic emergency or state of epidemic declared due to COVID-19 and within one year from the lift of the last of them, in cases heard according to the provisions of the Act of 17 November 1964 – Code

to have a camera and microphone on. It seems, however, that it is necessary to apply functional interpretation here. While the camera should remain on in the case of all participants, the microphone, due to possible interference, should be on for the person giving testimony.<sup>6</sup> The adoption of remote hearings made it possible for courts to function as safely and universally as possible during the pandemic.<sup>7</sup> As a result of the pandemic, the virtual court space has become increasingly important.<sup>8</sup> Yet, there are questions that need to be answered: is – and will – the video conference model be widely used by Polish courts? Will the solutions that make it possible to conduct remote hearings be incorporated into the existing legislation after the changes brought about by the pandemic cease to be in effect, in the so-called “post-pandemic” era? Do the introduced provisions for remote hearings allow citizens to exercise their constitutional right to court? Finally, does the level of digital exclusion observed in Polish society enable a broad, universal adoption of the model of proceedings in question? In 2020, Judge K. Kurosz stated as follows: “I believe that at the level of regional courts, online hearings will not become a universal solution anytime soon. This is because many people who are parties to proceedings do not have the technical capabilities or skills required to connect to the court via the Internet.” He added: In general, many more online hearings take place in district courts. Where professional attorneys are involved, that’s where it works very well.”<sup>9</sup> Has the reality changed? Do professionals really have no difficulties when it comes to participating in remote hearings? An empirical study of remote hearings conducted by a student research group and the author’s own experience in this area attempt to answer the questions posed.

## Digital exclusion and equality

Pursuant to Article 32(1) of the Polish Constitution, everyone is equal before the law. Everyone has the right to be treated equally by public authorities. According

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of Civil Procedure, hereinafter referred to as the “Code of Civil Procedure”: 1) a hearing or an open hearing shall be conducted using technical devices that allow it to be conducted remotely with simultaneous direct transmission of image and sound (remote hearing), provided that the persons participating in it, including members of the adjudicating panel, do not have to be in the court building” (uniform text in the Journal of Laws of the Republic of Poland of 2021, item 2095).

<sup>6</sup> A. Michór, *Postępowanie cywilne w okresie epidemii COVID-19*, “Przegląd Ustawodawstwa Gospodarczego” 2021, 9, p. 41.

<sup>7</sup> K. Jasińska, *E-rozprawa w postępowaniu cywilnym a prawo do sądu i możliwość obrony swoich praw*, “Studia Prawnicze. Rozprawy i Materiały” 2021, 2(29), p. 27.

<sup>8</sup> J. Jabłońska-Bonca, *Remote hearings and judicial symbolism. A draft*, “Krytyka Prawa” 2022, 14(2), p. 237.

<sup>9</sup> Interview with Judge K. Kurosz, [in:] B. Pilitowski et al., op. cit., pp. 26–27.

to Article 32(2), no one shall be discriminated against in political, social or economic life for any reason whatsoever. The right to a fair and public hearing without undue delay, before a competent, impartial, and independent court is guaranteed directly under Article 45(1) of the Polish Constitution. There is also Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>10</sup> which states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In a democratic state, the right to court regardless of ability, willingness, and capability to use digital services must be granted and guaranteed by the state. Therefore, the state needs to implement such legal solutions that prevent the relevant principles, especially those established in the Constitution, from being violated anytime and against anyone, in any way. The principle of equality is not the same as full egalitarianism. It refers to the legal situation of the addressee of a given norm.<sup>11</sup> It does not mean, however, that, for example, those who do not have the equipment enabling them to connect remotely to the court should be provided with it. Still, the opportunity to participate in a remote hearing should be guaranteed.

As a result of the outbreak of the pandemic, there was a significant limitation of almost all activity in the real world, in the case of both individuals and society as a whole. This was particularly true for the digitally excluded, especially senior citizens who rarely use the Internet. According to the results of the 2018–2019 PolSenior2 survey<sup>12</sup> conducted in a representative sample of 5987 Poles aged 60–106 years of age, 56.6% of seniors did not use the Internet, which meant they were definitely digitally excluded. The non-use of the Internet is primarily determined by age, but also by education and population of the place of residence. 39% of the youngest seniors (60–69) said they did not use the Internet. In the age group 70–79, this percentage was nearly 70%, and among the oldest (80+) seniors, it was 91%.<sup>13</sup> Broken down by two age groups – 44.4% of younger seniors (60–74) and 87.1% of older seniors (75+) did not use the Internet.<sup>14</sup> Although the PolSenior2 survey was conducted before the pandemic, according to the findings announced by the Statis-

<sup>10</sup> Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Journal of Laws of the Republic of Poland of 1993 No. 61, item 284.

<sup>11</sup> P. Czarnek, *Zasada równości wobec prawa*, [in:] D. Dudek (ed.), *Zasady ustroju III Rzeczypospolitej Polskiej*, Warszawa 2009, p. 92.

<sup>12</sup> T. Zdrojewski, Ł. Wierucki, H. Kujawska-Danecka et al., *Organizacja, zakres i przebieg badania*, [in:] P. Błędowski, T. Grodzicki, M. Mossakowska, T. Zdrojewski (eds.), *PolSenior2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem*, Gdańsk 2021, p. 116.

<sup>13</sup> E.M. Kwiatkowska, H. Kujawska-Danecka, A. Lange et al. (2021), *Wykluczenie cyfrowe*, [in:] P. Błędowski, T. Grodzicki, M. Mossakowska, T. Zdrojewski (eds.), op. cit., pp. 982–983.

<sup>14</sup> E.M. Kwiatkowska, *Analfabetyzm cyfrowy – czy stanowi problem?*, Paper for the 17<sup>th</sup> Congress of the Polish Society of Hypertension, Gdańsk, 24–26 June 2021.

tics Poland in 2021, the percentage of people aged 60–74 not using the Internet in the 3 months preceding the survey was 42.4%, while 34.5% of people in this age group had never used the Internet at all. Overall, in 2021, 14.6% of people aged 16–74 had not used the Internet in the 3 months preceding the survey, and 11.1% had never used it.<sup>15</sup> In 2022, the percentage of people not using the Internet – both among all respondents and among the oldest Poles surveyed by Statistics Poland – was lower, but there are still many people who do not use it at all. In the three months preceding the survey, 13.1% of people aged 16–74 did not use the Internet, and 9.4% never used it. Among the oldest Poles surveyed by Statistics Poland (age group 60–74), 38.9% had not used the Internet in the three months preceding the survey and 29.9% had never used it at all.<sup>16</sup>

Statistics on Internet non-use alone indicate the prevalence of digital exclusion among the elderly in particular, but not exclusively. Moreover, while Internet non-use automatically translates into digital exclusion, some Internet users have outdated equipment or suffer from poor connection speed, and there is a certain percentage of people whose skills in navigating in the online world are not sufficient to enable them to take part in a remote hearing. They too may belong to the digitally excluded.<sup>17</sup> Therefore, when designing the legal solutions to allow participation in remote hearings, those who do not use ICT or use it to a limited extent should be taken by all means into account. Otherwise, the solutions adopted will be incompatible with constitutional principles – the principle of equality and the principle of protecting human freedoms and rights, including the right to court.

Both a poor knowledge of how to take active part in remote hearings as well as any level of digital exclusion – and even temporary technical issues with the computer or Internet connection can result in a limited opportunity to communicate with the court during an e-hearing. This may affect the court's impression and perception of the party, and thus the right to a fair trial may be violated. There may also be a violation of the principle of equality of arms, leading to procedural inequality of the parties.<sup>18</sup> The answer to these problems is the legislation that has

<sup>15</sup> Statistics Poland, *Wykorzystanie technologii informacyjno-komunikacyjnych w jednostkach administracji publicznej, przedsiębiorstwach i gospodarstwach domowych w 2021 roku*, Warszawa 2022 (Excel, *Wykorzystanie technologii informacyjno-komunikacyjnych w gospodarstwach domowych w 2021 roku – część 2*).

<sup>16</sup> Statistics Poland, *Wykorzystanie technologii informacyjno-komunikacyjnych w jednostkach administracji publicznej, przedsiębiorstwach i gospodarstwach domowych w 2022 roku*, Warszawa 2022 (Excel, *Wykorzystanie technologii informacyjno-komunikacyjnych w gospodarstwach domowych w 2022 roku – część 2*).

<sup>17</sup> On digital exclusion – see, for instance: W. Chen, B. Wellman, *Minding the Cyber-gap: the Internet and Social Inequality*, [in:] M. Romero, E. Margolis (eds.), *The Blackwell Companion to Social Inequalities*, Blackwell Publishing 2005, pp. 523–545.

<sup>18</sup> M. Szwed, *Standardy międzynarodowe a granice wdrażania innowacyjnych rozwiązań w wymiarze sprawiedliwości*, [in:] P. Kładoczny, K. Wiśniewska (eds.), *Nowe technologie. Nowa sprawiedliwość. Nowe pytania. Wdrażanie nowych technologii w wymiarze sprawiedliwości*, Helsinki Foundation for Human Rights, Warszawa 2021,

been introduced, allowing participation in remote hearings in the court building. As of 3 July 2021, at the request of a party to a hearing or a summoned person – filed at least 5 days before the scheduled date of the remote hearing, the court will provide such a party or person with the opportunity to participate in the remote hearing in the court building if the party or person indicates in their request that they do not have the technical equipment necessary to take part in the remote hearing outside the court building.<sup>19</sup> Also, the court is to notify the summoned person and the party not represented by an advocate, an attorney-at-law, a patent attorney or a counsellor with the Treasury Solicitor’s Office of such an opportunity when serving the first notice of the date of the remote hearing.<sup>20</sup> Although the provision of paragraph 2 mentions the lack of access to the necessary technical equipment, but because of the possible problems in joining a remote hearing (not having the necessary equipment, access to the Internet, or the sufficient technical skills), it should be subject to a broad interpretation.<sup>21</sup> This is not a perfect solution, especially if one considers the premises-related problems that courts often face,<sup>22</sup> but it is a step towards allowing those with no or limited ability to use ICT or without the appropriate equipment to participate in remote hearings.

## Remote hearings and digital exclusion in light of the results of a study conducted by a student research group

An empirical study on remote hearings, exploring e.g. issues concerning the digital exclusion of subjects participating in such hearings and the existing technical problems, was conducted in June–October 2022 by a law student research group consisting of 11 students.<sup>23</sup> The study involved drawing up a set of reports encompassing 103 hearings taking place in civil courts across Poland. Most of the researchers prepared 10 such reports each (seven people), one person prepared nine of them, while the other three prepared eight. The cited observations offer a view of remote

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p. 42; K. Klimas, *Posiedzenie zdalne według art. 15zsz<sup>1</sup> KoronawirusU*, [in:] J. Gołaczyński (ed.), *Postępowanie cywilne w czasie pandemii. E-doręczenia, rozprawa zdalna, posiedzenia niejawne, składanie pism procesowych*, Warszawa 2022, p. 7, legalis.

<sup>19</sup> Article 15 zsz<sup>1</sup> (2) of the Anti-Covid Act.

<sup>20</sup> Article 15 zsz<sup>1</sup> (3) of the Anti-Covid Act.

<sup>21</sup> Also: K. Jasińska, op. cit., pp. 37–38. J. Gołaczyński talks about the lack of technical possibilities; J. Gołaczyński, *Informatyzacja postępowania cywilnego. Od odrębności do modelu podstawowego*, “Gdańskie Studia Prawnicze” 2022, 5(57), pp. 164–165.

<sup>22</sup> A. Michór, op. cit., p. 40.

<sup>23</sup> KU law students: J. Bryl, H.P. Cynkier, W. Fedoruk, F. Gołda, Z. Kozioł, N. Rybicka, N. Skierska, W. Stec, A. Tkaczuk, A. Waśniewski, M. Wawrzeniuk. The research was funded from a Kozminski University internal grant in 2022.

hearings<sup>24</sup> as seen by the general public.<sup>25</sup> Considering the topic dealt with, it is important to emphasise that researchers not only have computers and phones with access to the Internet, but also have had experience with remote learning. They are not affected by digital exclusion.

Even in the course of e-mail correspondence exchanged with some courts regarding participation in the hearing, there were cases in which students were informed that they had to use a specific browser when connecting to the court: “NOTICE!!! IMPORTANT!!! You must use Google Chrome or Mozilla Firefox browser for the connection to work smoothly – otherwise there may occur connection problems” (3\_2). When contacting another court, the following information was provided: “The videoconference connection should be established (...) using the latest version of Microsoft Edge browser or Jitsi application” (3\_3). Another court: “The court notified me by phone to always click the link in the laptop browser and not to enter the downloaded Jitsi Meet app because it had been causing problems lately. They told me it was best to use Microsoft Edge” (6\_10). Interestingly enough, these hearings were conducted using the same system – Jitsi. This makes the instructions to use other browsers, the application, and not to use the application to connect with the court all the more surprising and confusing. This situation (meaning not only different systems, but also different technical information) certainly doesn’t make it easy for remote hearing participants to navigate this virtual environment, especially for those not quite online-savvy.

Technical issues involved in successfully connecting to a court and joining a hearing can happen to any party participating in a remote hearing. The researchers experienced such issues several times as well.<sup>26</sup> And they did not manage to get inside the ‘e-courtroom’ eventually: “I connected with the court to take part in the remote hearing at 9:29 a.m., the hearing should start at 9:30 a.m., but after waiting for a long time for the hearing to start, I disconnected at 9:58 a.m. (...). The Regional Court in (...) sent a message with a link to the remote hearing, but failed to connect, making the public unable to participate in the hearing” (1\_4). The researcher faced an identical situation when trying to join another hearing, in the same court, conducted by the same judge (1\_6). Another researcher reported:

<sup>24</sup> According to the research intent, the hearings were to take place remotely. However, as it turned out after the study was carried out, despite the docket reading “remote hearing”, some of the hearings were conducted in hybrid mode, or those who connected with the court remotely were only the public – meaning the researcher, i.e. the student.

<sup>25</sup> These citations are coded – the first number indicates the name of the researcher, while the second number means the number of the hearing for which the report has been drawn up.

<sup>26</sup> On the problems of joining an e-hearing, including those documented in the same study of the law student research group, see also: J. Jabłońska-Bonca, *Wejście do sali rozpraw. Analiza porównawcza norm zachowania uczestników rozprawy zdalnej i tradycyjnej*, “Prawo i Więź” 2023, 2(45), p. 85 et seq.

“it was impossible to join the hearing even though I had a dedicated link. It did not work with any browser, be it Safari, Firefox or Google Chrome” (8\_1). And added: “the link I received from the court did not open for unknown reasons, even though I had very good Internet connection” (8\_1), and then: “My technical issue could not be solved despite my attempts to call the court tech support. Nobody answered my call” (8\_1). Another researcher: “The hearing was supposed to start at 11:00 a.m., I waited until 11:45 a.m. and the hearing did not start. (...) I did not receive any information that it was to be postponed/suspended” (5\_4). The question arises whether it was only the public that was not allowed into these hearings, or whether these were technical problems that made the courts unable to let parties attend the hearings, or whether the hearings did not take place at all.

It also occurred that the researchers were “kicked out” of a hearing after connecting with the court: “After several attempts to connect (...) I was kicked out of the hearing without a word of notice, each time I connected after about 10 seconds I was removed from the video conference” (8\_6). And: “I was kicked out of the hearing several times” (8\_6); “I waited from 1:59 pm, the hearing started around 2:10 pm (when I was allowed to join the hearing, the event was already in progress) and when the screen with the live stream appeared, I was kicked out. I thought it was some kind of error, so I joined the hearing again – I attended it for 2 minutes or so and was kicked out again” (5\_7); “I was removed from the hearing after about 20 minutes” (10\_2). The court also experienced a similar technical issue: “At 12:55 pm, the judge got disconnected from the video conference. He managed to reconnect at 12:59” (1\_9). Such situations can cause anxiety among other participants regarding the further course of the hearing. There was also a situation where, according to the researcher, all participants were kicked out of the hearing: “all those participating in the hearing remotely were kicked out of the video conference without being able to reconnect. The problem was most likely not resolved, so the hearing was adjourned” (1\_7).

There were cases of connection problems too: “Everyone had connection problems except the judge” (5\_8); “At the very beginning of the hearing, the plaintiffs’ attorney could not join the hearing” (9\_9); “the plaintiffs’ attorney could not join the session at the beginning (...), most likely because of Internet problems, as others could hardly hear him in the later part of the hearing” (10\_10); “The plaintiffs’ attorney could not connect (...), and when he managed to join the hearing, the judge said she did not see him in the Teams waiting room” (10\_9); “One participant was unable to connect for the first couple of minutes of the hearing. In this situation, the participant was sent an email message with a link to be able to join the session” (4\_5); “the judge asked the plaintiff to leave the video conference. Then, the judge ordered a 5-minute break for the plaintiff to reconnect” (1\_7); “the attorney



had connection issues, tried to reconnect two or three times" (6\_7) further: "she had technical problems after joining the virtual courtroom, could not hear the participants in the proceedings, and her camera switched on and off. The judge responded by requesting the attorney to reconnect and asked what browser she was using. (...) she replied that she was using Windows, to which the judge replied that the question concerned the browser and said it would be best for her to connect using Microsoft Edge. After a while, it worked" (6\_7). It appears that technical issues resulting from e.g. the quality of Internet connection, the type of equipment used, or the lack of digital skills do not affect only non-professionals, but also professional participants in remote hearings.

It may even occur that due to one's inability to connect with the court, the case will be postponed: "I was surprised by one black screen during the online session – the plaintiffs were unable to connect to the court via the app – the case was adjourned and the next hearing was scheduled to take place on-site" (2\_8). "It was impossible to examine the plaintiffs" (2\_8) because: "they could not turn on the camera – they were unable to do that" (2\_8). In this situation, the plaintiffs' inability to use ICT made it necessary to schedule another hearing in the courtroom, on premises.

After participants joined the online hearing, there were repeated video and audio issues: "The plaintiffs' attorney had a connection problem – he was present at the online hearing, but could not be seen or heard" (9\_7) and further: "in theory, he was connected, but could not be seen or heard" (9\_7); "The plaintiffs' attorney had a connection issue – his connection was broken, his camera kept turning off and on again. The judge had the same issue – his camera suddenly switched off. The attorney was annoyed because he could not be heard and had to repeat himself" (9\_8); "the defendant's attorney could not turn on the microphone or camera for 20 minutes, which further delayed the hearing" (4\_4); "the plaintiff's attorney's connection would get broken from time to time and he could not be heard" (2\_9). There were also cases where no sound could be heard: "At first, the judge could not hear the participants, which was resolved after the court reconnected" (3\_5); "The judge could not be heard, he informed the participants in the meeting chat that he would connect through another browser" (5\_1); "I have reservations regarding the unstable connection of one of the attorneys, which made it impossible to hear almost anything of what he was saying" (10\_10); "The plaintiff could not turn on the audio feature for a few minutes" (4\_8); "the participants in the meeting heard each other very poorly" (4\_9); "The judge at the beginning could not hear me or the plaintiff's attorney" (9\_1); "The judge had sound issues, the attorneys sometimes had to repeat the same statements because of this" (9\_1); "The only problem I noticed concerned the platform, which did not transmit audio signal to

the earphones" (1\_1; 1\_2; 1\_3). There were also situations where reverberation made it difficult to understand what was being said: "there was reverberation on both sides" [the court and the defendant's attorney], "which made it difficult to understand each other" (4\_9); "the plaintiffs' attorney had apparent problems with the connection, especially with the sound. Her statements were completely unintelligible due to the reverberation (echo) in the room. (...) You could also see the irritation on the face of the judge, who had to ask the parties making their statements to repeat them several times" (9\_10); "the attorney had difficulties asking questions because of the reverberation (she could hear herself speaking from the judge's microphone)" (3\_2); "the only problem was the reverberation from the courtroom – sometimes the judge had to repeat the questions asked by the attorneys present at the video conference to the witnesses being questioned" (3\_3). There were also instances where someone's switched-on microphone interfered with what others were saying: "one of the attorneys had the microphone on all the time, which drowned out the judge, who had the microphone placed far away and could be heard very poorly" (8\_9); "the plaintiffs had the microphones on for the first few minutes, which made their entire exchange audible, and the reverberation drowned out the judge's announcements" (4\_5); "there was a lot of echo, there was noise caused by the sound 'bouncing' because the judge and attorney did not have their microphones muted" (5\_8). There were also problems with video signal, such as: "the judge could not be seen" (8\_5) and further: "because there was no camera pointed there" (8\_5); "There was a black screen in the judge's window" (1\_2) and further: "We couldn't see the judge. Her webcam was either turned off or broken" (1\_2); "the judge could not be seen. At first, the judge's camera again didn't work and displayed a black screen, but later, because I pointed this out, the camera worked well and was pointed at the courtroom" (1\_3); it was not possible to see the judge well because the "camera faced the sun, so there was a lot of shading" (5\_1); "The judge was only seen for the first 5 minutes, later on she could not be seen at all" (4\_4). These problems did not affect the court only: "one of the attorneys had poor Internet quality and as he was sitting against the window, he became a dark silhouette" (8\_9); "One participant could not be seen – he could not turn the camera on" (2\_4); "at times, the cameras went off for a few seconds in the case of some participants, and a moment after they could be seen again" (3\_3); "The attorney had some issue with the camera, the judge suggested connecting using another device or reconnecting. Yet, she ended up taking part in the hearing without the camera" (3\_2). What's more, at this hearing, the other attorney also turned off his camera: "The attorney could be seen at the beginning, but later on – not" (3\_2); the "plaintiff's attorney had poor connection, disappeared from the list of connected persons for a while in the middle of the hearing, then 'rejoined'

the hearing but asked for approval to have her camera turned off due to the poor connection. The judge approved her request. Throughout the remaining part of the hearing, the plaintiff's attorney took part in the event with her camera off" (9\_1). While having the microphone off when someone else is speaking at a given moment can improve the overall audibility of what is being said, the camera should absolutely be on in the case of all participants in a remote hearing.

In several cases, participants did not answer the questions being asked immediately, using technical issues as an excuse. This could have allowed them to e.g. fabricate their testimony. Connection errors may have been intentional: "the questions of the defendant's attorney became difficult and uncomfortable, and may have challenged the validity of the method of determining the cost of cleaning up after a traffic accident" (3\_3) and further: "There was also a one-time interruption of the connection of the witness being interviewed, so the attorney could not ask the last question, but after about a minute the witness reconnected and the question was asked" (3\_3); "The witness did not answer the questions asked, blaming it on technical issues. He began to testify only after a few moments" (10\_2). Participants would also sometimes leave the sessions: "During the hearing, the plaintiff unexpectedly left the virtual courtroom for about ten minutes. It happened when the court addressed her with a question. When the plaintiff logged on again, she answered the court's question posed earlier without any hesitation. I was under the impression that the problems with the Internet connection were made up. By doing so, the plaintiff was able to communicate with the attorney 'in camera', off the record, so to speak" (7\_5).

Some of the observed behaviours may have been caused by the fact that the attorneys do not treat their work in a professional manner. Clearly, such behaviour at a traditional hearing taking place in a court building would not occur: "The attorney was sitting in the car, turned the camera on and off, only a part of her face could be seen" (2\_9); "The attorney, while still seen, got up and walked out of frame, then disconnected, and after reconnecting, did not turn his camera back on" (3\_2); "one attorney was absent for a while, he was simply somewhere else" (8\_2); "The attorney walked away from the computer several times, turned off the microphone, the camera, let the dog out onto the balcony, left to get coffee while the judge was talking, came back with the coffee, shouting to the judge 'I'm coming, I'm coming, I can hear everything', she would also roll her eyes at the witnesses' answers" (5\_3). The parties have not always behaved properly either: "There were two participants – two plaintiffs – taking part in the hearing using one device. From the very beginning of the session, one plaintiff could be heard telling the other plaintiff what to say during the examination. Despite the judge's requests and instructions, the plaintiffs continued to talk to each other. The judge was close

to imposing a penalty for breach of order on these participants” (4\_5); “The plaintiff (...) appeared to be reading their testimony from a file on the computer” (10\_1).

While situations where the attorney and the party were connected using the same device cannot be considered inappropriate, e.g.: “The plaintiff and his attorney (in one webcam)” (9\_4), and may even facilitate the parties’ participation in the hearing (e.g. the plaintiff was connected from the same device as her attorney: “I had the impression that the plaintiff was very stressed about the hearing (possibly due to the fact that it was taking place online, and she was of an age that could suggest she was not very tech-savvy)” (10\_9)), situations where witnesses testified using the same device may be considered inappropriate: “The attorney, the witness, and the plaintiff switched places depending on who was speaking, making it sometimes impossible to see any of these people” (10\_9) and further: “The witness was connected to the plaintiff from the same device” (10\_9); “After one witness testified, the other began to testify from the same device (they switched places)” (10\_10). The question arises whether a witness who did not testify was present when the previous witness was questioned. If so, this would be inconsistent with the rules of civil procedure.

In one case, “the plaintiff participated in the hearing from a special room in the court building, which is used to take place in remote hearings in the event when a given party does not have the right infrastructural conditions to participate in such a hearing” (10\_5) and further: “the plaintiff (...) was unable to participate in the hearing from home because, as he explained, he didn’t have the necessary equipment” (10\_5). If the case had been held in a traditional courtroom, “the plaintiff would certainly have felt more at ease because he seemed to be a person who, in addition to not having the equipment (as he said himself), had difficulty using the video conferencing application” (10\_5). This special room indeed made participating in the remote hearing possible, but digital exclusion resulted in a sense of discomfort and unease, which could have affected the equality of the parties to the proceedings.

## **Opportunities, problems, necessary solutions – instead of a summary**

Both the analysis of the reports drawn up by the student research group and the author’s own experience with remote hearings prove that there may occur many technical issues in their course. All parties – participants in e-hearings – not only judges and attorneys, but also parties to the proceedings, witnesses, and other individuals may have problems with the quality and stability of the Internet connection,

with joining the hearing, with sound quality or with the quality of the video signal transmitted and received. To name just a few issues. Moreover, in a hearing held in the traditional format, in a ‘brick-and-mortar’ courtroom, outsiders whose presence is not known to the court are not allowed to participate. On the other hand, in the case of remote hearings, it is possible to imagine non-participatory observation. For instance, it is possible for a third party to watch the computer screen of a person participating in a remote hearing. This is very easy to do. In fact, there is also no way to check whether a witness, when giving their testimony, is instructed by someone or whether they use documents and records. And, finally, whether the testimony of one witness is not listened to by another witness. It is also possible to pretend to experience technical issues, which could make it possible to e.g. orchestrate the testimony or to enable a party trying to prolong the proceedings to obstruct the proceedings.<sup>27</sup>

In their participant observation reports, students pointed out that not only could it be easier for many participants to attend hearings held in traditional courtrooms (especially with complex cases), but also the response of the parties and the attorneys representing them could be faster. This raises the question of whether courts have really become more accessible. Does “moving” the court online actually make it possible for a broader public to take part in hearings? Don’t technical issues and the frequent lack of the necessary equipment or digital skills discourage some individuals from turning to this form of dispute resolution? Isn’t the principle of equality being violated in remote hearings? Why isn’t there a single system, a single platform where all online proceedings could be hosted and conducted? If someone doesn’t feel too comfortable using technology, a single system could make it easier for participants to take part in remote hearings – especially since the problem of limited digital skills affects not only parties to proceedings, but also professional participants.

Certainly, remote hearings translate into e.g. time savings and greater convenience – their participants do not have to commute and stay in court. And in situations such as the pandemic, this might be the best way to proceed. Moreover, because there is no need to wait for vacant courtrooms, digital solutions can speed up proceedings.<sup>28</sup> They can become more effective, efficient, and less costly.<sup>29</sup> Digital

<sup>27</sup> J. Litowski, *Ograniczenie jawności postępowania cywilnego z uwagi na stan epidemii wywołany wirusem COVID-19*, “Monitor Prawniczy” 2021, 2, p. 72.

<sup>28</sup> See: the results of an online survey of 202 advocates, prosecutors, attorneys-at-law, and judges, conducted in the period 25.03–25.04.2021, K. Wiśniewska, *Nowe technologie w polskim wymiarze sprawiedliwości okiem prawników – stan obecny i perspektywy na przyszłość*, [in:] P. Kładoczny, K. Wiśniewska (eds.), op. cit., pp. 185, 188, 191.

<sup>29</sup> Z. Więckowski, G. Kubalski, *Czy sztuczna inteligencja oraz inne technologie informatyczne pomogą w dostępie do wymiaru sprawiedliwości osobom ze szczególnymi potrzebami?*, “Prawo i Więź” 2022, 4(42), p. 147.

solutions also make participating in remote hearings possible for those who are unable to appear in the court building due to e.g. health problems or disability and have given up on pursuing their claims in court as a result.<sup>30</sup> On the other hand, however, the problems that may be involved in the conduct of remote hearings, including those related to digital exclusion, should result in adapting the existing legislation to encompass this format in such a way as to eliminate as many potential irregularities and margins for error as possible, and – above all – to guarantee compliance with the principle of equality for both those who are proficient in the use of ICT and those who are not. The widespread adoption of remote hearings by courts requires respect for individual rights – including the right to court. It is necessary to design the manner of online proceedings in such a way as to make sure that everyone, not just those tech- and online-savvy and have access to quality devices, can freely participate in remote hearings. There may be no situations in which the accessibility of the court and the efficiency of participation in the proceedings due to digital illiteracy are limited.<sup>31</sup> This could lead to social exclusion, considered as a manifestation of the effects of legal exclusion – when the law becomes a factor in reducing the level of access to the system of justice, for instance.<sup>32</sup> The legal norms governing remote hearings and the phenomenon of digital exclusion occurring in society provide the context for legal exclusion.<sup>33</sup> A survey of representatives of various legal professions shows that more than 78% of those surveyed agree with the statement that digital exclusion is an issue that makes it impossible for courts to operate online in an obligatory manner.<sup>34</sup> Considering the widespread digital exclusion in Polish society (caused by the limited access to appropriate equipment and network, as well as by the lack of any – or even sufficient – digital skills), it is necessary to provide the digitally excluded with the opportunity to take part in remote hearings without the need to have their own devices or access to the Internet, as well as without having to demonstrate any level of digital skills. Those who do not have the digital competence or equipment to enter a remote hearing, i.e. the digitally excluded, may find it much easier and less stressful (especially considering the possible technical issues which such individuals may not be able to deal with) to take part in hearings held in the traditional format.

<sup>30</sup> J. Gołaczyński, A. Zalesińska, *Nowe technologie w sądach na przykładzie wideokonferencji i składania pism procesowych i doręczeń elektronicznych w dobie pandemii COVID-19*, "Monitor Prawniczy" 2020, 12, p. 638.

<sup>31</sup> See also: K. Wiśniewska, *Nowe technologie w polskim wymiarze sprawiedliwości...*, p. 192.

<sup>32</sup> J. Kwaśniewski, *Wpływ norm prawnych na procesy wykluczenia społecznego*, [in:] A. Turska (ed.), *Prawo i wykluczenie społeczne. Studium empiryczne*, Warszawa 2010, p. 189.

<sup>33</sup> A. Kojder, *Wykluczenie prawne jako fakt społeczny*, [in:] A. Turska (ed.), op. cit., p. 12.

<sup>34</sup> K. Wiśniewska, *Nowe technologie w polskim wymiarze sprawiedliwości...*, pp. 206–207.

## Bibliography

- Chen W., Wellman B., *Minding the Cyber-gap: the Internet and Social Inequality*, [in:] M. Romero, E. Margolis (eds.), *The Blackwell Companion to Social Inequalities*, Blackwell Publishing 2005, pp. 523–545.
- Czarnek P., *Zasada równości wobec prawa*, [in:] D. Dudek (ed.), *Zasady ustroju III Rzeczypospolitej Polskiej*, Warszawa 2009, pp. 90–98.
- Gołaczyński J., *Informatyzacja postępowania cywilnego. Od odrębności do modelu podstawowego*, "Gdańskie Studia Prawnicze" 2022, 5(57), pp. 145–179.
- Gołaczyński J., Zalesińska A., *Nowe technologie w sądach na przykładzie wideokonferencji i składania pism procesowych i doręczeń elektronicznych w dobie pandemii COVID-19*, "Monitor Prawniczy" 2020, 12, pp. 637–643.
- Główny Urząd Statystyczny, *Wykorzystanie technologii informacyjno-komunikacyjnych w jednostkach administracji publicznej, przedsiębiorstwach i gospodarstwach domowych w 2021 roku*, Warszawa 2022.
- Główny Urząd Statystyczny, *Wykorzystanie technologii informacyjno-komunikacyjnych w jednostkach administracji publicznej, przedsiębiorstwach i gospodarstwach domowych w 2022 roku*, Warszawa 2022.
- Jabłońska-Bonca J., *Wejście do sali rozpraw Analiza porównawcza norm zachowania uczestników rozprawy zdalnej i tradycyjnej*, "Prawo i Wiąż" 2023, 2(45), pp. 73–105.
- Jabłońska-Bonca J., *Remote hearings and judicial symbolism. A draft*, "Krytyka Prawa" 2022, 14(2), pp. 235–254.
- Jasińska K., *E-rozprawa w postępowaniu cywilnym a prawo do sądu i możliwość obrony swoich praw*, "Studia Prawnicze. Rozprawy i Materiały" 2021, 2(29), pp. 27–42.
- Klepczyński A., *Sądowy kalendarz w dobie lockdownu... Analiza HFPC o pracy sądów w pierwszym okresie pandemii*, Helsinki Foundation for Human Rights, Warszawa 2020, <https://hfhr.pl/upload/2022/01/sadowy-kalendarz-w-dobie-lockdownu.pdf> (access: 21.01.2023).
- Klimas K., *Posiedzenie zdalne według art. 15zsz<sup>1</sup> KoronawirusU*, [in:] J. Gołaczyński (ed.), *Postępowanie cywilne w czasie pandemii. E-doręczenia, rozprawa zdalna, posiedzenia niejawne, składanie pism procesowych*, Warszawa 2022, legalis.
- Kojder A., *Wykluczenie prawne jako fakt społeczny*, [in:] A. Turska (ed.), *Prawo i wykluczenie społeczne. Studium empiryczne*, Warszawa 2010, pp. 11–30.
- Kwaśniewski J., *Wpływ norm prawnych na procesy wykluczenia społecznego*, [in:] A. Turska (ed.), *Prawo i wykluczenie społeczne. Studium empiryczne*, Warszawa 2010, pp. 189–206.
- Kwiatkowska E.M., *Analfabetyzm cyfrowy – czy stanowi problem?*, Paper for the 17<sup>th</sup> Congress of the Polish Society of Hypertension, Gdańsk, 24–26 June 2021.
- Kwiatkowska E.M., Kujawska-Danecka H., Lange A. et al., *Wykluczenie cyfrowe*, [in:] P. Błędowski, T. Grodzicki, M. Mossakowska, T. Zdrojewski (eds.), *PolSenior2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem*, Gdańsk 2021, pp. 979–994.

- Litowski J., *Ograniczenie jawności postępowania cywilnego z uwagi na stan epidemii wywołany wirusem COVID-19*, "Monitor Prawniczy" 2021, 2, pp. 68–79.
- Michór A., *Postępowanie cywilne w okresie epidemii COVID-19*, "Przegląd Ustawodawstwa Gospodarczego" 2021, 9, pp. 36–45.
- Pilitowski B. (in association with Z. Branicka, B. Kociołowicz-Wiśniewska, and Domański Zakrzewski Palinka law firm), *Sądy dostępne przez Internet. Szanse i zagrożenia*, Toruń 2020, [https://courtwatch.pl/wp-content/uploads/2020/12/FCWP\\_raport\\_sady\\_dostepne\\_przez\\_internet\\_szanse\\_i\\_zagrozenia.pdf](https://courtwatch.pl/wp-content/uploads/2020/12/FCWP_raport_sady_dostepne_przez_internet_szanse_i_zagrozenia.pdf) (access: 21.01.2023).
- Szwed M., *Standardy międzynarodowe a granice wdrażania innowacyjnych rozwiązań w wymiarze sprawiedliwości*, [in:] P. Kładoczny, K. Wiśniewska (eds.), *Nowe technologie. Nowa sprawiedliwość. Nowe pytania. Wdrażanie nowych technologii w wymiarze sprawiedliwości*, Helsinki Foundation for Human Rights, Warszawa 2021, pp. 23–63.
- Więckowski Z., Kubalski G., *Czy sztuczna inteligencja oraz inne technologie informatyczne pomogą w dostępie do wymiaru sprawiedliwości osobom ze szczególnymi potrzebami?*, "Prawo i Więź" 2022, 4(42), pp. 146–165.
- Wiśniewska K., *Nowe technologie w polskim wymiarze sprawiedliwości okiem prawników – stan obecny i perspektywy na przyszłość*, [in:] P. Kładoczny, K. Wiśniewska (eds.), *Nowe technologie. Nowa sprawiedliwość. Nowe pytania. Wdrażanie nowych technologii w wymiarze sprawiedliwości*, Helsinki Foundation for Human Rights, Warszawa 2021, pp. 184–208.
- Wiśniewska K., *Prawo do sądu i rzetelnego postępowania sądowego*, [in:] P. Kubaszewski, K. Wiśniewska (eds.), *Prawa człowieka w dobie pandemii. 10 miesięcy, 10 praw, 10 ograniczeń, 10 rekomendacji na przyszłość...*, Helsinki Foundation for Human Rights, Warszawa 2021, [https://hfhr.pl/upload/2022/01/prawa-czlowieka-w-dobie-pandemii\\_1.pdf](https://hfhr.pl/upload/2022/01/prawa-czlowieka-w-dobie-pandemii_1.pdf) (access: 21.01.2023), pp. 22–31.
- Zdrojewski T., Wierucki Ł., Kujawska-Danecka H. et al., *Organizacja, zakres i przebieg badania*, [in:] P. Błędowski, T. Grodzicki, M. Mossakowska, T. Zdrojewski (eds.), *PolSenior2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem*, Gdańsk 2021, pp. 115–129.