


Remote trial in criminal proceedings as a threat to the implementation of the principle of immediacy? Reflections on the background of the Polish legal order¹

Julgamento remoto em processos criminais como uma ameaça à implementação do princípio da imediação? Reflexões à luz do ordenamento jurídico polonês

Renata Badowiec²

Nicolaus Copernicus University in Toruń, Toruń, Poland.

r.badowiec@umk.pl

 <https://orcid.org/0000-0001-7912-1363>

ABSTRACT: This article establishes whether a trial conducted with the use of technical devices with simultaneous direct transmission of video and audio can cause a limitation or even a threat to the realization of the principle of immediacy in criminal proceedings, which is an element of a fair trial. The author identified how the principle of immediacy is implemented in selected orders of European countries, i.e. Poland, Austria, Germany and England. The author analyzed the provisions for conducting a remote trial in Polish criminal proceedings. The author paid particular attention to the technical issues that limit the realization of the principle of immediacy during a remote trial, and presented the results of a survey of members of legal profession in Poland who also perceive these threats (also in the context of the standards of a fair trial). These considerations led the author to conclude that cases of conducting the trial with the use of technical devices with simultaneous

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² PhD in Law, assistant at the Department of Criminal Procedure and Criminalistics at the Faculty of Law and Administration, Nicolaus Copernicus University in Toruń (Poland).

direct transmission of video and audio may constitute a limitation of the principle of immediacy and, consequently, pose a threat to fair trial standards.

KEYWORDS: main trial; videoconference; principle of immediacy; fair criminal trial.

RESUMO: *Este artigo analisa se um julgamento conduzido com o uso de dispositivos técnicos, com transmissão direta simultânea de vídeo e áudio, pode causar uma limitação ou até uma ameaça à realização do princípio da imediação em processos criminais, que é um elemento do justo processo. Identificou-se como o princípio da imediação é implementado em ordenamentos jurídicos selecionados de países europeus, quais sejam, Polônia, Áustria, Alemanha e Inglaterra. Então, foram examinadas as disposições para a condução de um julgamento remoto em processos criminais na Polônia, com especial atenção às questões técnicas que limitam a realização do princípio da imediação durante um julgamento remoto, e apresentou os resultados de uma pesquisa com operadores do Direito na Polônia, que também percebem essas ameaças (ao se considerar os standards de um julgamento justo). Essas considerações levaram à conclusão de que os casos de condução do julgamento com o uso de dispositivos técnicos, com transmissão direta simultânea de vídeo e áudio, podem acarretar restrições ao princípio da imediação e, conseqüentemente, ameaçar os parâmetros do devido processo.*

PALAVRAS-CHAVE: Juízo oral; videoconferência; princípio da imediação; processo justo.

INTRODUCTION

As a result of the entry into force of the Act of June 19, 2020, on Interest Subsidies on Bank Loans to Entrepreneurs Affected by COVID-19 and on Simplified Proceedings for Approval of Arrangement in Connection with the Occurrence of COVID-19³, regulations have been introduced into the Polish Code of Criminal Procedure⁴, based on which it is possible to

³ Journal of Laws of 2020, item 1086 – hereafter referred to as Act of June 19, 2020.

⁴ Act of 6 June 1997 – Code of Criminal Procedure, Journal of Laws of 1997, No. 89, item 555 as amended, hereafter referred to as the CCP.

conduct trial activities remotely, or for a trial participant to participate in such form of a trial or court session.

The purpose of this article is to analyze the provisions in force in the Polish legal order, based on which the trial can be carried out using technical devices with simultaneous direct transmission of video and audio, as well as to analyze the impact of these technical devices on the implementation of the principle of immediacy in criminal proceedings. The study will use the following methods: dogmatic and empirical, the latter of which will in the presentation consist of some results of a survey conducted among members of the legal profession as part of implementing the grant 'Remote procedural acts in criminal process'.

The first part of the article will present issues related to the concept, implementation and exceptions related to the principle of immediacy in the legal orders of select European countries. The next part will discuss the provisions regulating the possibility of conducting a remote trial in Polish criminal proceedings. The last part of the article will be dedicated to the impact of the trial conducted using technical devices with the simultaneous direct transmission of images and sound in the Polish legal order on the realization of the principle of immediacy in criminal proceedings, as well as to answer the question presented in the study title, i.e. does conducting a trial remotely pose a threat to realizing the principle of immediacy? In conclusion, the study will formulate conclusions, and it postulates proposals *de lege ferenda*, in which it will be indicated in which cases a remote trial via criminal proceedings can be carried out without a negative impact or possible restrictions on the realization of the principle of immediacy.

1. THE PRINCIPLE OF IMMEDIACY IN THE LEGAL ORDERS OF SELECT EUROPEAN COUNTRIES

2.1 POLAND

One of the basic guarantees of a fair criminal trial is the principle of immediacy in the formal sense, i.e. in the form of a requirement to meet the demand for physical contact between the deciding court and

the evidence presented at trial. This is because it creates the possibility of a full and thorough analysis and, consequently, the most accurate evaluation of the evidence presented in the case. This especially applies to evidence that is of fundamental importance to determining the limits of the criminal responsibility of the defendant⁵. As such, the principle of immediacy is counted among the guiding principles of criminal trials in Poland as a principle affecting its model. In fact, in the abstract, this idea that influences the shape of the complaint process to the greatest extent, deciding, along with the principles of accusatorial procedure, adversariality, and transparency, as well as the right of the defendant to a defense, to distinguish this developmental form of the criminal trial. Only in the complaint process, initiated by a complaint about an authorized subject, can there be a dispute between parties, and the court has the opportunity to get as close as possible to the subject of proof⁶.

The principle of immediacy is not only a directive to know the facts in the best way and to get as close as possible to the truth using primary evidence first⁷. In fact, in Polish criminal proceedings, the content of the principle of immediacy is usually presented in the form of three postulates. According to the first, secondary evidence must not be given priority over primary evidence, an indication that is simultaneously a reflection of the desire to establish the material truth. The second postulate dictates that the adjudicating court must directly encounter the sourced the evidence. The third postulate states that the court's decision should be based solely on the evidence presented at the trial. This is because only at the trial can the conditions for reliable verification of evidence be fully met⁸.

⁵ BŁACHNIO-PARZYCH, Anna; KOSONOĞA, Jacek. Rzetelny proces karny w orzecznictwie Sądu Najwyższego. In: WILIŃSKI, Paweł (ed.). *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych*. Warszawa: Wydawnictwo Wolters Kluwer, 2009, p. 251.

⁶ PALUSZKIEWICZ, Hanna. Zasada bezpośredniości. In: HOFMAŃSKI, Piotr; WILIŃSKI, Paweł (eds). *System Prawa Karnego Procesowego. Tom III. Cz. 2. Zasady procesu karnego*. Warszawa: Wydawnictwo Wolters Kluwer, 2014, p. 1010.

⁷ Ibidem, p. 1012.

⁸ WILIŃSKI, Paweł. *Zasada prawa do obrony w polskim procesie karnym*, Kraków: Wydawnictwo Wolters Kluwer Polska, 2006, p. 235.

The principle of immediacy in Polish criminal proceedings is in force, even though it is not explicitly defined in the provisions of the Code of Criminal Procedure. Indeed, it is derived from the norm of Article 174 of the CCP ('Evidence from the explanations of the defendant or from the testimony of a witness may not be substituted for by the contents of writings, notes, or official notes.') and *a contrario* from the provisions constituting exceptions to the principle of immediacy⁹. In addition, it is necessary to bear in mind the provision of Article 410 of the CCP, according to the content of which only the totality of the circumstances disclosed during the main trial may form the basis of the judgment.

Constituting exceptions to the principle of immediacy in Polish criminal proceedings, in the course of the main trial, it is possible to read, to an appropriate extent, the records of the defendant's explanations previously made as a defendant in this or other cases in pre-trial proceedings, before a court, or in other proceedings provided for by law if they fail to appear at trial, refuse to explain or explains differently from before, or declares that they do not remember certain circumstances¹⁰. In addition, if a witness without legal grounds refuses to testify, testifies differently from before, or declare that they do not remember certain circumstances, are abroad, could not be served with a summons, failed to appear due to immovable obstacles, or the presiding judge failed to summon a witness owing to the circumstances indicated in Article 350a of the CCP (the presiding judge may refrain from summoning to trial witnesses who has been examined, who is abroad, or whose circumstances are not so momentous as to necessitate directly examining these witnesses at trial). Meanwhile, a witness has died, it is permissible to read, to an extent appropriate, the records of testimony previously given by the witness in pre-trial proceedings or before a court in this or other cases or in other proceedings provided by law¹¹. It is also permissible to read at the main trial the records of the hearings of witnesses and defendants made in pre-trial proceedings, or before a court, or in other proceedings

⁹ ORŁOWSKA-ZIELIŃSKA, Bogna; SZCZECZOWICZ, Krystyna. Wybrane aspekty odstępstwa od zasady bezpośredniości w procesie karnym i ich zgodność z Konstytucją. *Studia Prawnoustrojowe*, n. 23, 2014, p. 151.

¹⁰ See Article 389 § 1 of the CCP.

¹¹ See Article 391 § 1 of the CCP.

provided for by law, when direct evidence taking is not necessary and no parties present objects to this¹². It is also permissible to read at the trial the inspection, search, and seizure of things reports, as well as opinions from expert institutes, establishments, or institutions, criminal record data, the results of the community interviews, and any official documents filed in pre-trial, during court proceedings, or during other proceedings provided by law¹³. However, it is not permissible to read the notes of activities for which a record is required¹⁴. In addition, any private documents created outside the criminal proceedings, such as statements, publications, letters, and notes, may be read at the main trial¹⁵.

1.2 AUSTRIA

In Austria, the principle of immediacy is explicitly included in the Code of Criminal Procedure¹⁶, however, the principle was not introduced into Austrian law until 2004¹⁷. It is clear from the wording of Section 13 of the öStPO that the main trial is the focal point of criminal proceedings, during which time the evidence on which a decision is to be made is presented. It is important to note that evidence can be gathered directly, but it cannot be replaced by secondary evidence. Conversely, the contents of files and other documents may only be used to the extent permitted by the provisions of the Austrian Code of Criminal Procedure.

The principle of immediacy takes the forms of both a formal aspect and a substantive aspect, the former of which states that the court must present all evidence necessary for the decision in the main proceedings. Accordingly, when issuing a judgment, the court may consider only the

¹² See Article 392 § 1 of the CCP.

¹³ See Article 393 § 1 of the CCP.

¹⁴ *Ibidem*.

¹⁵ See Article 393 § 3 of the CCP.

¹⁶ Strafprozeßordnung 1975 (StPO), StF; BGBl. No. 631/1975, hereafter referred to as öStPO; see MIKLAU, Roland. Austria, principles of criminal procedure and their application in disciplinary proceedings. *Revue internationale de droit pénal*, v. 74, n. 3, 2003, p. 799.

¹⁷ Strafprozessreformgesetz 2004 BGBl I 2004/19.

evidence that was submitted during the main trial¹⁸. In the context of the substantive aspect of the principle of immediacy, it should be borne in mind that the court, when it can obtain evidence from various sources, should use the source whose information has been obtained to most directly about the historical facts proving the course of events¹⁹.

As in Polish criminal procedure, the legislator in Austrian criminal procedure allows certain exceptions to the principle of immediacy. One example is the content of Section 252 of the öStPO, based on which, in cases specified by the law, it is possible to read the records of the co-defendant and witnesses, records of evidence, official notes and other official documents containing the testimonies of witnesses or explanations of the co-defendant, expert opinions, and audio, and video recordings of the hearings of the co-defendant or witnesses.

In addition, it should be noted that Austrian jurisprudence indicates that conducting a hearing remotely is an exception to the principle of immediacy, and the possibility of such a hearing derives from Section 247a of the öStPO. Based on this provision, a witness who is unable to appear in court owing to age, illness, disability, or other valid reason may be questioned using technical devices that allow remote participation in the hearing with simultaneous direct video and audio transmission. The Supreme Court of Justice in Austria has indicated that a request for a videoconference hearing simply cannot be considered a request for a witness hearing, as such a hearing is simply a substitute for an in-person hearing before the adjudicating court²⁰. In one case, the Supreme Court of Justice in Austria found a violation of the principle of immediacy because the criminal proceedings failed to provide adequate means for witnesses to appear in person, which was a violation of the principle of immediacy, especially because the court made no attempt to summon witnesses to appear in person for the hearing²¹. The Supreme Court of Justice in Austria also adopted the rule that a videoconference

¹⁸ GILHOFER, Daniel. Use of Administrative Evidence in Criminal Proceedings in Austria. *Eucrim*, n. 4, 2022, p. 270; see also Section 258 para. 1 öStPO.

¹⁹ *Ibidem*.

²⁰ OGH 30.09.2020 15 Os 70/20p, see also OGH 15.12.2011 13 Os 135/11v.

²¹ OGH 30.09.2020 15 Os 70/20p.

hearing, which is a substitute for face-to-face hearing before the sentencing court, is allowed only in cases where the witness is unable or unwilling to appear in court due to residing abroad²².

1.3 GERMANY

In German criminal proceedings, the principle of immediacy is based primarily on the contents of Section 250 of the StPO²³, a norm referred to as the principle of personal hearing, which is based on the fact that if evidence of a fact is based on a person's experience, said person must be examined during the main trial²⁴. At the trial, it is necessary to consider evidence from the hearing of a specific person whenever the court intends to base a decision on such evidence. As a rule, it is not possible to replace this activity, neither by reading the content of a previously submitted testimony (explanation) recorded in the record nor by submitting a written statement²⁵. It follows from the wording of Section 261 of the StPO that the court decides on and issues a decision based solely the material presented at the main trial²⁶. In German criminal proceedings, therefore, as in Poland, there is no specific provision indicating the existence of the principle of

²² Ibidem, see also OGH 02.10.2013 15 Os 97/13y.

²³ Strafprozeßordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319), die zuletzt durch Artikel 2 des Gesetzes vom 25. März 2022 (BGBl. I S. 571), hereafter referred to as StPO.

²⁴ See ŚWIECKI, Dariusz. Postępowanie apelacyjne w niemieckim procesie karnym. *Prokuratura i Prawo*, n. 5, 2011, p. 110; see also HOFMANN, Robin. Formalism versus pragmatism – A comparative legal and empirical analysis of the German and Dutch criminal justice systems with regard to effectiveness and efficiency. *Maastricht Journal of European and Comparative Law*, v. 28, n. 4, 2021, p. 469.

²⁵ KUCZYŃSKA, Hanna. *Analiza porównawcza modelu rozprawy głównej. Między kontradiktoryjnością a inkwizycyjnością*, Warszawa: Wydawnictwo Wolters Kluwer Polska, 2022, p. 374.

²⁶ See DUMITRESCU, Adrian. Das Unmittelbarkeitsprinzip im deutschen und schweizerischen Strafprozessrecht. *Zeitschrift für die gesamte Strafrechtswissenschaft*, v. 130, n. 1, 2018, p. 109; JACKSON, John D.; WEIGEND, Thomas. Witness Evidence in Pre-Trial and Trial Procedure. In: AMBOS, Kai; DUFF, Antony; HEINZE, Alexander; ROBERTS, Julian; WEIGEND, Thomas (eds). *Core concepts in Criminal law and Criminal justice*. Cambridge: Cambridge University Press, 2022, p. 264.

immediacy, which is based on the individual regulations indicated above and which follows *a contrario* from the exceptions to the principle of immediacy.

In the context of exceptions to the principle of immediacy, it is worth pointing to Section 249 of the StPO, according to which documents (including electronic documents if they can be read) may be read at the main trial. In addition, based on Section 251 of the StPO, under the conditions set forth therein, the hearing of witnesses, experts, or the co-defendant may be replaced by a reading of the record of their hearing or their written statement. Under Section 253 of the StPO, it is possible to read the records of the examination of a witness or expert during the main trial if they say that they cannot remember certain facts. The records may also be read if there are contradictions to previously given testimonies that arose during the hearing, particularly when they cannot be clarified or otherwise resolved without interrupting the main trial. In addition, under Section 254 of the StPO, the defendant's explanations that were previously included in the record or the transcript of the audiovisual recording may be read at the trial as evidence of the defendant's confession. The record of the defendant's explanations may also be read if contradictions with previously made statements arise that cannot be clarified or resolved without interrupting the main trial. Moreover, the wording of Section 256 of the StPO makes it possible to read official documents during the main trial.

1.4 ENGLAND

An English criminal trial is essentially a model of the style of criminal trial rooted in the common law system, from which the subordination of evidentiary proceedings to the rule against hearsay evidence (principle of hearsay) comes, which is considered characteristic of and distinguishes this system from the continental system. In a sense, this principle is the equivalent of the principle of immediacy. The principle of rule against hearsay evidence implies the prohibition of proof by means of the hearsay testimony of a witness, intended to ensure adjudication based on the best evidence, free from distortions and risks of falsity²⁷.

²⁷ PALUSZKIEWICZ, Hanna. Zasada bezpośredniości. In: HOFMAŃSKI, Piotr; WILIŃSKI, Paweł (eds). *System Prawa Karnego Procesowego. Tom III. Cz. 2.*

In the Anglo-Saxon model, the purpose of prohibiting the admission of secondary evidence is to ensure adjudication based on the ‘best evidence’ (best evidence rule). It is assumed that the principle of immediacy is a necessary guarantee that members of the jury will maintain impartiality and objectivity. Secondary evidence, being less reliable, is generally considered inadmissible due to having a lower evidentiary value²⁸.

In the context of exceptions to the above-mentioned rule, it is permissible to take evidence from the statement of a witness not present in court, if it has been signed and served to the opposing party, who has not objected to its presentation as evidence. Thus, crucial to the possibility of admitting such evidence is obtaining the consent of the opposing party before reading such a statement. If there is an objection, the court has no possibility of admitting such evidence²⁹. A witness statement may also be read when the witness is unavailable because they have died, are living abroad and it is impossible for them to appear at trial, whether because the person is unfit to be a witness due to a physical or mental condition, the witness cannot be found despite steps having been taken to locate this person, or when owing to a well-founded fear the witness does not want to testify³⁰. If the witness states (or it is proven) that they have previously made a statement that contradicts the content of their current testimony, such a statement may be used as evidence³¹. In addition, a witness’s prior statement may be admitted as evidence

Zasady procesu karnego. op. cit., p. 1037; see also *Evidence: Report on Hearsay Evidence in Criminal Proceedings*, Scottish Law Commission (Scot Law Com No. 149), Edinburgh 1994, p. 15. Available at: <<https://www.scotlawcom.gov.uk/files/9412/7989/7413/rep149.pdf>>. Accessed on 23 February 2024; VOGLER, Richard. *The Principle of Immediacy in English Criminal Procedural Law*. *Zeitschrift für die gesamte Strarechtswissenschaft*, v. 126, n. 1, 2014, p. 241.

²⁸ KUCZYŃSKA, Hanna. *Analiza porównawcza modelu rozprawy głównej. Między kontradiktoryjnością a inkwizycyjnością*. op. cit., p. 378.

²⁹ *Ibidem*.

³⁰ Criminal Justice Act 2003, Section 116; see also BRODIN, Mark S. *The British Experience with Hearsay Reform: A Cautionary Tale*. *Fordham Law Review*, v. 84, Issue 4, 2016, pp. 1422.

³¹ Criminal Justice Act 2003, Section 119; see also BRODIN, Mark S. *The British Experience with Hearsay Reform: A Cautionary Tale*. op. cit., p. 1425.

to rebut the suggestion that his oral testimony was fabricated. Such a statement is admissible as evidence in any case in which the witness's oral testimony has been deemed admissible³². In English criminal proceedings, certain documents, such as professional documents, invoices, records, and hospital records are considered secondary evidence, and because it would be unreasonable to question as a witness every person who knows the contents of the document, the law makes an exception regarding the prohibition of admitting secondary evidence, allowing it to be used at trial if it meets certain criteria³³. Documentation of criminal proceedings - hearing reports prepared both in this and other proceedings - is also secondary evidence. They can be presented as evidence only if the conditions specified by law are met³⁴.

2. THE POSSIBILITY OF CONDUCTING A REMOTE TRIAL IN CRIMINAL PROCEEDINGS - REGULATIONS IN FORCE IN THE POLISH LEGAL ORDER

Concerning the Act of June 19, 2020, § 3-9 was added to Article 374 of the CCP, regulations that set the conditions for holding a trial remotely. In accordance with the introduced regulations, the presiding judge, at the request of the prosecutor, agrees to begin the trial using technical devices that allow remote participation in the trial, with the simultaneous direct transmission of video and audio, if not prevented by technical considerations³⁵. Another issue is that the presiding judge may be exempt from the obligation to appear at the trial with the remote participation of the defendant, an auxiliary prosecutor, or a private prosecutor who are deprived of their liberty, if it is ensured these parties can engage in the trial using technical devices that allow remote participation with simultaneous direct video and audio transmission³⁶. In such a case, a court registrar or assistant judge employed by the court in whose district the party resides, or a representative of the administration

³² Criminal Justice Act 2003, Section 120.

³³ Criminal Justice Act 2003, Section 117.

³⁴ Criminal Justice Act 2003, Section 117(4)–(5).

³⁵ See Article 374 § 3 of the CCP.

³⁶ See Article 374 § 4 of the CCP.

of a penitentiary or detention center, if the party is housed therein, is present at the party's location³⁷. As a rule, counsel for the defense will take part in the trial conducted remotely at the defendant's place of residence, unless they appear in court for this purpose. However, in the event that the counsel for the defense participates in the trial while residing at a location different from that of the defendant, the court, upon the request of the defendant or counsel for the defense, may order a recess for a specified period before continuing the trial on the same day to allow the counsel for the defense to contact the defendant by telephone, unless the request clearly does not serve to exercise of the right of defense, and, in particular, aims to disrupt or unreasonably prolong the trial³⁸. If there is a need for the participation of an interpreter in a trial conducted remotely, the interpreter will participate from the place of residence of the defendant who is not sufficiently proficient in Polish or at the place of residence of a deaf or mute person, when communication with them by means of a letter is insufficient, unless otherwise ordered by the presiding judge³⁹. In addition, the legislator has introduced the corresponding application of the regulation in force in summary proceedings, i.e. during court actions in which the defendant participates with the use of technical devices that allow these actions to be conducted remotely, participants in the proceedings may submit motions and other statements and perform procedural actions only orally into the record. The court is then obliged to inform the defendant and the counsel for the defense at the next procedural action of the content of all pleadings that have been received in the case file since the transfer of the motion for trial to the court. At the request of the defendant or the counsel for the defense, the court is obliged to read the contents of these pleadings. Then, the pleadings of the defendant and his counsel for the defense, which could not be transmitted to the court, may be read by them at the trial, immediately after which they have a procedural effect and are treated as actions made orally⁴⁰.

³⁷ See Article 374 § 5 of the CCP.

³⁸ See Article 374 § 6 - § 7 of the CCP.

³⁹ See Article 374 § 8 of the CCP.

⁴⁰ See Article 374 § 9 and Article 517ea of the CCP.

In the explanatory memorandum to the Act of June 19, 2020, the drafters pointed out that the regulations in force to date were insufficient and did not account for technical developments affecting the spread of solutions for remote communication and the need to hasten proceedings, reduce inconveniences for participants, and reduce risks associated with epidemic or emergency states⁴¹. It was also pointed out that the draft provides solutions allowing the participation of parties, including the counsel for the defense and proxies, in the trial at the stage of court proceedings using technical devices that allow participation at a distance with the simultaneous direct transmission of video and audio, regulating precisely the issues related to the conditions for the application of such a possibility and the manner of its implementation, as well as including norms to ensure the effective exercising of the right to defense by the defendant and the protection of the rights of other participants in the proceedings⁴².

Of note, the remote form has also been introduced into court sessions (Article 96a and Article 250 § 3b-3h of the CCP), so it must be emphasized that despite the introduction by the Act of June 19, 2020 of the possibility of a remote trial in criminal proceedings, the provisions regulating it do not contain a condition in the form of the existence of difficulties or threats related to the epidemic situation, which were raised in the justification of said law. This means a trial in remote form, once certain conditions are met, can be held in any case, and this rule has been permanently introduced into the Code of Criminal Procedure⁴³. This was confirmed by the Supreme Court, which indicated that the subject matter scope of the application form of a remote trial has not been explicitly defined. Thus, it can be stated that in virtually every case, it is permissible to hold a trial remotely, and this scope is determined based on the subject criterion, namely, concerning the parties referred to in Article 374 § 4

⁴¹ Explanatory Memorandum to the government draft act on interest subsidies on bank loans granted to provide liquidity to COVID-19-affected entrepreneurs and on amendments to certain other laws, print No. 382, 22.05.2020, p. 25.

⁴² Ibidem, p. 26.

⁴³ ŚWIECKI, Dariusz. Art. 374. In: ŚWIECKI, Dariusz (ed.). *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX 2023.

of the CCP, two conditions for holding a trial remotely are required. The first is the factual premise of the deprivation of liberty, and the second is ensuring these parties participate in the trial using technical devices that enable remote engagement in the trial with the simultaneous direct transmission of video and audio. In doing so, the Supreme Court stressed that when proceeding remotely, it is necessary to ensure the proper and effective exercising of the defendant's right of defense, as the law does not and cannot impose any restrictions on this right⁴⁴.

3. THE IMPACT OF A REMOTE TRIAL ON IMPLEMENTING THE PRINCIPLE OF IMMEDIACY IN CRIMINAL PROCEEDINGS

Juxtaposing the provisions governing remote trials in Polish criminal proceedings with the demands of the principle of immediacy, one could argue this form of trial satisfies the principle. First, the directive mandating evidence be presented during the main hearing is fulfilled. Indeed, the parties might not be physically present in the courtroom, but the hearing continues regardless according to the wording of the provision of Article 374 § 4 of the CCP. The case examination takes place at trial, despite the party being in another location, and contact with the court is carried out using technical devices that allow real-time participation in evidence-taking through the direct transmission of video and audio. The non-present party can thus see and hear everything occurring in the courtroom and thus has direct contact with the trial participants, making it possible, for example, to enquire of those being questioned⁴⁵. In the context of the second directive of the principle of immediacy, which mandates the court have direct contact, a remote hearing is not a direct hearing, as it is executed through technical devices⁴⁶. However, owing to the direct transmission of images and sound, the court sees and hears the parties and other participants in the proceedings and observes their behavior. Thus, from this perspective, the court's perception of

⁴⁴ Decision of the Supreme Court of 22.06.2022, IV KK 79/22, LEX n. 3454989.

⁴⁵ ŚWIECKI, Dariusz. Art. 374. In: ŚWIECKI, Dariusz (ed.). *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*. op. cit., LEX 2023.

⁴⁶ *Ibidem*.

behaviors is the same as when in direct contact with the trial participants in the courtroom. Formally, therefore, in the case of a remote hearing, the court does not have direct contact with the person being examined, but thanks to technical devices, the purpose of this directive is achieved. Conversely, such a hearing method makes it possible to implement the third directive of the principle of immediacy in full, as the court can introduce primary evidence⁴⁷.

In the literature, even before the introduction of the regulations allowing remote trials to be conducted, but when the regulation of Article 177 § 1a of the CCP was already in force, according to which it is possible to question a witness remotely using technical devices with the simultaneous direct transmission of video and audio, it was pointed out that a remote hearing should not be feared. This is because if properly planned and conducted, it prevents any allegations of violations of procedural principles, primarily concerning the principles of immediacy, adversarialism and the defendant's right to defense. It has also been stressed that the principle of immediacy is undoubtedly realized remotely better during a hearing by an appointed judge or a summoned court⁴⁸, because the trial body comes into direct contact with the evidentiary source and can access the primary evidence. In judicial proceedings, the entire panel can also to encounter the evidence at trial⁴⁹, with indications that using at form of videoconferencing when examining a witness enables the realization of not only the principle of immediacy, but also the principle of transparency. In addition, the conduct of a remote trial may be, from the viewpoint of the counsel for the defense, a more favorable form of obtaining evidence from witness testimony than via a traditional hearing by the court. This is because the counsel for the defense can then participate in the hearing as if they were present in the courtroom, but without having to incur additional expenses, such as for travel to the court. In fact, they can ask

⁴⁷ Ibidem.

⁴⁸ LACH, Arkadiusz. Przesłuchanie na odległość w postępowaniu karnym. *Państwo i Prawo*, n. 12, 2006, p. 87.

⁴⁹ LACH, Arkadiusz. Udział oskarżonego w czynnościach procesowych w drodze videokonferencji. *Prokuratura i Prawo*, n. 9, 2009, p. 32.

questions on the fly and verify the answers given, observe the witness reactions, and adjust their hearing tactics accordingly⁵⁰.

However, it should be emphasized that appropriate technical equipment is required both for the court venue and for the trial participant taking part remotely. First, there must be a camera pointing at the trial participant and a screen showing the person being questioned. Second, there should be a camera pointing at the trial participant and a screen showing an image of the person asking questions. The principles of adversariality and the right of defense require that the defendant and their counsel for the defense be able to see and hear the trial participants clearly⁵¹. Therefore, to conduct a full-fledged remote trial, based on a sound tactical plan to lead the trial body to the most satisfactory results, it is necessary to adopt a system of multiple cameras and microphones to transmit accurately reflected images and voices of the trial participants, as well as of the situation taking place in the courtroom and of the other participants in the main trial located elsewhere⁵².

Despite the above-mentioned advantages of conducting a trial using technical devices with the simultaneous direct transmission of video and audio (efficiency and speed of proceedings, the possibility for the court to encounter primary evidence, the economy of the trial), it should be borne in mind that during a remote trial, the principle of immediacy can be violated to a serious degree, because panel members have a limited opportunity to encounter evidence sources. Explanations or testimonies given through remote trial devices are not performed directly before the court, and there may be interference with the transmission of video or audio, which may ultimately affect the evaluation of this evidence⁵³. The court can only make findings based on the evidence to which the parties have access and on their ability to exercise their rights, that is,

⁵⁰ DEMENKO, Anna. *Prawo do obrony formalnej w transgranicznym postępowaniu karnym w Unii Europejskiej*, LEX 2013.

⁵¹ LACH, Arkadiusz. Przesłuchanie na odległość w postępowaniu karnym. op. cit., pp. 83-84.

⁵² DUTKIEWICZ, Marcin. Przesłuchanie świadka na odległość w świetle art. 177 § 1a k.p.k. *Palestra*, n. 3-4, 2008, p. 75.

⁵³ GRUBALSKA, Aleksandra. Rozprawa zdalna na gruncie art. 374 kodeksu postępowania karnego. *Roczniki Administracji i Prawa*, n. 3, 2021, p. 104.

to ask questions and make statements during the main trial. In this way, active participation of the parties in the trial is ensured. However, owing to technical difficulties that can occur, for example, when listening to a witness remotely, this activity can be shortened to a minimum, and the court can order the parties to prepare for the possibility of this event beforehand. Therefore, the aim is to prevent repeating the activity, unless for good reason, thus hastening the proceedings and reducing their costs. However, it should be considered that speed and ready-made lists of questions can give the impression of a poorly conducted procedural activity and could prevent a party from asking additional questions, the necessity for which arises only during the hearing⁵⁴.

As indicated above, the principle of immediacy, which applies in criminal proceedings, dictates that the trial authority must make direct contact with the evidence source. This directive, conversely, is most fully realized when the procedural authority and other persons participating in the hearing are guaranteed the opportunity to encounter and observe the person being examined directly, while being in the same room as them⁵⁵. This is because these circumstances create the best conditions for a full perception of the messages transmitted by the examined person in a non-verbal manner, especially those transmitted unconsciously and involuntarily⁵⁶. Non-verbal communication, on the other hand, is of considerable importance, referring to the sending or receiving of information derived from a person's facial features, facial expressions, gaze, posture, or movements. This behavior that can signal the intentions of the participants in the proceedings and form impressions among panel members and other participants who observe the person. Alternatively, the use of technical devices for

⁵⁴ DUTKIEWICZ, Marcin. Przesłuchanie świadka na odległość w świetle art. 177 § 1a k.p.k. op. cit., p. 80.

⁵⁵ PALUSZKIEWICZ, Hanna. Zasada bezpośredniości. In: HOFMAŃSKI, Piotr; WILIŃSKI, Paweł (eds). *System Prawa Karnego Procesowego. Tom III. Cz. 2. Zasady procesu karnego*. op. cit., p. 1037.

⁵⁶ See LACH, Arkadiusz; KLUBIŃSKA, Maja; BADOWIEC, Renata. Conflicting interests of witnesses and defendants in a fair criminal trial – can a hearing by videoconference be the best instrument to reconcile them?. *Revista Brasileira de Direito Processual Penal*, v. 8, n. 3, 2022, pp. 1177-1178.

video and audio transmission during remote trials limits the scope of the vision and the ability of proceeding participants to evaluate the evidence being collected, including during the defendant and witness hearings⁵⁷. Thus, of note, remote participation in a trial deprives the participant connecting remotely of or significantly limits their access to the non-verbal information being communicated by other persons. Non-verbal messages containing information about the other person's attitude, emotions, mental state, or treatment of others person help regulate conversation and serve to create the desired impression⁵⁸.

It should be emphasized that direct communication between people interacting in the same space (in this situation, the courtroom) increases the chances that the trial will better achieve its purpose and accomplish its stated tasks. In addition, the implementation of the principle of immediacy during the trial has a positive impact on society, as such a process increases the feeling that the state, through the court, is serious about resolving a particular case. From this perspective, remote trials can be considered an instrument for mediating contact between trial participants. Admittedly, the lack of direct personal contact during a main trial conducted remotely does not in itself necessarily entail a complete violation of the principle of immediacy. However, there is an impression that the immediacy of the main hearing renders it of an 'inferior quality', as this form leads to the imposition of restrictions on the court's contact with trial participants in the form of screens and computer programs that allow remote participation in the proceedings⁵⁹.

Thus, even if a trial conducted remotely considers the principle of immediacy to some extent, this is not equivalent to realizing the

⁵⁷ DENAULT, Vincent; PATTERSON, Miles L. Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges. *Journal of Nonverbal Behavior*, v. 45(1), 2021, pp. 4-5; see also DENAULT, Vincent; DUNBAR, Norah. Nonverbal communication in courtrooms: Scientific assessments or modern trials by ordeal? *The Advocates' Quarterly*, v. 47(3), 2017, pp. 280-308.

⁵⁸ HALL, Judith A.; HORGAN, Terrence G.; MURPHY, Nora A. Nonverbal Communication. *Annual Review of Psychology*, n. 70, 2019, pp. 271-294.

⁵⁹ INCHAUSTI, Fernando G. Challenges for Orality in Times of Remote Hearings: Efficiency, Immediacy and Public Proceedings. *International Journal of Procedural Law*, v. 12, n. 1, 2022, pp. 20-21.

postulates of this principle during a traditional trial. This is because, as indicated above, physical, face-to-face communication consists of both verbal and non-verbal information (body language, eye contact, facial expressions), whereas communication via computers is limited because much of the non-verbal information is lost. It should also be emphasized that cameras are often not set up so the person can look directly into the camera, so it is difficult to make eye contact with the interlocutor⁶⁰. Another problem is that during a remote hearing it is impossible to communicate with only select people, as the same screen is broadcast to all participants in the trial, so all messages are transmitted to all participants partaking in the trial⁶¹.

Finally, it should also be clarified that when communicating at a distance as is the case in a remote trial, there can be an increased cognitive load, which is caused by, among other things, the asynchronicity of communication caused by delays, and poor natural regulation of conversations (the brain has a natural need to work in full synchronization)⁶² and the lack of non-verbal communication or eye contact, which serves to coordinate joint activities and maintain concentration during activities and conversations⁶³.

⁶⁰ HJORT Maria A. Orality and Digital Hearings. *International Journal of Procedural Law*, v. 12, n. 1, 2022, p. 32; see also BENABOU, Valérie-Laure; JEULAND, Emmanuel. From the Principle of Immediacy to the Principle of Presence: A French Example and a Comparative Law Perspective. *International Journal of Procedural Law*, v. 12, n. 1, 2022, p. 47.

⁶¹ HJORT, Maria A. Orality and Digital Hearings. op. cit., p. 33.

⁶² WIEDERHOLD, Brenda K. Connecting Through Technology During the Coronavirus Disease 2019 Pandemic: Avoiding “Zoom Fatigue”. *Cyberpsychology, Behavior, and Social Networking*, Jul;23(7), 2020, pp. 437-438.

⁶³ SCHILBACH, Leonhard; WILMS, Marcus; EICKHOFF, Simon B.; ROMANZETTI, Sandro; TEPEST, Ralf; BENTE, Gary; SHAH, N Jon; FINK, Gereon R.; VOGELY, Kai. Minds made for sharing: initiating joint attention recruits reward-related neurocircuitry. *Journal of Cognitive Neuroscience*, Dec;22(12), 2010, pp. 2702-2715.

4. LIMITATIONS OF REALIZING THE PRINCIPLE OF IMMEDIACY DURING REMOTE TRIAL IN CRIMINAL PROCEEDINGS IN THE POLISH LEGAL ORDER – THE RESULTS OF A QUESTIONNAIRE SURVEY

As part of the ongoing research project implementation of the grant ‘Remote procedural acts in criminal process’ funded by the National Science Centre under the OPUS 19 competition, the research team (Arkadiusz Lach⁶⁴, Maja Klubińska⁶⁵, Bartosz Sitkiewicz⁶⁶, Renata Badowiec) conducted between October 2022 and March 2023 a survey of individuals representing judges, prosecutors, attorneys, and solicitors regarding procedural actions conducted remotely in criminal proceedings (excluding executive proceedings).

The survey was completed by 96 representatives of the group of judges (and judicial assessors), accounting for almost 25% of all those surveyed; by 257 prosecutors (and assistant prosecutors), accounting for more than half of all those surveyed; 30 attorneys (and trainee attorneys), accounting for less than 10% of all those surveyed; and 40 representatives of the group of solicitors (and trainee legal solicitors), but the results of only 21 questionnaires can be considered (owing to the others’ incomplete surveys).

In the context of the problem analyzed in this article, the relevant question asked of those surveyed was whether, given the standards and functions of a fair criminal trial, the preparedness of the courts to conduct procedural actions remotely, and the degree of advancement of digitization in Polish society, it is reasonable to introduce into the Code of Criminal Procedure, in the near future, regulations allowing a trial or court session to be conducted entirely remotely. In total, 204 people offered a negative answer to this question, while 184 people answered positively. Thus, as can be seen, there was a slight preponderance of people

⁶⁴ Professor of criminal procedure, Head of Department of Criminal Procedure and Criminalistics at the Faculty of Law and Administration, Nicolaus Copernicus University in Toruń (Poland).

⁶⁵ PhD in Law, Assistant Professor at the Department of Criminal Procedure and Criminalistics at the Faculty of Law and Administration, Nicolaus Copernicus University in Toruń (Poland).

⁶⁶ PhD in Law, District Court judge in Toruń (Poland).

who indicated that it would be unreasonable to introduce into the Code of Criminal Procedure, in the near future, regulations allowing a trial or court session to be conducted entirely remotely, but what is important is the justification for such a response by those surveyed.

Representatives of the group of judges justified their response based on, among other things, the incompatibility of such provisions with the principle of immediacy, as they pointed out that only direct contact with witnesses and parties in the courtroom allows the fullest evaluation of the explanations and testimonies given, as well as enable such activities as confrontation or presentation of a person to be carried out. By participating in the main trial conducted remotely, there is a fear of influence on the testimony and explanations, and there may be shortcomings in the ability to create conditions for the person being questioned to give a free account. In addition, remote contact can prolong the proceedings and interfere with the proper perceptions of the person participating in the trial when using technical devices with the simultaneous direct transmission of video and audio in the Polish legal order. According to the judges, direct contact with trial participants allows better jury work and an improved assessment of the credibility of the interviewed persons. The judges also stressed that during the remote trial, there are limitations on the possibility of showing documents from the case file. Representatives of prosecutors also pointed out that the introduction of regulations in the Code of Criminal Procedure, in the near future, allowing a trial or court session to be conducted entirely remotely could contradict the principle of immediacy. According to this group of respondents, the immediacy of the evidence-taking makes it possible to observe the witness behaviors in full, which the remote mode, however, lacks, and there may also be reduced control over the independence of the statements of witnesses and other persons questioned. Furthermore, the trial body evaluates testimony or explanations based on not only verbal, but also non-verbal behavior, and the remote process does not allow such a full evaluation. There may also be concern about influencing personal evidence sources. Representatives of the group of attorneys and solicitors also pointed out that holding a traditional trial makes it possible to assess and confront the credibility of witnesses and the defendant better, as well as the freedom and spontaneity of their statements:

activities conducted remotely, on the other hand, do not allow a full assessment of the behavior of the person being questioned.

Representatives of the group of judges who pointed out that the implementation of the principle of immediacy may be limited by conducting trials remotely stressed that this may concern in particular the inability of the court to assess the statements of witnesses, experts, or defendants properly. According to the judges, assessing the credibility of personal evidence is also largely reliant on the evaluation of non-verbal communication. Thus, the lack of independence of the statements of defendants and witnesses, the vagueness of statements, or the difficult-to-predict situations that would not occur in direct contact in the courtroom can also be serious threats. Representatives of the prosecutors' group considered that violations of the principle of immediacy during proceedings conducted remotely can occur through misrepresentations in the record due to poor sound quality, others' influence on the content of testimony and the freedom of expression of those being questioned, the inability to assess the behavior of the person being questioned in its entirety, as only parts of the body are visible, which can affect or impair credibility assessments, or the possibility of the witness preparing statements and reading them. Representatives of the group of attorneys and solicitors, who indicated that they perceive threats to the realization of the standards of a fair criminal trial and the realization of its functions as a result of conducting activities remotely, considered the most important of these to be difficulties in assessing evidence credibility, such as fear of obstruction, lack of spontaneity in testimony or explanations, influence on testimony, ease of lying during explanations or testimony given remotely, and difficulty in asking questions. They pointed out that the lack of immediacy prevents trial authorities from making adequate findings in the case.

CONCLUSIONS

The considerations made in this study show the importance of how the principle of immediacy factors into the conduct of criminal proceedings. Regardless of whether it is explicitly included as a principle

in the provisions of the Code of Criminal Procedure (as in Austria) or whether it is derived from other regulations, it impacts the shape of evidentiary proceedings and, ultimately, the decision of the court that will be made after the main trial. The way the court encounters a particular means and source of evidence affects its evaluation, rendering it important for the court to use primary evidence and to encounter it directly during the main trial.

In Polish criminal proceedings it is currently possible to conduct a remote trial, and while there are no subject matter restrictions, the legislator has not indicated in what categories of cases there is a possibility of conducting the trial using technical devices with the simultaneous direct transmission of video and audio. Admittedly, such a form of conducting proceedings promotes speed and efficiency (while also assuming the courts and participants in the proceedings are technologically prepared), as well as cost reduction, but it should be clearly stated that in no case can the principle of immediacy be fully realized during a remote trial. Even with the best-organized criminal proceedings, having top-quality equipment and an elevated level of digitization, the barrage of monitor screens will at least minimally distort the jury members' perceptions of the evidence collected. Computer equipment also causes delays in the transmission of either images or sound, and the entire person and their surroundings may not be visible on the screen. Moreover, non-verbal communication is of considerable importance in the evaluation of evidence, so a remote trial limits the court's perception of the evidence being collected.

Meanwhile from the survey results presented, it appears representatives of the legal practice perceive problems that can arise during a trial conducted using technical devices with simultaneous direct video and audio transmission. Those partaking in the survey acknowledged the dangers of such a form of trial in its realization of the principle of immediacy. In particular, the limitation of the court in observing the full behavior of the participants in the proceedings should be pointed out here, including those being questioned, which also negatively impacts the free evaluation of evidence by the panel deciding the case. Thus, in this context, technical equipment is a barrier, so there can be no direct contact between the court and the evidence collected during the main trial. The lack of this immediacy has even more dire consequences,

impacting the implementation of other principles, such as the defendant's right of defense, the principle of adversariality, or the aforementioned principle of the free evaluation of evidence. The court is thus reduced to observing only what is visible on the monitor, and often, the picture is not complete and only a fragment of the person being questioned can be seen, which may result in a different assessment by the court than if the person were in the courtroom.

Following these considerations, it is worth noting that the decision concerning the possibility of holding a trial remotely should rest with the court, which has the fullest knowledge of the proceedings and the evidence that must be given in the case. In addition, the court's ability to choose the form of remote trial should be limited only to cases in which the facts are uncomplicated and especially when the defendant has either pleaded guilty or there has been at least one motion based on which there can be a consensual conclusion to the proceedings.

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Authorship information

Renata Badowiec. PhD in Law, assistant at the Department of Criminal Procedure and Criminalistics at the Faculty of Law and Administration, Nicolaus Copernicus University in Toruń (Poland). r.badowiec@umk.pl

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