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The Openness of Civil Court Proceedings in the Time of the COVID-19 Pandemic

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Abstract. The COVID-19 pandemic has resulted in the adoption of several measures to protect public health during civil trials in Poland. Some of these measures have restricted the traditionally open nature of the trial by allowing for closed hearings to be held in situations not regulated before. This study examines such situations in the light of international human rights instruments, from the dual perspectives of internal (between the parties) and external (towards third parties) openness of court hearings. It is established that such hearings do not contravene international human rights instruments pertaining to a fair trial if the restrictions are well-founded and proportional, even though some measures have to be taken in order to protect parties and third parties vulnerable to the lack of the necessary instruments or technical knowledge to attend hearings remotely. The author concludes that some restrictions to open court civil proceedings during the COVID-19 pandemic are likely to remain in place, and the possibilities of remote access may even prove beneficial in enhancing the principle of the open trial.

Keywords: COVID-19, fair trial, public hearing, open court, Poland

1. Introduction

Before February 2020, probably nobody in Poland and in many other jurisdictions thought that such a basic procedural principle as the openness of court proceedings may be widely restricted. However, the COVID-19 pandemic arrived, and even such a bedrock rule had to be rethought and adjusted to the new pandemic reality. Due to the hazard to life and health, special measures have been adopted to limit or exclude the open court principle. The aim of this article is to critically consider those measures.

To attain this goal, the paper is structured as follows. Firstly, the importance of the open court principle is presented. Part 3 elaborates on the measures introduced, and the analysis is divided into the modification in reference to the internal openness (part 3.1) and the external openness (part 3.2). Furthermore, the

paper considers the best solution to the current situation, which tries to reconcile the elaborated principle with the current pandemic situation. The paper ends with a short conclusion.

2. The Openness of Civil Court Proceedings

The openness of civil court proceedings[1] is recognized in international instruments such as:

– The European Convention on Human Rights and Fundamental Freedoms; hereinafter: *ECHR*, in Art. 6 sec. 1;[2]

– The International Covenant on Civil and Political Rights; hereinafter: *ICCPR*, in Art. 14 sec. 1;[3]

– The Charter of Fundamental Rights of the European Union; hereinafter: *CFR*, in Art. 47.[4]

Recognition of this feature of court proceedings, including civil ones, in such instruments leads to at least two conclusions. Firstly, the openness of the hearing may be seen as one of the most important features of civil court proceedings.[5] Secondly, in every democratic country, this should be the feature characterizing civil proceedings. Therefore, the following question arises: what should be understood by it?

1 Hereinafter also as: open court principle.

2 Article 6 – *Right to a Fair Trial* – para. 1. 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and *public hearing* within a reasonable time by an independent and impartial tribunal established by law. *Judgment shall be pronounced publicly, but the press and the public may be excluded from all or part of the trial* in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice' (emphasis added).

3 '1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and *public hearing* by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children' (emphasis added).

4 Article 47 – *Right to an Effective Remedy and to a Fair Trial*. 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and *public hearing* within a reasonable time by an independent and impartial tribunal previously established by law' (emphasis added).

5 See Miszewski 1933. 11; Zembrzuski 2021. 6.

As it is often indicated and can be derived from the wording of Art. 6, para. 1 of the ECHR, the openness of civil court proceedings is realized by a right to a public hearing of the case and the public announcement of judgments.[6] It is noteworthy, however, that in the case of the openness of civil court proceedings we are dealing 'only' with the principle. Such openness may be restricted. A prominent example is the fact that in most jurisdictions there are cases, issues, or situations in which provisions explicitly allow them to be adjudicated during closed hearings.[7] Furthermore, the press and public may be excluded from all or part of a certain trial that should normally be open to the public.[8]

Regardless of those potential exceptions, the importance of the open court principle should not be underestimated. As the titles in Article 6 ECHR and Article 47 CFR suggest, the openness of civil court proceedings constitutes one of the guarantees of *a fair trial*.[9] Therefore, the question may be asked as to how this principle contributes to it. As indicated in the literature, this feature aims to:

– protect the parties from justice carried out without public oversight,
– avoid arbitrary court case decisions and mobilize judges to be diligent,
– ensure the correct course of the proceedings,
– build citizens' trust in the courts,
– educate the public on how the justice system operates.[10]

In view of the above, there should be no doubts that the open court principle constitutes one of the most important rules of civil proceedings. As it was amply indicated some time ago: 'it is an achievement and a measure of progress; an exponent of the rule of law; a guarantee of an independent, impartial and scrupulous jurisdiction'.[11]

The COVID-19 pandemic and the restriction implemented as a result of it pertaining to the openness of court proceedings[12] seem to pose a threat to, or at least undermine, the importance of this principle.[13]

6 See Litowski 2021. 68.
7 For more on this issue, see Part 3.1 of this paper.
8 However, certain conditions have to be met. See, for example, Art. 6, para. 1 ECHR. More on this issue below.
9 See Zembrzuski 2021. 7. Right to a fair trial constitutes an internationally recognized human right. See OSCE 2020. 6.
10 Litowski 2021. 68–69; T. Zembrzuski 2021. 6–8.
11 Miszewski 1933. 11. The author's own translation. Original sentence: 'jest zdobyczą i probierzem postępu; wykładnikiem praworządności; rękojmią niezawisłej, bezstronnej I sumiennej jurysdykcji.'
12 The problem of a form in which the restrictions have been introduced exceeds the scope of this article. For more on the issue, see, for example: OSCE 2020. 11–12, 14.
13 As it was more broadly stated, 'the right to a fair trial (…) are at particular jeopardy'. OSCE 2020. 8.

3. Introduced Modifications

The COVID-19 pandemic was a huge challenge for many judicial systems,[14] notably for those that have not properly followed the spirit of the current technological revolution, i.e.[15] those systems in which communication between the court and parties still occurred mainly on paper and face-to-face.[16] In such jurisdictions, the court proceedings were almost totally frozen when the pandemic set in.[17] However, after the horrifying start of the pandemic, even such judicial systems realized that the courts cannot be permanently closed and that they have to adjust to the new COVID-19 reality.[18] As it was graphically said, 'the pandemic catapulted the judiciary into the age of technology'.[19] Courts began to render judgements, but numerous modifications to civil proceedings have been introduced as a rule.[20] Many of them were or are still marked as 'temporary ones'; however, the uncertainty regarding the pandemic and the 'efficiency' of these modifications raise the question whether they really can remain only transitional measures.[21]

In the context of this article, the relevant modifications are those introduced during the COVID-19 regarding the openness of civil court proceedings. To consider them in a more structured way, the principle can be viewed from two perspectives. *External openness* refers to the openness of court proceedings in reference to third parties.[22] On the other hand, we can also distinguish *internal openness*, i.e. the openness of proceedings in reference to parties to a dispute.[23]

Such distinction is important since the latter may be restricted to only very limited and exceptional circumstances.[24] Exceptions to external openness are more numerous and easier to encounter.[25]

3.1. The Internal Openness Perspective

As mentioned above, the internal openness of civil court proceedings will not, as a rule, be restricted, as under *normal circumstances* such exclusion or limitation may lead to the situation that a party is prevented from defending

14 See OSCE 2020. 4. See also: OSCE 2021. 74–79.
15 See OSCE 2020. 20.
16 See OSCE 2020. 22–23.
17 See OSCE 2020. 4, 9, 23.
18 See OSCE 2020. 4, 9, 23.
19 OSCE 2020. 20.
20 OSCE 2020. 4–45.
21 For more on external openness, see: Zembrzuski 2021. 7. The author argues that some of the measures introduced as transitional ones should stay in the Polish civil procedure permanently.
22 See, for example, Kościółek 2021. 24.
23 For more on internal openness, see, for example: Litowski 2021. 68.
24 Some may argue that internal openness can never be limited. Such statement is also made in Litowski 2021. 68.
25 See, for example, Art. 6, para. 1 ECHR and the exceptions provided there.

his/her case, which may consequently lead to, e.g. the invalidity of the court proceeding.[26]

However, the COVID-19 pandemic was and is still not treated as a set of normal circumstances.[27] Therefore, also some limitation in reference to this aspect of openness may be found in pandemic regulations. However, before referring to such limitations, an important terminological distinction must be made. Usually, from the perspective of the openness of civil court proceedings, we can distinguish *open court hearings* and *closed court hearings*.[28] The latter may be closed not only for the public but also in reference to the parties. In the first situation, we may speak about limitation to external openness, but not to the internal one. Therefore, this part of the paper focuses on the closed hearings that are, at least to some extent, closed even with respect to parties to a dispute.

The idea behind such closed hearings is that the presence of parties is not required with respect to certain issues.[29] As a rule, only formal or incidental issues are being adjudicated by a court during such hearings.[30] However, in some jurisdictions, even judgments on merits may be rendered under certain circumstances by courts subsequent to such hearings.[31] In Poland, even before the pandemic, we have seen a slow trend of allowing more and more issues and cases to be settled in such closed hearings.[32] What is more, even the basic rules were changed.[33] The main reason for such changes is the efficiency and pace of court proceedings.

However, in this paper, in accordance with its title, emphasis should be placed on the measures limiting the internal openness introduced during the COVID-19 pandemic. We can consider at least the following potential exclusions or restrictions to internal openness:

26 In reference to Polish law, Art. 379, point 5) of the Polish Code of Civil Procedure (henceforth: the Polish CCP), to Kościółek 2021. 29, and to Zembrzuski 2021. 8.

27 At least currently; and it remains to hope that it will not be a constant presence.

28 Also often named as 'open hearings' and 'closed hearings'. On this distinction, see, for example, Zembrzuski 2021. 5.

29 Miszewski 1933. 6.

30 Compare Zembrzuski 2021. 11.

31 See, for example, Art. 148^1 § 1 of the Polish CCP, which states that the court may hear a case held in a closed hearing if the defendant has admitted a claim or if the court considers – after the parties have submitted pleadings and documents and after they have submitted oppositions or objections to the order for payment or an opposition to a default judgment, having regard to all arguments and evidence – that a trial is not necessary. However, according to 148^1 § 3 of the Polish CCP, a case may not be heard in a closed hearing if the party included a motion to hold a trial in his/her first pleading, unless the defendant has admitted a claim.

32 For more on this, see Zembrzuski 2021. 11–13.

33 Since 5 August 2019, a court does not need to have explicit legal basis to issue an order on the closed hearing. Currently, in the Polish CCP, Article 148 § 3 provides a general authorization for the court to issue orders on closed hearings. For more on the issue, see Zembrzuski 2021. 13.

1. introduction of additional circumstances in which certain issues can be solved during a hearing closed for the parties,

2. introduction of the possibility to issue *a judgment* by a court after a closed hearing,

3. the issue of videoconferencing during court hearings.[34]

With regard to the first situation, an introduction of new issues that can be solved in closed hearings is not a novelty.[35] However, such a modification should have valid grounds. Preferably, it should be based on the nature of an issue or a case,[36] be connected with health considerations and maybe have only a temporary nature.[37] Notably flawed seem to be those modifications that allow for the resolution of certain issues during a closed hearing due to 'technical problems'.[38] In other words, *faulty technology* would be a reason *to limit one of the most basic civil procedural law principles*.[39] This should not be the case. A limitation of internal openness on the basis of technological reasons should be possible only if there is a consent of the parties to the dispute.[40] The lack of a consent requirement and such limitation may especially raise the question of whether these types of modifications are in line with Art. 6, para. 1 ECHR.[41]

As the second restriction to internal openness, new COVID-based possibilities to issue judgements by the court after closed hearings can be observed. Some may say that this is only a subcategory of the above elaborated issue. However, this issue shall be considered separately, if only for the reason that Art. 6 of the ECHR clearly distinguishes the right to public hearing (session)[42] and the right to the public pronouncement of a judgment.[43]

The COVID-19 pandemic and social distancing rules may constitute a ground on which states will try to limit the publicity of the pronouncement of a judgement. Such restrictions are more interesting from the perspective of external openness of court proceedings. However, the COVID-19 pandemic showed that legislators can

34 In reference to the issue of videoconferencing, see OSCE 2020. 21–24.

35 Similarly, Zembrzuski 2021. 13.

36 Zembrzuski 2021. 11.

37 Cf. Zembrzuski 2021. 13.

38 This is what the new Polish COVID legislation will in essence try to attain. For more on the issue, see Zembrzuski 2021. 13–14.

39 Cf. Zembrzuski 2021. 14.

40 Currently, on the basis of the Polish COVID-19 legislation [*Ustawa z dnia 14 maja 2020 r. o zmianie niektórych ustaw w zakresie działań osłonowych w związku z rozprzestrzenianiem się wirusa SARS-CoV-2 (Dz. U. poz. 875 z późn. zm.)*] – henceforth: *the Polish COVID-19 legislation* – one of the conditions to be fulfilled to hold a closed hearing, besides technical difficulties and a threat to health, is that neither party should object to the holding of a closed hearing. However, as mentioned above, this condition will be probably abandoned in the future. For more details, see Art. 15zzs[1] of the Polish COVID-19 legislation and Zembrzuski 2021. 13–14.

41 Kurczewska 2021.

42 The first sentence of Art. 6, para. 1 ECHR.

43 The second sentence of Art. 6, para. 1 ECHR.

be quite creative and can introduce also limitations in reference to this aspect of internal openness. For example, according to Art. 15zzs[2] of the Polish COVID-19 legislation, if, in the case examined pursuant to the provisions of the Polish CCP, the evidentiary proceedings have been conducted in full, the court may close the hearing and issue a ruling in a closed hearing after having received written statements from the parties or participants in the proceedings. Such a limitation to internal openness may be seen from two perspectives. Firstly, if a hearing was closed, and, therefore, parties had an opportunity to present their position during the hearing, it seems there is no harm to the parties in the judgment alone being delivered in a closed hearing. Such judgment will be served to the parties, and they will have an opportunity to appeal it. Therefore, it seems there is no real harm to internal openness here. On the other hand, the question may be asked as to whether such a general limitation is in line with Article 6, para. 1 of the ECHR. This norm explicitly provides for exceptions to external openness; however, it may be questioned whether they refer to internal openness. The question is interesting since the word 'publicly' may suggest that Art. 6, para. 1 of the ECHR refers only to external openness and not to the internal one. If so, the question may be asked whether ECHR allows at all the limitation of internal openness. If so, under what conditions?[44]

At the end of this part, the issue of the online court hearing may be elaborated on. The COVID-19 threat to human health caused court hearings in many jurisdictions to start taking place in online form.[45] The question may be asked whether this constitutes a restriction to the internal openness of court proceedings. It seems that, as a rule, a change in the form of participation in a hearing, from traditional to online, does not constitute a restriction to internal openness.[46] As it is amply noted in the literature, we are not dealing with the implementation of new institutions but only with the progressive computerization of court proceedings.[47] Parties communicate directly with the court and have an opportunity to present their standpoints, submit requests, contest the position of the opposing party, and discuss issues with a judge.[48] Generally, it cannot be said that the internal openness of hearings was limited.

A problem arises only in reference to those parties that do not have appropriate equipment, software or have difficulties operating modern devices. As it was noted, 'marginalized communities are unlikely to have access to videoconferencing technology and risk being disadvantaged in terms of access to justice'.[49] If they

44 The indicated problem exceeds the scope of this article.

45 See OSCE 2020. 9. For more on this issue in reference to the Polish law, see, for example, Zembrzuski 2021. 9–10.

46 A similar position is presented in Zembrzuski 2021. 9.

47 Similarly, Zembrzuski 2021. 9.

48 Cf. Zembrzuski 2021. 10.

49 OSCE 2020. 13. See also: Canadian Bar Association 2013; Fielding–Braun–Hieke 2020.

are not urgent, then trials regarding such persons shall be postponed, or some special regulations shall be provided for them, which will allow such persons to attend online court hearings.[50] Importantly, 'The right to a fair trial must not be jeopardized by any technological solutions to the pandemic',[51] wherefore a court should be able to resign from online hearings if such hearings could lead to unfair trials. It is noteworthy that currently online court hearings often raise the problem of lacking external openness; however, this issue will be elaborated upon below.[52] It may be added at the end that online hearings will probably not cease to exist once the pandemic is over. They are likely to coexist and supplement the traditional form of proceedings.[53]

3.2. The External Openness Perspective

The *external* openness of civil court proceedings refers to the openness of a civil court proceeding in reference to third parties, the so-called 'public'.[54] The wording of the relevant articles of the ECHR, ICCPR, and CFR indicates that those instruments refer entirely or at least mainly to this type of openness. In the case of external openness, it is much more difficult to determine in general what the procedural consequences will be in case of improper limitations.[55] It seems that we cannot say that proceedings in such cases will be always void and third parties will have the right to contest a judgment. Since it is very difficult to speak about the consequences in general, this issue exceeds the scope of this paper and deserves an article or even a book of its own.

However, ignoring the consequences, we can still consider at least the following potential exclusions or restrictions to the external openness principle during the COVID-19 period:

1. *prohibition* in reference to third parties regarding entering 'open hearings' in a court building,

2. an introduction of possibilities to issue a judgment by the court outside of public hearings,

3. *restrictions* in reference to third parties regarding entering 'open hearings' in court building.

The first issue refers to the situation of a planned hearing in the courtroom, but where third parties are not allowed to enter. Such restriction is usually based on

50 For example, a court in such situations should be obliged to appoint a 'technical assistant' whose task would be to assist the party by providing the appropriate equipment and advice to make the online hearing possible. The problem is indicated in OSCE 2020. 25.

51 OSCE 2020. 28.

52 See Part 3.2. of this article.

53 For more on this issue, see Part 4 of the paper.

54 See, for example, Kościółek 2021. 24.

55 This issue is considered in reference to the Polish law, for example, in: Broniewicz 1954. 92.

the COVID-19 justification, i.e. a reduction of risk of transmitting the COVID-19.[56] Simply put, open courts in such times can put the health and the life of citizens at risk.[57] The mentioned measure may lead to the conclusion that the court *should* be closed for the public during the COVID-19 pandemic; to be in line with the principle of external openness in such times is simply impossible[58] – notably since such restraint may be seen as within the quite broad bounds of Article 6, para. 1 of the ECHR, permitting exceptions based on public order and/or national security.[59] Therefore, at the first glance, such prohibition may be seen as being in accordance with the ECHR and other international instruments. However, seeing how important the open court principle is for democratic societies,[60] the question may be asked whether the analysis should end here.

The authors of the ECHR did not have in mind new technologies and the opportunities which they create. Thanks to such novelties, we are currently able to hold open hearings with the simultaneous remote participation of the public.[61] Such opportunity allows, on the one hand, to avoid health concerns and, on the other, to be in line with the rule of the external openness of civil court proceedings. Thus, the risk regarding spreading the virus may constitute a good ground to deny access to the courthouse or courtroom but should not constitute a basis for denying remote access to the proceeding. To back up the above argumentation, it may be added that, according to the Siracusa Principles,[62] restrictions should be the least intrusive and restrictive available to reach the objective.[63] In other words, such denial may be seen as disproportionate.[64] The issue of remote access of third parties to proceedings will be discussed in more detail below.[65]

Furthermore, it is worth distinguishing a situation in which even a judgment is pronounced without the participation of third parties because their access has been prohibited. Such secrecy seems to be even more far-reaching than the secrecy of a 'normal' hearing. The lack of a public pronouncement of a judgment may deprive parties of the protection provided thanks to the public oversight of justice and may consequently lead to more arbitrary court decisions. What is more, in some jurisdictions, the lack of the public pronouncement of a judgment

56 This paper does not consider the form in which such restriction has been adopted. In reference to this problem, see, for example, OSCE 2020. 21.
57 See Kościółek 1954. 32.
58 Compare Kościółek 1954. 32.
59 Similarly, but in reference to the same premises included in the Polish Constitution, see Kościółek 1954. 28.
60 See Part 2 of this paper.
61 'Alternative means of communicating with court users should be considered in order to reduce the numbers of persons attending court in person'. OSCE 2020. 21.
62 American Association for the International Commission of Jurists 1985.
63 For more on the Siracusa Principles, see OSCE 2020. 7.
64 See OSCE 2020. 8.
65 See Part 4 of this paper.

may lead to its legal non-existence.[66] Being outside the scope of Art. 6, para. 1 of the ECHR exceptions, such remarks do not result in the public pronouncement of a judgment. It has to be indicated that the wording of this provision is quite broad: 'all or part of the trial'. However, the above commentary justifies the conclusion that even if a proceeding was closed for the public for reasons of COVID-19 restrictions, at least the pronouncement of the judgment will be available publicly. In this case, *publicly* would mean that third parties should have remote access to the pronouncement. The situation in which the court does not want to provide online access to the pronouncement of the judgment for reasons of COVID-19 restrictions should not be in accordance with the open court principle. Such pronouncements do not constitute a threat to human health, and the technological reasons should not be seen as a sound basis for depriving parties of the very guarantee of a fair trial.

The third issue refers to a situation of a planned hearing in the courtroom where there are, however, additional requirements for third parties that have to be fulfilled to enter the courtroom. As the COVID-19 pandemic showed, such prerequisites may relate, for example, to:

– submitting an appropriate motion,

– obtaining the consent of a specific person (usually one of the judges),

– indication of the maximum number of the third parties who can take part in the hearing.[67]

As in the case of the absolute prohibition, such restrictions are based on the COVID-19 justification, i.e. a reduction of risk of transmitting the COVID-19. Since more far-reaching restrictions (total exclusion) were in line with Art. 6, para. 1 of the ECHR, exceptions less far-reaching should also be in compliance with the ECHR (*a maiori ad minus*). However, again, providing for third parties a possibility to participate in court hearings remotely may be the solution that deprives such restrictions of the mentioned justification and that is in line with the rule of openness of court proceedings. Therefore, it should not be surprising that there are cases of hearing broadcasts, for example, via YouTube.[68]

4. Remote Hearings and Remote Access to Hearings

As already indicated, remote access to court hearings may be the solution to the COVID-19 problems described above. Thanks to it, we can avoid a threat to public health since we are able to exclude the risk of spreading the virus in the courthouse. Therefore, we are able to maintain the openness of court hearings

66 See considerations regarding this issue in reference to the Polish law: Kościółek 1954. 30–31.

67 For more on these restrictions in Poland, see Kościółek 1954. 29.

68 OSCE 2020. 22.

and eliminate the cause on the basis of which openness was limited. In other words, as a result, we are able to maintain the international procedural standard expressed in Art. 6, para. 1 of the ECHR, in Art. 14, para. 1 of the ICCPR, and in Art. 47 of the CFR. Thus, it should come as no surprise that such a solution existed or was introduced in many jurisdictions during the pandemic.[69] Furthermore, remote access to court hearings would probably cause that the goals which we try to attain are better attained thanks to the principle of openness of civil court proceedings.[70] It is not a secret that there is no audience in most civil court proceedings.[71] A situation in which a person can follow a court hearing from his/her apartment may change this. Hopefully, that will increase citizens' trust in the court[72] and lead to higher public oversight of court decisions.

It is noteworthy that this not a solution without risks and drawbacks.[73] Firstly, the technological transformation is usually not a low-cost process.[74] Problems may refer to, for example, no or poor Internet connection or the lack of necessary equipment.[75] The potential pandemic recession may cause that many jurisdictions will not have the resources to transform courthouses from physical to physically digital ones. There are also data protection and privacy concerns.[76]

Secondly, we have to bear in mind that traditional court hearings before the pandemic were not *fully* open either. Besides the COVID-19 pandemic justification, there are also other reasons which may allow the court, on a case-by-case basis, to close the hearing to the public.[77] Obviously, in such cases, remote access should not be provided to third parties.

Furthermore, in most jurisdictions, we can find some general limitation regarding who can participate in the open court hearings. For example, only adults may be allowed access to the public hearing.[78] Moreover, witnesses who

69 Videoconferencing was used in civil procedures, among others, in Austria, Croatia, France, Hungary, Ireland, Kazakhstan, Portugal, Serbia, Slovenia, Sweden, the United Kingdom, and Poland. See OSCE 2020. 22 and Kościółek 1954. 32–33.

70 In reference to these goals, see Part 2 of this paper.

71 This remark is based on the author's professional experience in reference to Polish civil court proceedings.

72 If we have only a plaintiff and a defendant in a case, then usually at least one of the parties will not be happy with the judgment and may blame the court for that. The audience may silently support the court decision and cause more persons to be contented with the judgment as opposed to the ones that are not. Hereby, the audience may give a decision greater legitimacy and cause the court to be better perceived. We have to bear in mind that even courts are now evaluated on Google.

73 In reference to some critics, see, for example, Harsagi 2012 and Fischer 2012.

74 OSCE 2020. 27.

75 For more on the issue, see OSCE 2020. 7 and a virtual mock trial carried out by the UK-based organization Justice: https://justice.org.uk/our-work/justice-covid-19-response/.

76 This issue exceeds the scope of this article. For more on this, see: OSCE 2020. 7, 14.

77 See, for example, Art. 6, para. 1 ECHR.

78 See Art. 152 of the Polish CCP.

have not yet testified may not attend the examination of other witnesses.[79] Therefore, even if it may be seen as a restriction to the external openness of court proceedings, a person who wants to attend a court hearing remotely should be to some extent verified.[80] As it is very aptly indicated in the literature: 'While allowing the possibility of remote observation of court hearings by third parties, one should also remember about the need to ensure the protection of values other than openness'.[81] Such verification should take place only to such extent as is necessary to determine whether a person fulfils the legal requirements to participate in an open court hearing.[82] Further, 'online third parties' should be the muted participants of court hearings, and courts should have a possibility to exclude a person from a hearing if his or her behaviour is not in line with the seriousness of the court proceedings.[83]

Such technological openness of court hearings may lead to another problem, the one regarding the recording of hearings by third parties.[84] This may be problematic, for example, in the context of witnesses who did not testify so far in a proceeding. Therefore, appropriate technological solutions should be provided to exclude, or at least limit, this risk.[85]

Finally, it may be added that remote access to court hearings should not be abandoned once the pandemic is over, but it should coexist with and supplement traditional, physical hearings. As already indicated, that would probably cause the goals which we try to attain to be better achieved thanks to the open court principle. It is difficult to agree with the statement that 'remote hearings may be experienced as more tiring than in-person hearings'.[86] This author's court experience shows that it is the opposite, not to mention the time saved.

79 See, for example, Art. 264 of the Polish CCP. It may be questioned whether the access of witnesses to a court hearing should be considered within internal or external openness.

80 Similarly, Kościółek 1954. 33. This problem is also indicated in OSCE 2020. 25.

81 Translation by the author. Translated sentence: 'Dopuszczając możliwość zdalnego obserwowania posiedzeń sądowych przez osoby postronne, należy pamiętać również o potrzebie zapewnienia ochrony wartościom innym niż jawność.' Kościółek 2020. 34.

82 Such requirements may be different for different jurisdictions, but, for example, such verification in Poland would require a verification of age.

83 See, for example, Art. 152 § 4 of the Polish CCP, which states that persons who do not respect the dignity of the court may not be present during court activities (original rule: 'Przy czynnościach sądu nie mogą być obecne osoby w stanie nielicującym z powagą sądu').

84 This problem was indicated, for example, by the Oireachtas Library and Research Service 2020. 19–20 and OSCE 2020. 26.

85 The author of this paper is not a technological expert, wherefore he only assumes that it is possible to provide such solutions – for example, to provide access to the hearing on the basis of a software that does not allow recording, maybe to have witnesses in separate online rooms and have them testify during the same hearing, etc.

86 OSCE 2020. 13.

5. Conclusions

The COVID-19 pandemic was a huge challenge for the principle of the openness of civil court proceedings. In many jurisdictions, the existing methods of implementing this openness were found to be inadequate for the new social distancing reality.[87] To protect public health, many regulations or less formal solutions have been introduced, significantly modifying the course of the civil proceedings. From the perspective of the open court principle – which is recognized in international treaties – many such measures may be seen as highly controversial. However, contesting them is not an easy task since such modifications are justified on the grounds of public health, and the temporary nature of them is usually mentioned.[88]

Nonetheless, the considered principle constitutes one of the most important guarantees of a fair trial. We should not give up on it or limit its scope on the basis of a public health excuse,[89] especially in a situation in which new technologies allow us to maintain its core and essence. Court proceedings with possible remote participation are in line with the obligation of social distancing and allow us to realize this principle almost in its fullness. Furthermore, such solutions do not only allow for compliance with the basic principle but may also bring about its enhancement. The remote access of third parties to court proceedings may cause that such goals as citizens' trust in courts and public oversight of courts be better attained in the future. What is more, such solutions bring the courts closer to our current social reality, where more and more issues are handled online, without the physical presence of the persons involved. Therefore, such measures should not be temporary in nature but should stay with us even after the pandemic. If so, the open court principle will not only survive the COVID-19 pandemic but will only become stronger after it.

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87 Cf. Kościółek 1954. 35–36.

88 Similarly, Zembrzuski 2021. 14.

89 '(…) the key standards underpinning the operationalization of the courts must continue even during times of emergency', OSCE 2020. 7. See also CEPEJ 2020.

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