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# Exercise of the Right to Defence in Criminal Proceedings during the COVID-19 Pandemic with Particular Reference to the Relation Between the Accused and the Defence Counsel

**Abstract:** The aim of this article is to present the legal solutions adopted in criminal proceedings during the COVID-19 pandemic and their impact on the implementation of the right to defence, focusing, in particular, on the relation between the accused and the defence counsel. During the pandemic, online trials and hearings became widespread and communication with the courts via email developed. Issues of confidentiality between the accused and his/her defence counsel, as well as access of the defence counsel to files, were analysed, particularly in cases related to pretrial detention. The new solutions have been evaluated, possibilities of their use after the end of the pandemic have been indicated and postulates as to the desired directions of changes have been formulated. The issues addressed are relevant today and extremely important in the sphere of public law, as criminal liability is proved during criminal proceedings. In general, it should be assessed positively that the COVID-19 pandemic has become an opportunity to introduce new legal solutions for the modernisation of criminal proceedings. However, some of these regulations do not fully meet the objectives set for them, hindering, through the adoption of specific solutions and practices, the proper implementation of certain key procedural principles, primarily the right to defence.
**Keywords**: accused, criminal proceedings, defence counsel, defence secrecy, online hearing, online trial, right to defence

## Introduction

The COVID-19 pandemic has affected every sphere of economic, social and legal life. The world has faced many challenges. The economy came to an unprecedented halt, the work of public institutions came to a standstill, and the freedom of movement was severely restricted. Over the last two years, terms such as lockdown, restrictions, working from home and online classes have become a permanent part of our vocabulary.

Countering the spread of the COVID-19 pandemic has been accelerated by the implementation of technological solutions in public institutions, which make it possible to communicate or perform activities remotely using the internet. This has contributed significantly to the spread of online trials, email communication with courts and the online examination of witnesses.

The unexpected and sudden entry into the 21st century has exposed weaknesses resulting from insufficient technical preparation and a state of legislation ill-suited to modern needs.[1] The remedy for the legislative problems was to be the enactment of the Act of 2 March 2020 on specific solutions related to the prevention, countering and combating of COVID-19, other infectious diseases and crisis situations caused by them.[2] The changes introduced by this legal act regulated many issues related to the organisation of healthcare and state aid to entrepreneurs, but also amended the emerging normative gaps. One of such gaps was the lack of powers, resulting from the provisions of the system regulating proceedings before a designated authority, to hold hearings and make legally binding decisions in a remote or mixed mode. That was the case, for example, with the courts, universities and professional self-governing bodies.

The normative solutions introduced in March 2020 are characterised by the fact that they respond to current problems of an organisational and legal nature. This is best demonstrated by the fact that since its promulgation, the COVID-19 Act has lived to see 34 amendments.[3] The force majeure, which is undoubtedly the ongoing pandemic and the consequent need to protect the lives and health of citizens, necessitated taking rapid steps to adapt the legal provisions to the emerging challenges.

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1 See on this subject: A. Klepczyński, P. Kładoczny, P. Kubaszewski, K. Wiśniewska, Raport Helsińskiej Fundacji Praw Człowieka, Czy koronawirus SARS-CoV–2 zaatakował system wymiaru sprawiedliwości w sprawach karnych?, Warsaw 2021, https://www.hfhr.pl/wp-content/uploads/2021/11/Raport-COVID-a-proces-karny-PL.pdf (accessed 26.11.2021).

2 Uniform text. Journal of Laws of 2021, item 2095 with amendments. (hereinafter: the Act on COVID-19).

3 Journal of Laws of 2020, item 1639, item 2112, item 2123, item 2157, item 2255, item 2275, item 2320, item 2327, item 2338, item 2361 and item 2401; of 2021, item 11, item 159, item 180, item 694, item 981, item 1023, item 1090, item 1162, item 1163, item 1192, item 1510, item 1535, item 1777, item 2120, item 2133, item 2269, item 2317, item 2368, item 2459 and of 2022 item 202, item 218, item 830 and item 771.

Many solutions are of a temporary nature, i.e. they are binding for the duration of the state of epidemic and up to one year after its cancellation as well. It should be noted, however, that there are also such solutions that will remain in force regardless of the situation related to the COVID-19 pandemic. Among them are changes leading to the increase of the use of the internet in criminal proceedings and remote communication. This trend should be assessed positively, although there are problems with some of the specific legal solutions that raise doubts, e.g. those concerning the implementation of certain fundamental procedural principles in criminal proceedings, including the right to defence.

## 1. Online Hearings and Trials

Reducing interpersonal contact to stop the spread of COVID-19 has presented the justice system with a difficult challenge. The first months of the 2020 pandemic revealed legislative, technical and organisational unreadiness to conduct online hearings or trials without the need for participants to appear in the court building. Consequently, common courts ceased to continue work and the hearing of cases was suspended, except for those deemed urgent[4] by the legislator, and court business and procedural deadlines were suspended as well.[5] The response to this situation was to adapt the existing legislation to the challenges of reality and to enable online hearings and trials. The problem has affected not only Poland, but many other European countries as well, and resulted in changes of the law in force or in the passing of new legislation.[6] In the literature on the analysis of Covid legislation in European coun-

4 This was regulated by Article 14a of the COVID-19 Act in force from 31 March 2020 to 4 September 2020. Urgent cases included the following cases: on motions for the application, extension, amendment and revocation of pretrial detention; in which detention or a preventive measure in the form of pretrial detention was used; in which a protective measure was ordered; the hearing of a witness in pretrial proceedings by the court pursuant to Articles 185a–185c or 316 § 3 of the Code of Criminal Procedure, if the hearing under the procedure provided for the examination of urgent cases was requested by the prosecutor; on the European arrest warrant; on conditional discontinuance of proceedings.

5 This was regulated by Article 15zzs of the COVID-19 Act in force from 31 March 2020 to 16 May 2020. Among the suspended deadlines, the legislator also listed deadlines in criminal proceedings, criminal fiscal proceedings and proceedings in misdemeanour cases. At the same time, it should also be pointed out that by the Act of 20 April 2021 amending the Act – Penal Code and certain other acts (Journal of Laws, item 1023), Article 15zzr[1] was added to the COVID-19 Act, under which the running of the statute of limitations for criminal prosecution in cases of offences and fiscal offences was suspended during the period when the state of epidemic emergency or the state of epidemic declared due to COVID-19 was in force and during the period of six months after their revocation. The pause is counted from 14 March 2020 (for the epidemic emergency), and from 20 March 2020 (for the epidemic state).

6 A. Sanders, Video-Hearings in Europe Before, During and After the COVID-19 Pandemic, 'International Journal for Court Administration' 2020, no. 12(2), pp. 1–12, http://doi.org/10.36745/

tries, it was generally noted that the use of videoconferencing instead of a traditional hearing should meet the standards of a fair trial, based on Article 6 of the ECHR.[7] As far as the procedure of videoconferencing itself is concerned, the necessity to use specialised audiovisual equipment was raised, while noting that the use of videoconferencing is not a good solution for all court actions. That is why it has been proposed to divide court actions into three groups: a) those that can be performed equally well, or even better, by videoconferencing than by conventional means, b) those that can be performed with the aid of such a tool but require the related complications to be taken into account (e.g. multi-party proceedings), and c) those which are not compatible with videoconferencing and should not be carried out by means of it (e.g. the confrontation of witnesses or the accused, because of the psychological implications of a judicial assessment of the credibility of the participants involved).[8]

Initially, the changes covered civil and administrative court proceedings. Pursuant to the provisions of Article 15zzs[1] to Article 15zzs[4] amending the COVID-19 Act[9], in civil and administrative cases during the period of an epidemic emergency or a state of epidemic declared due to COVID-19, the possibility of holding a hearing or a public hearing remotely was admitted, and the persons participating in them did not have to be in the court building. The possibility to abandon holding a trial or a hearing in favour of a closed session was also adopted, including the entitlement to issue a decision in a closed session after collecting written positions from the parties or participants in the proceedings. It is also worth mentioning that since 3 July 2021[10] it has become the rule to hear cases in accordance with the provisions of the Code of Civil Procedure[11] in online sessions.

Subsequently, it was decided to make changes in criminal proceedings. This was done pursuant to the Act of 19 June 2020 on interest subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of this arrangement in connection with the occurrence of COVID-19,[12] thus amend-

ijca.379 (accessed 25.04.2022).

7 P. Gori, A. Pahladsingh, Fundamental rights under COVID-19: a European perspective on videoconferencing in court, 'ERA Forum' 2021, no. 21, p. 574, https://doi.org/10.1007/s12027–020–00643–5 (accessed 25.04.2022).

8 C. Kulesza, Rozprawa zdalna oraz zdalne posiedzenie aresztowe w świetle konwencyjnego standardu praw oskarżonego, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 3, pp. 211–212 and the literature referred to therein.

9 By virtue of the Act of 14 May 2020 on amending certain laws in the field of protective measures in connection with the spread of the SARS-CoV–2 virus (Journal of Laws, item 875).

10 Entry into force of the Act of 28 May 2021 on amending the Act – Code of Civil Procedure and certain other acts (Journal of Laws, item 1090).

11 Act of 17 November 1964 – Code of Civil Procedure (uniform text Journal of Laws of 2021, item 1805 as amended).

12 Uniform text Journal of Laws of 2021, item 1072 as amended (hereinafter: amendment of the Code of Criminal Procedure of 2020).

ing the Code of Criminal Procedure.[13] A different manner of regulations in relation to civil procedure emerges at first sight. For, while the changes in civil proceedings are temporary and were included in the COVID-19 Act, the changes in criminal proceedings are permanent and, in addition, they were also included in the Code of Criminal Procedure.

In criminal proceedings, even before the changes introduced during the pandemic, the possibility to hold an online hearing was allowed if the case was subject to examination in a fast-track procedure (Article 517 §§ 2a–2d of the Code of Criminal Procedure).[14] In other cases, it was only possible to conduct certain evidentiary actions remotely with the use of devices allowing for direct transmission of images or sound. A witness, expert or interpreter may be examined in this manner (Article 177 §§ 1a and 1b, Article 185b § 2, Article 197 § 3 and Article 204 § 3 of the Code of Criminal Procedure), as well as the injured party (Article 185c § 3 of the Code of Criminal Procedure) and the accused who is absent during the trial (Article 377 § 4 of the Code of Criminal Procedure).

The amendment to the Code of Criminal Procedure of 2020, by adding §§ 3–9 to Article 374 of the Code of Criminal Procedure, enabled, apart from the already mentioned procedural actions, online participation in the trial by the prosecutor and defence counsel, as well as persons deprived of liberty: the accused, an auxiliary prosecutor and a private prosecutor. Furthermore, online conduct of sessions has also been allowed, which is regulated in Article 96a (referring to the appropriate application of the provisions on trial), Article 100 § 10 (on considering as present an entity or party participating in an online session during the announcement of a decision or order) and Article 250 §§ 3b–3h (online participation in a sitting on pretrial detention).

The solutions adopted in Article 83 of the 2020 amendment to the Code of Criminal Procedure should also be considered here. This provision provides for the possibility of participation of parties, defence counsels or legal representatives in the hearing with the use of technical equipment which makes it possible to conduct the hearing remotely with simultaneous direct transmission of an image or sound. It differs from the regulation of Article 374 of the Code of Criminal Procedure in that it applies to situations other than deprivation of liberty, on condition that the partic-

13 Act of 6 June 1997 – Code of Criminal Procedure (uniform text Journal of Laws of 2021, item 534 as amended).

14 Act of 31 August 2011 amending the Act on mass events safety and certain other acts (Journal of Laws of 2011, No. 217, item 1280). The Act in this respect entered into force on 12 November 2011. This procedure determines cases in which an investigation is carried out, if a perpetrator has been apprehended in the commission of an offence or immediately afterwards, detained and within 48 hours brought by the police and handed over to the court's disposal together with a motion to examine the case in fast-track proceedings (Article 517b, paragraph 1 of the Code of Criminal Procedure).

ipants are in the court building, in a room or rooms properly equipped to conduct a hearing remotely. Thus, this excludes the participation in a court sitting or hearing of, for example, persons in quarantine. This solution, to which Article 374 §§ 3–8 of the Code of Criminal Procedure applies accordingly, can hardly be described as remote. It would be more effective to adopt in this case a solution known in the civil procedure, which allows for participation of all participants in a hearing or a session by means of technical equipment allowing for their participation online with simultaneous direct transmission of images and sound without the necessity to be present in the court building.

The initiators of online participation in a session or hearing may be the prosecutor or the parties to the proceedings.[15] Ł. Brzezowski expressed a different view in this respect, that *verba legis* only the prosecutor is granted the right to submit a motion, and in the remaining scope the legal norm gives the right to exemption from appearing in person only to the chairman, not the participants.[16] This view does not seem justified. The prosecutor is referred to *expressis verbis* in Article 374 § 3 of the Code of Criminal Procedure (this also applies in the case of online hearings or sessions ordered pursuant to Article 83, paragraph 1 of the amendment to the Code of Criminal Procedure of 2020), but this does not mean exclusion of Article 9 § 2 of the Code of Criminal Procedure, under which the parties may request actions which the authority may or is obliged to undertake *ex officio*. The decision is made by the chairman of the adjudicating panel, and in the case of a motion of the prosecutor, but not of another public prosecutor, it is binding on the chairman, unless technical reasons stand in the way.[17]

The analysis of the adopted solutions regarding online hearings and sessions leads to the conclusion that in criminal proceedings the legislator has not decided to enable the parties and their legal representatives to participate in a hearing or a session to the same extent as in civil proceedings. It is still necessary for the accused who is not deprived of liberty, defence counsel, legal representatives and prosecutors to appear in the court building, although there is no such requirement for witnesses, experts or interpreters. An exception is a hearing or session in which the prosecutor, the accused and his/her defence counsel participate online in the place of residence of the accused.

15 R.A. Stefański, S. Zabłocki, Kodeks postępowania karnego. Tom III. Komentarz do art. 297–424, R.A. Stefański, S. Zabłocki, WKP 2021, com. to Art. 374, point 10.

16 Ł. Brzezowski, Udział prokuratora w rozprawie i posiedzeniu zdalnym, 'Prokuratura i Prawo' 2021, no. 3, pp. 40–41.

17 D. Świecki, (in:) D. Świecki (ed.), B. Augustyniak, K. Eichstaedt, M. Kurowski, Kodeks postępowania karnego. Tom I. Komentarz aktualizowany, LEX/el. 2021, com. to Art. 374, point 25; C. Kulesza, (in:) K. Dudka (ed.), Kodeks postępowania karnego. Komentarz, WKP 2020, com. to Art. 374, point 12; R.A. Stefański, S. Zabłocki, Kodeks…, *op. cit.*, com. to Art. 374, point 9.

## 2. Online Hearings and Trials and the Right to Defence

Regardless of whether a hearing or trial is held in a fixed location or online, the accused must be able to exercise his/her right to defence in both formal and substantive terms. Considering the amendment to the Code of Criminal Procedure of 2020, threats to the realisation of the right to defence should be seen in the insufficient guarantee of confidentiality of the contact between the defence counsel and the accused when they are not in the same place, difficulties in accessing the case files, and the limited possibility to communicate with the court by email. The lack of digitisation of files was particularly noticeable in the early days of the pandemic when the majority of courts restricted access to client service offices, and consequently access to files.[18]

Pursuant to Article 250 § 3b of the Code of Criminal Procedure, Article 374 §§ 4–6 of the Code of Criminal Procedure and Article 96a of the Code of Criminal Procedure the prosecutor, the accused and the defence counsel may participate in the session or hearing on pretrial detention in the place of residence (penal institution, detention centre, prosecutor's office). The presiding judge may release the accused, who is deprived of liberty, from the obligation to appear in court if he/she has been provided with the right of remote participation. The defence counsel is also entitled to participate both in physical and remote sessions on pretrial detention (Article 250 § 3d of the Code of Criminal Procedure).[19]

In the event the defence counsel is in a different place than the accused, the legislator is allowed to order a time-limited break for telephone contact between the defence counsel and the accused during the hearing on pretrial detention (Art. 250 3e of the Code of Criminal Procedure), and in the case of a trial to order a time-limited break to allow telephone contact between the defence counsel and the accused (Art. 374 § 7 of the Code of Criminal Procedure). In essence, therefore, it will be a short technical break to conduct a telephone conversation between the defence counsel and the accused.[20] The court, however, has the right to refuse if it considers that granting the motion may disrupt the proper course of the hearing or if it poses a risk of not adjudicating on the motion on the application of a pretrial detention before the expiry of the permissible period of detention of the accused, or if it considers that the submission of the motion clearly does not serve the implementation of the right to defence and, in particular, aims at disrupting or unreasonably prolonging

18 A. Klepczyński, P. Kładoczny, P. Kubaszewski, K. Wiśniewska, Raport…, *op. cit.*, pp. 21–24.

19 See more: P. Misztal, Zdalne posiedzenia aresztowe w trybie art. 250 §§ 3b–3h Kodeksu postępowania karnego. Uwagi de lege lata i de lege ferenda, 'Studia Prawnoustrojowe' 2021, no. 54, pp. 405–421.

20 J. Mierzwińska-Lorencka, E-rozprawa w sprawach karnych w związku z regulacjami z tarczy 4.0, LEX/el. 2020, point 7.

the hearing. The Helsinki Foundation for Human Rights[21], the Supreme Bar Council[22] and the representatives of the doctrine of criminal procedure[23], among others, were critical of the above-mentioned solutions as they infringed the right to defence. Defence secrecy is a special type of advocate's secrecy, i.e. the duty of the advocate to keep secret everything he/she learns in connection with the provision of legal assistance. Its function is to protect the rights and freedoms of citizens, and consequently it is the foundation of liberal constitutional democracy in which every person can feel safe from the arbitrary use of power by the state.[24] For this reason, the increasingly frequent attempts to interfere in this aspect of the legal profession must give rise to justified concern and opposition.[25]

It is impossible to speak of effective realisation of the right to defence in its material sense when the use of services of a professional defence counsel is limited by the presence of a third person who is controlling the contact of the accused and his/her defence counsel. The assumption of a fully confidential contact of the defence counsel with his/her mandate constitutes the foundation of the provision of effective and professional legal assistance. Without it, the right to defence of the accused is considerably restricted.[26] For it is difficult to expect that a suspect will provide the defence counsel with all the information required for effective defence in a situation where their conversation is not of a confidential nature – and the third party present is, at the same time, the suspect's litigation opponent. In this case it is also difficult for the defence counsel to inform the suspect of all his/her rights, including potential procedural scenarios, for example the possibility to cooperate with law enforcement authorities and to benefit from the institution of a small crown witness.[27]

21 Opinion of Helsinki Foundation for Human Rights of 14 June 2020 do Druku Senackiego no. 142, https://www.hfhr.pl/wp-content/uploads/2020/06/druk-senacki-nr-142-uwagi-HFPC-1.pdf (accessed 25.04.2022).

22 Opinion of Legislative Committee at Supreme Bar Council (Komisji Legislacyjnej przy Naczelnej Radzie Adwokackiej) of 2 June 2020, https://www.adwokatura.pl/admin/wgrane_pliki/file-20200608-u-o-doplatach-do-oprecent-kredytow-tarcza-04-sm-24–20–29964.pdf (accessed 25.04.2022).

23 See e.g. C. Kulesza, Rozprawa…, *op. cit.*, pp. 217–218; J. Zagrodnik, (in:) J. Skorupka (ed.), Kodeks postępowania karnego. Komentarz aktualizowany, 33rd edition, Legalis, com. to Art. 374 k.p.k.

24 M. Pietrzak, Tajemnica adwokacka jako fundamentalny element systemu ochrony praw i wolności, 'Palestra' 2019, no. 7–8, pp. 89 and 96–97.

25 M. Gutowski, P. Kardas, J. Giezek, Tajemnica adwokacka w świetle wyzwań współczesności – uwagi wprowadzające, 'Palestra' 2019, no. 7–8, p. 9; see more about advocate's secrecy C. Kulesza, Obrońca, Tajemnica obrończa, (in:) P. Hofmański (ed.), System Prawa Karnego Procesowego, tom VI, Strony i inni uczestnicy postępowania karnego, C. Kulesza (ed.), Warsaw 2016, pp. 935–939.

26 M. Szurman, M. Korzeniak, Poufność w kontakcie z obrońcą na wstępnym etapie postępowania karnego – analiza regulacji 73 § 2 oraz art. 245 § 1 Kodeksu postępowania karnego w świetle standardów konstytucyjnych, unijnych i konwencyjnych, 'Palestra' 2020, no. 9, p. 37.

27 *Ibidem*, p. 40.

Obstacles to the confidentiality of contact between the accused and his defence counsel can also undermine the European standards of a fair criminal trial developed by the European Court of Human Rights[28] with regard to the right to defence. In one of its judgments in Modarca v. Moldova[29], the ECHR held that an accused's contact with his/her defence counsel must be unrestricted, as this is the only condition for the proper functioning of the defence relationship. The ECHR also held that the violation of Article 6 of the Convention was due to the design of the meeting room of a suspect remanded in custody with his/her counsel. The counsel was separated from the detainee by a glass pane, which hindered the contact between them and necessitated raising the voice, thus making it impossible to ensure confidentiality and discretion.[30] In addition, the Court is sceptical about some of the ways in which contact between the accused and his/her defence counsel is ensured during the trial by videoconference, pointing out that the contact during which the equipment is provided and operated by the state may generate doubts about confidentiality of contact with legal counsel.[31] This illustrates the importance and significance of ensuring unrestricted contact between the accused and his/her defence counsel.

In situations referred to in Article 250 § 3e of the Code of Criminal Procedure and in Article 374 § 7 of the Code of Criminal Procedure, ensuring confidential contact appears to be limited. The defence counsel will be present in court. The telephone conversation will therefore take place either in the courtroom or in the court corridor. In the case of the accused, it cannot be ruled out that the contact will take place in the presence of a court clerk, a judge's assistant or a prison service officer. According to Article 8 § 3 and Article 215 § 1 of the Penal Code[32], a convicted person deprived of liberty or a detainee may communicate with his/her defence counsel, legal representative who is an advocate or legal adviser in the absence of other persons, and conversations with these persons during visits and telephone calls are not subject to control. Access to telephone in prison or detention centre should be provided, enabling the defence counsel to communicate with the accused. Since it is not possible to

28 Judgment of ECHR of 13 August 2016 in Ibrahim and others v. Great Britain, ECLI:CE:ECHR:2016:0913; Judgment of ECHR of 27 November 2008 in Salduz v. Turcji, ECLI:CE:ECHR:2008:1127; Judgment of 31 March 2009 in Płonka v. Poland, ECLI:CE:ECHR:2009:0331; Judgment of ECHR of 9 November 2018 in Beuze v. Belgium, ECLI:CE:ECHR:2018:1109; Judgment of ECHR of 30 August 1985 in Can v. Austria, ECLI:CE:ECHR:1985:0930; Judgment of ECHR of 15 November 1996 in Domenichini v. Italy ECLI:CE:ECHR:1996:1115.

29 Judgment of the ECHR of 10 May 2007 in Modarca v. Moldova (no. 14437/05), ECLI:CE:ECHR:2007:0510.

30 M. Szurman, M. Korzeniak, Poufność…, *op. cit.*, p. 42.

31 A. Lach, Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego, Warsaw 2018, p. 118 and ECHR case law cited therein.

32 Act of 6 June 1997 – Executive Penal Code (uniform text Journal of Laws of 2021, item 53 as amended).

call the telephone number from which the person detained in a penitentiary institution or in custody uses to contact his/her defence counsel, the telephone conversation will take place in the premises of the administration of the penitentiary unit. This may result in the accused not being able to remain there alone for security reasons (e.g. in the case of particularly dangerous inmates). The rules governing the online trial and hearing do not require third parties (a prison service officer, a judge's assistant or a court clerk) to leave the place of residence of the accused or suspect for the duration of his or her interview with the counsel. In addition, in the context of an online hearing on pretrial detention, one should remember about the possibility of the presence of a prosecutor or a person authorised by the prosecutor, pursuant to Article 73 § 2 of the Code of Criminal Procedure.

## 3. Postulates de lege ferenda

We should approve the view expressed by C. Kulesza, who points out that in the case of an online detention hearing the defence counsel, having a choice of either reading the case files or travelling to the detention centre or prison to participate in the hearing at the accused's place of residence, will most often choose to stay at the seat of the court (or be obliged to do so by the court). In the latter case, he or she will usually not be able to establish direct contact with the accused before the hearing, and telephone contact during the hearing, which depends on a discretionary decision of the court, may prove inadequate.[33]

In view of the above, it is worth considering the introduction of the possibility to have remote access to the prosecutor's motion and the evidence justifying the application for pretrial detention. Lack of digitisation of files was particularly felt at the beginning of the pandemic when most courts had limited access to customer service offices and consequently also access to files.[34] Effective exercise of the right to defence in such conditions, given the short time for consideration of a motion for pretrial detention, was very difficult. It is worth adding that pursuant to Article 7 (1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[35], the evidentiary basis for a motion for the application or extension of pretrial detention must be fully open to the accused and his/her defence counsel. Therefore, both the evidence contained in the case files and any other information carriers (e.g. surveillance video stored only on a USB drive)[36] should be accessible. A solution to this situation could be digitisation of a mo-

33 C. Kulesza, Rozprawa…, *op. cit.*, p. 218.

34 A. Klepczyński, P. Kładoczny, P. Kubaszewski, K. Wiśniewska, Raport…, *op. cit.*, pp. 21–24.

35 Official Journal L 142, p. 1.

36 M. Fingas, Bezpośrednie stosowanie dyrektywy 2012/13 w zakresie dostępu obrony do akt sprawy w procesie karnym – glosa do postanowienia Sądu Apelacyjnego w Gdańsku z 8.04.2020 r. (II AKz 207/20), 'Palestra' 2020, no. 12, p. 95.

tion for temporary arrest together with evidence referred to in Article 250 § 2a of the Code of Criminal Procedure. This would not be a novelty, as similar regulations are in force in fast-track proceedings (Article 517e § 1 and § 1a of the Code of Criminal Procedure). The motion with enclosures and a notification about an online hearing on pretrial detention would be delivered to the defence counsel via electronic mail. Then, the defence counsel would be able to participate in the hearing at the place of residence of the suspect, increasing the effectiveness of the exercised right to defence.

Apart from online sittings and the digitisation of case files, the use of electronic mail in criminal proceedings for the delivery of letters and procedural decisions deserves attention. Many public institutions, including courts and prosecutor's offices, introduced compulsory quarantine for incoming correspondence, installed inboxes to minimise direct contact, and even prevented the filing of pleadings directly at a trial or hearing to limit the transmission of the virus. It should have become natural to switch to communication by email. However, this is not possible because of the incompatibility of the Code regulations to modern needs. While communication by email is possible between the court and the party, sending letters by email the other way has no legal effect. That is why the doctrine postulates a wider use of electronic mail in criminal proceedings as one of the areas of development of the criminal procedure aimed at its digitisation.[37] The legislator also seems to be heading in this direction. This is the aim of the Act of 18 November 2020 on Electronic Service[38], which in Article 82 amends the Code of Criminal Procedure by extending the possibilities for electronic service in criminal proceedings. However, major changes will not enter into force until 1 October 2029.

In the case of online hearings and trials, the above considerations become particularly important, especially because the participants may submit motions and other statements and perform procedural actions only orally for the record. For these reasons, the participation of defence counsel is very important.[39] Delivery of letters and motions by email makes it possible to become familiarised with their content, even shortly before the commencement of the trial or session in an online form. This eliminates the need to read them out, gives room for a quick reaction of the party to the proceedings or his/her legal representative, and leaves the court more time to take a decision.

The adoption of a fully online hearing or trial requires, for the exercise of the rights to defence, that the submissions and statements made be reflected as accurately

37 See more: J. Kosowski, Elektronizacja jako kierunek rozwoju procesu karnego?, (in:) Quo vadit processus criminalis? Rzeczywistość i wyzwania, R. Olszewski, A. Małolepszy (eds.), Warsaw 2021, pp. 380–391; S. Kowalski, O potrzebie upowszechnienia doręczania pism sądowych za pośrednictwem poczty elektronicznej, (in:) Quo…, *op. cit.*, pp. 405–414.

38 Journal of Laws, item 2320, as amended.

39 C. Kulesza, Rozprawa…, *op. cit.*, p. 215.

as possible in the court record. The traditional form, if we consider available equipment and software, is becoming unsuitable for modern requirements. One must agree with J. Kosowski that in criminal proceedings, following the example of proceedings in misdemeanour cases, e-records should be implemented.[40] Transcription of spoken words into written form in real time, combined with digital audiovisual recording, allows for a reliable reflection of the course of a hearing or trial, while providing permanent and easy access to these materials.

## Conclusions

In general, it should be stated that solutions in the field of criminal proceedings adopted during the COVID-19 pandemic are needed, as they indicate the possibilities of action in these special conditions. Online recognition of cases, digitisation of files, and facilitating and improving communication between participants of the proceedings have been necessary during the pandemic and will be useful also after its end. These solutions create new possibilities for streamlining proceedings, while at the same time responding to contemporary challenges. The point is that these issues should be regulated and implemented in a well-thought-out way, considering procedural principles and guarantees, ensuring the fairness of the criminal procedure.[41] Doubts, however, concern specific solutions and practice, which appear to be debatable and may be assessed as violating certain fundamental procedural principles. The lack of comprehensive legal solutions means that what was supposed to facilitate and accelerate proceedings using the internet and modern technology will not achieve this goal.

Penitentiary units pose a significant problem, as they are not fully adapted to conduct online proceedings during sessions held there. This concerns access of inmates to email or digitised case files. It is noteworthy that hearings conducted in an online mode apply only to a narrow group of situations involving deprivation of liberty of an accused person. In other cases, personal appearance in court is necessary, which in the perspective of pandemic threats and limitations is questionable. Furthermore, the procedure adopted at that time, whereby the defence counsel stays in a separate room during the trial, significantly impedes the exercise of the rights to defence, if only for the reason that in order to ensure contact between the defence counsel and the accused it becomes necessary to order a break. Of course, being aware of the completely different nature of cases, it is worth pointing out that in civil proceedings online sessions have become the rule. It seems worth considering the extension of the catalogue of cases that could be heard online in criminal proceedings.

40 J. Kosowski, Elektronizacja jako kierunek rozwoju procesu karnego?, Quo…, *op. cit.*, pp. 381–384.
41 R. Olszewski, Wprowadzenie, (in:) Quo…, *op. cit.*, p. 16.

Implementation of another change, important from the perspective of the right to defence as well as adversarialism, would be to create the possibility to improve electronic communication between the court and the litigating parties. This concerns the equalisation of rights and, while it is permissible and feasible for the procedural authorities to send information to the parties via email, it would be desirable to create the possibility for the parties to do the same to the procedural authorities.

In conclusion, it should be stated that the COVID-19 pandemic has become an opportunity to introduce new legal solutions for the modernisation of criminal proceedings, which should generally be assessed positively. The point is, however, that some of these regulations do not fully realise the objectives set for them, hindering, through the adoption of specific solutions, the proper realisation of certain fundamental procedural principles, first and foremost the right to defence.

## REFERENCES

Brzezowski Ł., Udział prokuratora w rozprawie i posiedzeniu zdalnym, 'Prokuratura i Prawo' 2021, no. 3.

Dudka K. (ed.), Kodeks postępowania karnego. Komentarz, WKP 2020.

Fingas M., Bezpośrednie stosowanie dyrektywy 2012/13 w zakresie dostępu obrony do akt sprawy w procesie karnym – glosa do postanowienia Sądu Apelacyjnego w Gdańsku z 8.04.2020 r. (II AKz 207/20), 'Palestra' 2020, no. 12.

Gori P., Pahladsingh A., Fundamental rights under COVID-19: a European perspective on videoconferencing in court, 'ERA Forum' 2021, no. 21, https://doi.org/10.1007/s12027–020–00643–5.

Gutowski M., Kardas P., Giezek J., Tajemnica adwokacka w świetle wyzwań współczesności – uwagi wprowadzające, 'Palestra' 2019, no. 7–8.

Klepczyński A., Kładoczny P., Kubaszewski P., Wiśniewska K., Raport Helsińskiej Fundacji Praw Człowieka, Czy koronawirus SARS-CoV–2 zaatakował system wymiaru sprawiedliwości w sprawach karnych?, Warsaw 2021, https://www.hfhr.pl/wp-content/uploads/2021/11/Raport-COVID-a-proces-karny-PL.pdf.

Kosowski J., Elektronizacja jako kierunek rozwoju procesu karnego?, (in:) R. Olszewski, A. Małolepszy (eds.), Quo vadit processus criminalis? Rzeczywistość i wyzwania, Warsaw 2021.

Kowalski S., O potrzebie upowszechnienia doręczania pism sądowych za pośrednictwem poczty elektronicznej, (in:) R. Olszewski, A. Małolepszy (eds.), Quo vadit processus criminalis? Rzeczywistość i wyzwania, Warsaw 2021.

Kulesza C., Obrońca, Tajemnica obrończa, (in:) P. Hofmański (ed.), System Prawa Karnego Procesowego, tom VI, Strony i inni uczestnicy postępowania karnego, C. Kulesza (ed.), Warsaw 2016.

Kulesza C., Rozprawa zdalna oraz zdalne posiedzenie aresztowe w świetle konwencyjnego standardu praw oskarżonego, 'Białostockie Studia Prawnicze' 2021, no. 3 (vol. 26).

Lach A., Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego, Warsaw 2018.

Mierzwińska-Lorencka J., E-rozprawa w sprawach karnych w związku z regulacjami z tarczy 4.0, LEX/el. 2020.

Misztal P., Zdalne posiedzenia aresztowe w trybie art. 250 §§ 3b–3h Kodeksu postępowania karnego. Uwagi de lege lata i de lege ferenda, 'Studia Prawnoustrojowe' 2021, no. 54.

Olszewski R., Wprowadzenie, (in:) R. Olszewski, A. Małolepszy (eds.), Quo vadit processus criminalis? Rzeczywistość i wyzwania, Warsaw 2021.

Opinion of Helsinki Foundation for Human Rights of 14 June 2020 r. do Druku Senackiego no. 142, https://www.hfhr.pl/wp-content/uploads/2020/06/druk-senacki-nr-142-uwagi-HFPC-1.pdf.

Opinion of Legislative Committee at Supreme Bar Council (Komisji Legislacyjnej przy Naczelnej Radzie Adwokackiej) of 2 June 2020, https://www.adwokatura.pl/admin/wgrane_pliki/file-20200608-u-o-doplatach-do-oprecent-kredytow-tarcza-04-sm-24–20–29964.pdf.

Pietrzak M., Tajemnica adwokacka jako fundamentalny element systemu ochrony praw i wolności, 'Palestra' 2019, no. 7–8.

Sanders A., Video-Hearings in Europe Before, During and After the COVID-19 Pandemic, 'International Journal for Court Administration' 2020 no. 12(2), http://doi.org/10.36745/ijca.379.

Skorupka J. (ed.), Kodeks postępowania karnego. Komentarz aktualizowany, 33rd edition, Legalis.

Stefański R.A., Zabłocki S., Kodeks postępowania karnego. Tom III. Komentarz do art. 297–424, WKP 2021.

Szurman M., Korzeniak M., Poufność w kontakcie z obrońcą na wstępnym etapie postępowania karnego – analiza regulacji 73 § 2 oraz art. 245 § 1 Kodeksu postępowania karnego w świetle standardów konstytucyjnych, unijnych i konwencyjnych, 'Palestra' 2020, no. 9.

Świecki D. (ed.), Kodeks postępowania karnego. Tom I. Komentarz aktualizowany, B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, LEX/el. 2021.