Conflicting interests of witnesses and defendants in a fair criminal trial – can a hearing by videoconference be the best instrument to reconcile them?[1]

Conflito de interesses entre testemunha e pessoa acusada em uma persecução penal justa – a oitiva por videoconferência pode ser um instrumento para solução?

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Abstract: This study determined whether an adequately regulated hearing by videoconference can become (alone or in conjunction with other measures) an instrument to balance the protection of the rights of the accused with the protection of the interests of witnesses in the criminal process. The authors identified the requirements that a hearing by videoconference must meet the standards established by the European Court of Human Rights. They performed a critical analysis of the existing provisions relating to hearing in Polish criminal procedural law and the practice of their application and showed why in some situations, hearing by videoconference seems to be the most optimal form of hearing. Particular attention was paid to witnesses with specific needs for protection during a hearing. These considerations led the authors to the general (i.e., not exclusively applicable to the Polish legal order) conclusion that hearing by videoconference is a very useful instrument for realising fair trial standards and witness protection.

Keywords: hearing; witness; videoconference; accused; right to defence.

Resumo: *Este artigo verifica se uma adequadamente regulada oitiva por videoconferência pode ser (por si só ou juntamente a outras medidas) um instrumento para balancear a proteção dos direitos fundamentais da pessoa acusada com a proteção dos interesses da testemunha no processo penal. Na pesquisa, são identificados os requisitos que devem ser atendidos por uma oitiva em videoconferência conforme o Tribunal Europeu de Direitos Humanos. Realiza-se uma análise crítica da legislação da Polônia sobre o assunto e sustenta-se que, em algumas situações, a oitiva por videoconferência é a melhor opção para realização do ato. Contudo, deve-se ter cautela com especiais necessidades de testemunhas que carecem de medidas de proteção. A partir de tais premissas, conclui-se que, em geral (e não somente para o sistema legal da Polônia), a oitiva por videoconferência é um instrumento muito útil para atender aos parâmetros do devido processo e à proteção das testemunhas.*

Palavras-chave: *oitiva; testemunha; videoconferência; acusado; direito de defesa.*

Introduction

In international and supranational instruments, the scope *ratione personae* of the right to fair trial is regulated in different ways, usually limited to the accused, but victims and witnesses are certainly protected by other rights. Therefore, national lawmakers are obliged to introduce regulations that not only ensure the protection of the rights of the accused but also adequately safeguard those of others. This applies, inter alia, to persons examined during a criminal trial, as the latter may involve secondary victimisation and other specific risks and discomforts, especially in the case of witnesses with specific needs for protection during a hearing. However, introducing such solutions and their application by procedural authorities is extremely challenging as it involves an inevitable conflict of legal values. After all, instruments protecting the rights of the witnesses mentioned earlier, especially those setting specific rules for their questioning, often restrict the defendant's right of defence, significantly undermining the adversarial principle and equality of arms. However, placing undue emphasis on protecting the rights of the accused by either the legislature itself or the procedural authorities can make the protection that should be provided to this category of witnesses insufficient or even fictitious. Any of these situations are incompatible with the standards of witness protection.

Here, we explore whether an adequately regulated hearing by videoconference can become (alone or in conjunction with other measures) an instrument to balance the protection of the rights of the accused with the due protection of the witnesses' interests in the criminal process. Therefore, in addition to defining the concept of witnesses with specific needs for protection during a hearing, we refer to the relevant European Court of Human Rights'[5] jurisprudence and critically analyse the regulations adopted in the Polish legal order. The latter is based on the ECHR[6] and EU standards; therefore, it may also be of interest for readers from other jurisdictions. Moreover, most problems that arise in

[5] Hereafter referred to as "ECtHR" or "the Court".

[6] COUNCIL OF EUROPE, Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950. Hereafter referred to as "the Convention" or "ECHR".

the Polish legal system are universal; therefore, the solutions offered may be applicable to other countries.

We are aware that the COVID-19 pandemic has made the issue of hearing by videoconference more popular, attracting unprecedented interest from academics, practitioners, and legislators. In our article, however, we deliberately do not take up this thread because we intend to demonstrate that conducting hearings through videoconference is a universal instrument and not useful only in times of crisis, such as the pandemic.

I. Witnesses with specific needs for protection during a hearing

In this part of the study, it is necessary to identify witnesses with characteristics that justify their inclusion in the category of witnesses with specific needs for protection during a hearing and to explain the reasons that determined persons with these specific characteristics to fall into the aforementioned category. By witnesses "with specific needs for protection during a hearing", we mean witnesses (including victims questioned in this capacity) for whom the need for protective measures is limited solely to providing appropriate conditions for questioning and does not require other measures to be taken to ensure the safety of the witness, such as, for example, keeping the witness' identity secret, providing personal protection to the witness, or providing assistance in relocating the witness. In the case of witnesses whose protection requires more than the creation of appropriate conditions for questioning, a videoconference hearing may be considered a protective measure but used alone it might not provide sufficient witness protection. This means that the relevance of hearing by videoconference is different in this situation than in the case of witnesses, for whom there is no need for the aforementioned specific protection measures. Therefore, this issue requires a separate analysis.

The category of witnesses "with specific needs for protection during a hearing" includes: witnesses experiencing increased stress levels during a hearing because of their personal characteristic, witnesses experiencing increased stress levels during a hearing because of specific

circumstances of the case and witnesses with physical disability and physical illness.[7].

A. *Witnesses experiencing increased stress levels during a hearing because of their personal characteristics.*

First, consideration should be given to witnesses who experience significantly increased stress levels related to an examination (especially by a court) as part of pending criminal proceedings. Stress affects the vast majority of witnesses to a greater or lesser extent. In most cases, however, its level and impact on the witnesses' functioning, particularly their ability to recollect observations, will not justify adopting special rules for their examination.

However, there are some witnesses who, due to their personal characteristics, have serious difficulties coping intellectually and emotionally with the inconvenience of the hearing and need special treatment.

This subcategory includes particularly minors. Child witnesses (basically persons up to the age of 18 years[8]) reveal specific protection

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[7] All these categories of witnesses can be called vulnerable witnesses. A vulnerable witness, according to the broadest definition of the term, is "any witness (whether a victim or not) who is likely to find witnessing a crime, any subsequent contact with the criminal justice system unusually stressful, upsetting or problematic, because of their personal characteristics, the nature of the offence, the nature of any evidence they are called upon to give at any stage to assist the justice process, the offender's characteristics, any relationship between them and the defendant or intimidation" – ELLIOTT, Robin. *Vulnerable and intimidated witnesses: A review of the literature*. London: Home Office, 1998, p.108., see also Article 22 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Official Journal of the EU L 315 of 14.11.2012).

[8] Notably, in light of the provision of Article 1 of the Convention on the Protection of the Rights of the Child (Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989, Journal of Laws of 1991, No. 120, item 526), a "child" is any human being under the age of 18 unless they attain the age of majority earlier in accordance with the law.

needs and require individual approaches and attention during the criminal proceedings especially because of their inexperience, lack of life knowledge, immaturity and emotional sensitivity[9]. The literature indicates that the child's unique needs causing the necessity for suitable hearing conditions are related, in particular, to the fact that children may be afraid to participate in procedural activities and stressed by the new situation, the new place and the presence of strangers. In addition, children may be susceptible to suggestions, repress traumatic experiences (as a witness or victim) and rationalize them in a way that makes them socially acceptable, and moreover blame themselves for the events involved in the procedural activity[10]. The child victims are vulnerable to secondary and repeat victimisation, intimidation, and retaliation[11].

It should be emphasised that the necessity to provide children (victims and witnesses) with special conditions for hearings also stems from European and international law[12]. Acts of European law imply, inter alia, that States should take measures to protect child victims to safeguard their best interests, considering an assessment of their needs[13]. It also follows from them that participation in criminal

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[9] ŚWIĘCICKA, Dagmara. Małoletni świadek w procesie karnym. *Palestra*, no. 11, 2021, p. 19.

[10] PUDZIANOWSKA, Dorota (et. al.). Wiek. In: PUDZIANOWSKA, Dorota; JAGURA, Jarosław (eds.). *Równe traktowanie uczestników postępowań. Przewodnik dla sędziów i prokuratorów*. Warszawa: Biuro Rzecznika Praw Obywatelskich, 2016, pp. 84 – 85.

[11] Resolution of the Supreme Court of 20.12.1985, VI KZP 28/85, OSNKW 1986/5-6, item 30.

[12] In the context of international law see, i.a. Rule 88 of the Rules of Procedures and Evidence of the International Criminal Court Adopted by the assembly of states, first session New York, September 3-10 2002 ICC-ASP/1/3.

[13] Directive 2011/92/EU of the European Parliament and of the Council of December 13, 2011 combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, Official Journal of the EU L 335 of 17.12.2011 (Preamble (30)); The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse drawn up in Lanzarote on October 25, 2007 (Council of Europe Treaty Series No. 201) also indicates that each party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are conducted in the

proceedings by child victims should not cause additional trauma to the extent possible, as a result of interviews or visual contact with offenders. A good understanding of children and how they behave when faced with traumatic experiences will help to ensure a high quality of evidence-taking and reduce the stress placed on children when carrying out the necessary measures. Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, considering their personal situation and immediate needs, age, gender, disability, and level of maturity, and fully respecting their physical, mental, and moral integrity. To avoid further hardship to the child, interviews, examinations, and other forms of investigation should be conducted by trained professionals in a sensitive, respectful, and thorough manner[14]. Notably, acts of supranational law do not introduce additional age limits differentiating between aggrieved child witnesses and non-aggrieved child witnesses as to the protective standards of their questioning. This issue already needs to be signalled here as the Polish legislator introduced such differentiation as a limit by setting the age of 15 years at the time of hearing without in any way justifying the reasons for this differentiation. Legal scholarship indicates that this limit was established by considering the child's average degree of emotional development[15]. Nevertheless, doubts arise over the said regulations and whether these standards should be extended to cover witnesses up to 18 years of age. Part III of the paper will discuss these regulations in more detail.

Increased stress level and risk of secondary victimisation related to participating in a hearing during pending criminal proceedings may be

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best interests and respecting the rights of the child. Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate (Article 30 paragraph 2).

[14] Annex to UN Economic and Social Council Resolution 2005/20 ("Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime") adopted on 22 July 2005 (V. The right to be treated with dignity and compassion).

[15] HOFMAŃSKI, Piotr; SADZIK, Elżbieta; ZGRYZEK, Kazimierz. *Kodeks postępowania karnego. Komentarz. T. I.* Warszawa: C.H. Beck, 2007, p. 874.

also experienced by minors and adults with intellectual and developmental disabilities and mental illness[16].

When assessing the credibility of testimony, the procedural authority must always consider the witness's current mental and physical condition. The existence of reasonable doubts as to the witness's mental state, mental development, and the ability to perceive or recollect observations justifies examining them with the participation of an expert physician or psychologist[17]. Testimony given by witnesses with mental disorders cannot be entirely disregarded; each situation must be analysed *in concreto*[18]. The participation of witnesses with mental disorders in criminal proceedings at both the preparatory and jurisdictional stages involves the application of certain specific legal regulations when such a situation arises (although certain norms remain common to witnesses with and without mental disabilities). Similarly, hearing of a witness with limitations in intellectual functioning and adaptive behaviour should be conducted in a manner adapted to them, considering the influence these limitations might have on the content and form of their testimony[19].

In some cases, such problems affect also elderly witnesses[20].

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[16] PUDZIANOWSKA, Dorota (et. al.). Niepełnosprawność. In: PUDZIANOWSKA, Dorota; JAGURA, Jarosław (eds.). *Równe traktowanie uczestników postępowań. Przewodnik dla sędziów i prokuratorów*. Warszawa: Biuro Rzecznika Praw Obywatelskich, 2016, p. 34.

[17] Under the provisions of the Polish Code of Criminal Procedure, the legislator in the wording of Article 192 § 2 indicated that "If there is doubt as to the mental state of a witness, his state of mental development, the ability to see or play by him, the court or prosecutor may order the hearing of a witness with the attendance of a expert doctor or an expert psychologist, and a witness can't object to that".

[18] JAGIEŁŁO, Dariusz. Choroba psychiczna a świadek w procesie karnym (wybrane problemy na styku prawa i medycyny). *Nowa Kodyfikacja Prawa Karnego*, vol. LX, 2020, pp. 60-61.

[19] ZNAMIEROWSKI, Jakub. Prawne i kryminalistyczne aspekty przesłuchania w postępowaniu karnym świadków z zaburzeniami psychicznymi. *Przegląd Sądowy*, no. 7-8, 2014, p. 135.

[20] LOVE, Helene. Aging witnesses: Exploring difference, inspiring change. *The International Journal of Evidence & Proof*, vol. 19(4), 2015, pp. 210–227.

B. Witnesses experiencing increased stress levels during a hearing because of the specific circumstances of the case.

As mentioned earlier, some witnesses suffer from fear or high distress in relation to testifying in criminal proceedings not (or not only) because of their personal characteristics but because of the specific circumstances of the case (e.g. the nature of the offence, the offender's characteristics, any relationship between them and the defendant or intimidation)[21].

This subcategory of witnesses includes, in particular, witnesses who fear contact with the accused during a hearing because of the threat to them or those closest to them from the perpetrator or others seeking to prevent the witness from testifying (however, for the reasons indicated at the beginning of this chapter, we exclude from this category of witnesses those whose safety requires measures going beyond the creation of appropriate conditions for their examination, such as anonymous witnesses and crown witnesses). Given the above context, notably, instruments of European and international law[22] stipulate the adaptation of judicial and administrative procedures to the needs of the victim and witnesses. These should be implemented by, inter alia, taking measures to minimise inconvenience to victims, protect their privacy when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation[23].

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[21] ELLIOTT, Robin. *Vulnerable and intimidated witnesses: A review of the literature*. London: Home Office, 1998, p.108.

[22] See e.g. Article 12 paragraph 3 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Official Journal of the EU L 101 of 15.4.2011), Article 13 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 24 paragraph 2 (b) of United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly of 15 November 2000 (Journal of Laws of 2015, No. 18, item 158).

[23] Article 6 (d) of Annex Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34 of 29 November 1985.

This subcategory of witnesses also includes people for whom participation in procedural activities risks secondary victimisation and traumatisation due to the nature of the crimes they were victims or witnesses. This applies, in particular, to victims and non-aggrieved eyewitnesses of the most severe offences, especially crimes involving violence, threats of violence, or against sexual freedom. These persons require special protection during a hearing because they must revisit, replay, and recount drastic memories of the crime. It is necessary to emphasise the importance of solutions and regulations of a supranational and international nature that provide specific instruments for the protection of witnesses who are at risk of secondary victimisation and traumatisation. For example the preamble to Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA[24] stipulates that victims of crime should be recognised and treated in a respectful, sensitive, and professional manner without discrimination of any type based on any grounds, should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice. According to Article 68 (1) of the Rome Statute of the International Criminal Court, the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[24] Preamble (9), Official Journal of the UE L 315 of 14.11.2012. In this context, see also i.a. Article 56 of the Council of Europe Convention on preventing and combating violence against women and domestic violence drawn up in Istanbul on 11 May 2011 (Journal of Laws of 2015, item 961).

C. Witnesses with physical disability and physical illness.

This subcategory of witnesses with specific needs for protection during a hearing includes witnesses who reveal physical health problems preventing them or significantly hindering them from attending a hearing at the seat of the authority conducting proceedings. The causes include e.g. permanent and bedridden illness of the witness, their stay in a hospital, the permanent disability or invalidity of the witness, which prevents them from moving freely[25]. For this category of witnesses, arrangements are envisaged to allow them to be heard without having to appear at the seat of the authority conducting proceedings.

Thus, the grounds for adopting special protection solutions during a witness hearing can vary and include age, health (both physical and mental), or imminent danger from the accused or others seeking to prevent the witness from testifying. In any case, specific legal standards in force provide grounds for protecting such persons during pending criminal proceedings. Finally, one method of protecting witnesses with specific protection needs during a hearing, also provided for in acts of supranational and international law, could be the hearing of a witness by videoconference, which will be discussed in the subsequent part of the article[26].

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[25] GABERLE, Andrzej. *Dowody w sądowym procesie karnym*. Warszawa: Wolters Kluwer, 2007, pp. 93-94.

[26] See, e.g., Article 20 paragraph 5(b) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (Official Journal of the EU L 335 of 17.12.2011), Article 15 paragraph 5(b) of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Official Journal of the EU L 101 of 15.4.2011), Article 36 paragraph 2(b) of The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse drawn up in Lanzarote on October 25, 2007, Article 56 paragraph 1(i) of The Council of Europe Convention on preventing and combating violence against women and domestic violence drawn up in Istanbul on 11 May 2011 Article 31(a) of Annex to UN Economic and Social Council Resolution 2005/20 ("Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime"); Article 24 paragraph 2 (b) of United Nations

II. ECHR STANDARDS CONCERNING HEARING OF WITNESSES BY VIDEOCONFERENCE

Hearing of a witness by videoconference in criminal cases can be considered on two levels in terms of human rights: ensuring the witness' rights and the right to a fair trial of the accused when a witness is heard by videoconference.

Concerning the first aspect, it is first necessary to analyse which rights are at stake. The right to a fair trial is the first that comes into focus. However, that the Convention does not generally guarantee the witness the right to a fair trial, since Article 6 (1) refers only to the accused and persons whose rights and obligations of a civil nature are adjudicated in a trial ("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"). Therefore, one can focus on the situation where the witness is an aggrieved party pursuing a civil claim in a criminal trial, which may be covered by guarantees under Article 6 (1) ECHR[27]. In some states, such a person is treated only as a witness, whereas in others, they also have the distinct status of a party to the proceedings. While the Court emphasises that civil claimants are entitled to fewer guarantees than the accused[28], they can undoubtedly invoke, for example, a violation of equality of arms or the adversarial nature of the proceedings.

This issue has not been analysed extensively by the ECtHR strictly in the context of hearing by videoconference, but some conclusions can be drawn from the Court's case law relating to a remote hearing.

First, videoconferencing can enable the victim to pursue a claim. In the case of Conde Nast Publications Ltd. and Carter[29], when referring

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Convention against Transnational Organized Crime, adopted by the United Nations General Assembly of 15 November 2000 (Journal of Laws of 2015, No. 18, item 158).

[27] Judgment of the ECtHR in case Perez v. France of 12.02.2004, application no. 47287/99.

[28] Judgment of the ECtHR in case König v. Germany of 28.06.1978, application no. 6232/73.

[29] Decision of the ECtHR in case Conde Nast Publications Ltd and Carter v. the United Kingdom of 8.01.2008, application no. 29746/05.

to the allegation that granting the claimant the opportunity to make an appearance by videoconference violated the right to fair trial of the opposite party, the ECtHR indicated that "such means of submission of evidence is not contrary to the principles of the Convention (...). In the present proceedings, the legitimate aim pursued was the proper administration of justice, by granting RP[30] access to the same procedural facilities as other litigants and enabling him to continue the proceedings which were aimed at the vindication of his right to reputation guaranteed under Article 8 of the Convention" and "the State cannot be condemned under Article 6 of the Convention for providing a particular litigant with facilities that were available to other litigants simply because of his status as a fugitive from justice. The deprivation of such facilities would run counter to the Convention guarantee of equal treatment that is inherent in the principle of equality of arms". In balancing the interests of the claimant and the defendant (the applicant before the ECtHR), the Court held that "the applicants had suffered little, if any, disadvantage as a result of the submission of RP's evidence by VCF whereas, in the event of a refusal of the relevant order, RP would, in practice, have been requested to abandon his action in denial of his right of access to court. In these circumstances, the Court does not consider that the order enabling RP to submit his evidence by VCF hindered the principle of equality of arms or rendered the proceedings unfair in any other way". Although the above ruling was made in the context of a civil trial, it may similarly be applicable in a criminal trial in which the aggrieved party asserts a claim as a civil party or, while not a party, files in a criminal trial a motion for compensation from the accused. The reason for choosing videoconference may be, for example, a serious risk of secondary victimisation or illness.

The issue of an appearance at a trial by videoconference often arises in situations where the aggrieved party is deprived of liberty, e.g. due to serving a prison sentence in another case. If bringing such a witness to a hearing might be problematic, e.g. due to long distance or fear of flight, hearing by videoconference appears to be a good alternative. In addressing this issue, the Court "established a twofold test to assess

[30] Facing the risk of extradition to the US when appearing in the UK, RP (the claimant) gave evidence in the English court by videoconference from France.

whether an incarcerated applicant's absence from civil court hearings was compatible with the requirements of Article 6 of the Convention: the Court must first examine the manner in which the domestic courts assessed the question whether the nature of the dispute required the applicant's personal presence; secondly, it must determine whether the domestic courts put in place any procedural arrangements aiming at guaranteeing his effective participation in the proceeding"[31].

Participation in this mode of hearing entails making use of all the guarantees afforded to the person whose rights and obligations are decided in the proceedings. These guarantees obviously cover the quality of the connection and the possibility of freely making statements or seeing other evidence. To successfully allege a violation of these guarantees before the ECtHR, they must first be formulated in domestic proceedings[32]. Referring to the accused's participation in a hearing by videoconference (which may be *mutatis mutandis* applied to the civil claimant), the Court indicated that "physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole (...). Furthermore, although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention (...). It must be ensured that the applicant can follow the proceedings and be heard without technical impediments"[33].

The second issue that might be analysed in this context is the need to protect the life and health of the witness from retribution by the accused and criminal groups. Notably, apart from obligations to refrain from a specific interference, the ECHR also imposes positive obligations on parties, manifested in the necessity of protecting individuals within

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[31] Judgment of the ECtHR in case Polyakova and others v. Russia of 7.03.2017, applications no. 35090/09, 35845/11, 45694/13 and 59747/14, § 127.

[32] Judgment of the ECtHR in case Ulimayev v. Russia of 21.02.2017, application no. 23324/04, § 39.

[33] Ulimayev v. Russia, supra, § 37.

their territory from the actions taken by other individuals[34]. This is the so-called horizontal dimension of human rights protection, and its impact is evident by Articles 2 (right to life) and 3 (freedom from torture, inhuman, or degrading treatment) of the ECHR. Thus, the State must take all measures to ensure witness protection if there is a real risk of an attack on them. Undoubtedly, one way to protect the witness in connection with their testimony against attack in the courtroom or other court premises is to hear them by videoconference. Such examination will not only minimise some risk to the life and health of the witness but can also positively affect the witness's comfort of testifying.

The third issue is witness protection from secondary victimisation and the adverse effects of the traditional hearing on the witness. This is especially true for witnesses who have been aggrieved in sexual offences and for minors or parties aggrieved in offences with the use of violence. In such a situation, direct contact with the perpetrator may entail trauma and negatively affect the person's health.

The ECtHR addressed these two aspects in the Doorson[35] case concerning the use of anonymous witnesses in a criminal trial. Answering the question of the limits of the accused's right to a fair trial, the Court said, "It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify". Thus, the institution of an anonymous witness was recognised as compliant

[34] Judgments of the ECtHR in cases Osman v. United Kingdom of 28.10.1998, application no. 23452/94, § 113 - 123 and Kurt v. Austria of 15.06.2021, application no. 62903/15, § 157 – 160.

[35] Judgment of the ECtHR in case Doorson v. the Netherlands of 26.03.1996, application no. 20524/92, § 70.

with the Convention. At the same time, specific requirements for the mode of hearing of such a witness were formulated.

Similarly, in the case involving the sexual exploitation of a child, the Court concluded that "The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim"[36].

As an aside, it may be mentioned that the Court of Justice of the European Union also pointed to this aspect in the Maria Pupino[37] case stating that "Articles 2, 3 and 8 (4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with the arrangements that allow those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place". Notably, minors who are victims of sexual or physical abuse are usually examined only once, in the preparatory proceedings and in the absence of the suspect. However, videoconferencing may, in some situations, be a good additional instrument for protection of this kind of witnesses.

The second aspect involved in ensuring respect for rights in connection with videoconferencing involves hearing of a witness in such a way as to ensure the defendant's right to a fair trial, in particular, the right to a defence. This particularly implies the possibility of participating effectively in the taking of evidence. As the ECtHR pointed out in Murtazaliyeva v. Russia[38], "Article 6, read as a whole,

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[36] Judgment of the ECtHR in case S.N. v. Sweden of 2.07.2002, application no. 34209/96, § 47.

[37] Judgment of the CJEU (Grand Chamber) of 16.06.2005, Criminal proceedings against Maria Pupino, ECLI:EU:C:2005:386.

[38] Judgment of the ECtHR in case Murtazaliyeva v. Russia of 18.12.2018, application no. 36658/05, § 91.

guarantees the right of an accused to participate effectively in a criminal trial, which includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings (...). The right to an adversarial trial means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party". Problems with hearing the witness's testimony due to the poor quality of the connection or to the sound set too quietly may give rise to a claim under Article 6[39]. In general, however, videoconferencing provides a better opportunity for the accused to get familiarised with the witness's testimony and challenge it than, e.g., hearing conducted via international or domestic legal assistance, the reading of the witness's testimony given in the preparatory proceedings, or hearing by the court in the absence of the accused. The Court made this clear in the Zhukovskiy[40] case noting that "The domestic courts did not hear the direct evidence of these witnesses and the applicant had no opportunity to cross-examine them. The Court is not persuaded that the materials of pre-trial investigation, in which the applicant partly participated, and the video of the questioning could compensate such a complete lack of possibility for the courts and the applicant to examine the witnesses directly. Furthermore, being aware of difficulties in securing the right of the applicant to examine the witnesses in the present case, the Court considers that the available modern technologies could offer a more interactive type of questioning of witnesses abroad, like a video link".

As indicated above, the right of the accused to a fair trial is not limitless under the Convention. It may be limited in some cases by, inter alia, the need to consider the witnesses' interests. As the ECtHR emphasises, "Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court"[41]. However, the latter must not lead to a non-acceptable limitation of the procedural guarantees

[39] See judgment of the ECtHR in case Stanford v. the United Kingdom of 23.02.1994, application no. 16757/90, § 29.

[40] Judgment of the ECtHR in case Zhukovskiy v. Ukraine of 3.03.2011., application no. 31240/03, § 45.

[41] S.N. v. Sweden, supra, § 44.

enjoyed by the accused, as emphasised by the ECtHR in, inter alia, S.N. v. Sweden[42] when it pointed out that "the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence (...). In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours". Only such measures restricting the rights of the defence, which are strictly necessary, are permissible under Article 6 (1)[43]. The Court also takes the position that "Before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable"[44].

Hearings by videoconference should generally not entail a reduction in the procedural guarantees of the accused compared with the hearing of a witness present in the courtroom. However, if such a negative impact has occurred or is likely to occur, measures to counterbalance such a reduction should be considered. In WS v. Poland[45], the Court appreciated that the law enforcement authorities wished to protect the victim from the negative effects of direct questioning but noted that "it has not been shown or argued that the authorities envisaged or made attempts, either at the investigation stage, or later, before the court, to test the reliability of the victim in a less invasive manner than direct questioning. This could have been done, for example, by more sophisticated methods, such as having the child interviewed in the presence of a psychologist and, possibly, also her mother, with questions put in writing by the defence,

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[42] S.N. v. Sweden, supra, § 47.

[43] Judgment of the ECtHR in case Van Mechelen and others v. the Netherlands of 23.04.1997, applications no. 21363/93, 21364/93, 21427/93 and 220 56/93, § 58.

[44] Judgment of the ECtHR in case Al-Khawaja and Tahery v. the United Kingdom of 15.12.2011, applications no. 26766/05 and 22228/06, § 125.

[45] Judgment of the ECtHR in case W. S. v. Poland, of 19.06.2007, application no. 21508/02, § 61.

or in a studio enabling the applicant or his lawyer to be present indirectly at such an interview, via a video link or one way mirror".

In the context of hearing by videoconference, several key requirements relating to the right to a fair trial can be identified.

First, the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings[46]. However, "As a general rule, paragraph 1 and paragraph 3(d) of Article 6 cannot be interpreted as requiring in all cases that questions be put directly by the accused or his lawyer, whether by means of cross-examination or by any other means"[47] and "since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims involves a risk of further traumatisation on the latter's part, in the Court's opinion personal cross-examination by defendants should be subject to most careful assessment by the national courts, the more so the more intimate the questions are"[48]. It is not enough, however, to be able to see the witness's videoconference testimony and observe the witness's demeanour if they cannot be asked questions[49].

Second, under the principle of equality of arms, if hearing of witnesses by videoconference is allowed in respect of prosecution witnesses, it should also be available for defence witnesses.

Third, a videoconference hearing is sometimes the only way to examine a witness, especially if they are abroad and not willing to appear in court because of, e.g., potential criminal liability. The authority conducting the proceedings should carefully consider such a request from the defence and, if there are no serious reasons for refusing it, examine the witness in this mode. Any decision to refuse the request

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[46] Al-Khawaja and Tahery v. the United Kingdom, supra, § 118. More on the subject see MAFFEI, Stefano. *The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses*. Groningen: Europa Law Publishing, 2006.

[47] W. S. v. Poland, supra, § 55.

[48] Judgment of the ECtHR in case Y. v. Slovenia of 28.05.2015, application no. 41107/10, § 106.

[49] Judgment of the ECtHR in case D. v. Finland of 7.07.2009, application no. 30542/04, § 50.

must be duly reasoned[50]; otherwise, it may violate the accused's right of the defence.

Fourth, the accused should be allowed to observe the witness's demeanour during the examination at a distance and to challenge their credibility. In the Bocos-Cuesta[51] case, "neither the applicant nor the trial court judges were able to observe their demeanour under questioning and thus form their own impression of their reliability (...). It is true that the trial courts undertook a careful examination of the statements taken from the children and gave the applicant ample opportunity to contest them, but this can scarcely be regarded as a proper substitute for a personal observation of a witness giving oral evidence". This implies the need for appropriate technical solutions (e.g. the location of the camera or TV screens) so that the witness is visible while giving the testimony not only to the judges and jurors but also to the accused and the defence counsel. In addition, the quality of the transmission should allow for such an observation.

Thus, under the ECHR standards, remote hearing of witnesses is allowed and sometimes even promoted as a means of realisation of fair trial requirements or protection of other human rights. However, there are certain requirements concerning this type of hearing laid out by the jurisprudence of the ECtHR.

III. Hearing of a witness by videoconference as an instrument allowing the fair trial standard to come into effect in relation to witnesses "with specific needs for protection during a hearing" - analysis of solutions adopted in Polish criminal proceedings

The provisions of the Polish Code of Criminal Procedure (CCP) and the regulations issued on its basis indicate that the Polish legislator recognises the problems concerning witnesses "with specific needs for

[50] Judgment of the ECtHR in case Khodorkovskiy and Lebedev v. Russia (No. 2) of 25.07.2013, applications no. 51111/07 and 42757/07, § 506.

[51] Judgment of the ECtHR in case Bocos-Cuesta v. the Netherlands of 10.11.2005, application no. 54789/00, § 71.

protection during a hearing", which it seeks to solve by introducing specific standards for hearing of these subjects. Hearing by videoconference is also mentioned among the instruments designed to secure the interests of the persons mentioned earlier, which, from the perspective of the subject matter of this paper, is the most relevant. However, both the Polish legislator and the Polish procedural authorities (courts, public prosecutors, police) do not appropriately appreciate the form of hearing; consequently, it is used too rarely to the detriment of the implementation of procedural guarantees in Polish criminal proceedings. Considerations in this regard should begin by drawing attention to the fact that under Article 177 of the CCP, which refers to the examination in both the preparatory and jurisdictional phases, the legislator indicated that the examination of a witness may take place at the seat of the authority conducting proceedings (Article 177 § 1 of the CCP), in the place of the witness' stay, in a situation where the witness is unable to attend the summons due to illness, disability, or any other insurmountable obstacle (Article 177 § 2 of the CCP) and in the mode of videoconferencing[52] (Article 177 § 1a and Article 177 § 1b of the CCP). However, the legislator has not indicated, in principle, any prerequisites for waiving the hearing of a witness at the seat of the authority conducting proceedings or at the place of the witness's stay and replacing these modes of examination with a remote hearing[53]. Nevertheless, it cannot be inferred from this circumstance that the aforementioned forms of hearing are entirely equivalent in the sense that they may be used interchangeably on a fully discretionary basis. The principle of immediacy, which applies in criminal proceedings, prescribes that the procedural authority must come into direct contact with the source of evidence and the means of evidence[54]. The principle is most comprehensively implemented when the authority conducting proceedings

[52] The Polish legislator defines this examination in a descriptive form as "examination with the use of technical devices allowing this procedure to take place remotely, with a simultaneous direct transmission of sound and vision" (see i.a. Article 177 § 1a of the CCP).

[53] Therefore, the regulation contained in Article 185b § 2 of the CCP should be treated as an exception (this regulation will be referred to later in this article).

[54] This is called the principle of immediacy in a formal sense, ŚWIECKI, Dariusz. *Bezpośredniość czy pośredniość w polskim procesie karnym*. Warszawa: LexisNexis, 2013, p. 23.

and the other participants in the hearing are guaranteed the possibility of contact and observation of the person being examined directly while being in the same room with them[55]. These circumstances create the best conditions for the full perception of the messages conveyed non-verbally by the person being examined, including, in particular, the messages communicated unconsciously and involuntarily[56]. Furthermore, in the case of a face-to-face hearing, conducting this action properly does not depend on access to properly functioning technical equipment and the ability to operate it. The traditional form of interrogation obviates the negative impact that the specific conditions of a hearing by videoconference may have on the quality of the testimony given, related primarily to the lack of direct contact with the interrogator, distraction by technical process and the necessity "to speak to a computer screen". These circumstances may bemuse the witnesses and, even if they are not fully aware of it, prevent them from giving a free and complete account. Moreover, the lack of direct contact with the interrogating authority may cause the witness to not give due weight to the importance of the activity, which may also reflect negatively on the quality of their statement[57]. In the case of face-to-face

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[55] MAZUR, Hubert. Przesłuchanie świadka na odległość. In: CZARNECKI, Paweł; CZERWIŃSKA, Małgorzata (eds.). *Katalog dowodów w postępowaniu karnym*. Warszawa: Wydawnictwo C.H. Beck, 2014, pp. 160–161.

[56] Non-verbal communication is the way "people communicate intentionally or unintentionally, without words; non-verbal indicators include facial expressions, tone of voice, gestures, body position and movements, touch and gazing" - ARONSON, Elliot; WILSON, Timothy D.; AKERT, Robin M. *Psychologia społeczna. Serce i umysł*. Poznań: Polish translation by Zysk i S-ka Wydawnictwo s.c., 1994, p. 173. On the role of non-verbal communication in the judicial process - see for more details DENAULT, Vincent; DUNBAR, Norah. Nonverbal communication in courtrooms: Scientific assessments or modern trials by ordeal? *The Advocates' Quarterly,* vol. 47(3), 2017, pp. 280-308.

[57] This includes, in particular, the negative impact on the willingness of the witness to speak the truth and give as much details as possible. See FEKETE, Gábor. Videoconferencing hearings after the times of pandemic. *EU and Comparative Law Issues and Challenges Series (ECLIC)*, vol. 5, 2021, p. 483.The issue of change of rituals in case of remote hearings and virtual courts was also observed in ROSSNER, Meredith. Remote rituals in virtual courts. *Journal of Law and Society*, vol. 48(3), 2021, pp. 334–361. In the above context, however, notably, empirical research conducted in Australian courts has shown that the children and vulnerable adults giving evidence remotely understood that they were attending a courtroom and that the matter was serious. Stakeholders did

hearing, to which the procedural authorities are accustomed, there are also no problems characteristic of remote questioning in assessing the procedural statements made in this way, which are caused not only by the limited possibility of receiving non-verbal messages but also by the very fact that the questioning authority has no direct contact with the person questioned[58]. Furthermore, in the traditional type of hearing - as opposed to videoconference questioning[59] - third parties have no opportunity of unauthorized influence of the witness (e.g. by telling the witness how and what to testify) during the hearing[60]. Therefore, the view expressed in the legal scholarship that a remote hearing should be regarded as an exception to the rule and applied when a direct hearing of the witness is not possible, inadvisable, or substantially impeded is well-founded[61]. However, it should not be concluded from the above that hearing by videoconference, in general, excludes the possibility of assessing non-verbal communication.

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not feel that children and other vulnerable witnesses giving evidence by video link lacked an appreciation of the seriousness of the matter and the authority of the court – see: ROWDEN, Emma; WALLACE, Anne. Remote Judging: the impact of video links on the image and the role of the judge. *International Journal of Law in Context*, vol. 14(4), 2018, p. 517.

58 The perception of remote witnesses by court is different from that of witnesses interviewed directly. On the problems that may arise in assessing the credibility of the testimony of witnesses heard by videoconference, see in more detail SOMMERER, Lucia. Virtuelle Unmittelbarkeit? Videokonferenzen im Strafverfahren während und jenseits einer epidemischen Lage von nationaler Tragweite. *ZSTW*, vol. 133(2), 2021, pp. 421 – 424.

59 BERMANN, George A. Dispute Resolution in Pandemic Circumstances. In: PISTOR, Katharina (ed.). *Law in the time of Covid-19*. New York: Columbia Law School, 2020, p. 172.

60 Because of its weaknesses, hearing by videoconference is sometimes seen as limiting the principle of immediacy, the right to be heard and even the principle of equality of arms. Such assessments, however, do not apply to all hearings by videoconference (i.e. hearings by videoconference as such), but to those that are conducted in a manner that may violate these principles. It, therefore, depends primarily on the content of the regulations for the specific type of hearing by videoconference – see e.g. SAKOWICZ, Andrzej. Glosa do wyroku Sądu Najwyższego z dnia 18 marca 2015 r., II KK 318/14. *Białostockie Studia Prawnicze*, vol. 21, 2016, p. 221.

61 LACH, Arkadiusz. Przesłuchanie na odległość w postępowaniu karnym. *Państwo i Prawo*, no. 12, 2006, p. 81, WILIŃSKI, Paweł. Przesłuchanie świadka na odległość w postępowaniu karnym. *Przegląd Sądowy*, no. 6, 2005, pp. 17-18.

In fact, this is not the case, as has also been confirmed with the ECtHR case law cited above. When this action is conducted in such a way as to ensure that those taking part in the hearing are able to observe the demeanour of the person being heard (including, in particular, his facial expressions, posture, gestures, and body movements), the possibility of receiving non-verbal messages will be preserved, although undoubtedly not to the same extent as in the case of a direct hearing[62]. Properly drafted legislation on videoconferencing interrogation, the provision of suitable equipment for videoconferencing to procedural authorities, and training to raise awareness of the technical and psychological aspects of videoconferencing hearings among representatives of procedural authorities and other persons involved in this type of hearing are also capable of, if not eliminating[63], at least significantly reducing the risks associated with the use of this form of hearing[64].

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[62] 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*, vol. 45 (1), 2021, pp. 1-10, BROWN, Robert. Many Remote Lawyers Struggle to Read Body Language. Available at: <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-many-remote-lawyers-struggle-to-read-body-language>. Accessed on 26 June 2022, MACKENZIE, John. The pros and cons of remote hearings. Available at: <https://www.lexology.com/library/detail.aspx?g=a3ea7acf-1421-4683-8dfd-642d22cfa45f>. Accessed on 28 June 2022.

[63] For instance, an adequate safeguard against the possibility of unlawful influence on a witness during remote questioning is the presence of a representative of the procedural authority at the place where the witness is present during this activity – see Article 177 § 1a and 1b of the CCP.

[64] More on the proper conduct of a hearing by videoconferencing, including the technical and organisational requirements for videoconferencing in judicial proceedings – see: Guidelines on videoconferencing in judicial proceeding. Document adopted by the CEPEJ (European Commission for the efficiency of justice) at its 36th plenary meeting (June 2021). Available at: <https://rm.coe.int/cepej-2021-4-guidelines-videoconference-en/1680a2c2f4>. Accessed on 15 September 2022, General Secretariat of the Council, Guide on videoconferencing in cross-border proceedings. Available at: <https://e-justice.europa.eu/content_manual-71--maximize-en.do?idSubpage=18>. Accessed on 16 September 2022. In the above context, it is also worth mentioning that training courses on conducting procedural acts at a distance are organised in Poland (the only question is whether in sufficient numbers), see e.g. <https://www.iustitia.pl/dzialalnosc/

Thus, the law-making and law-applying bodies should consider all these circumstances when choosing between hearing in the traditional-basic mode (i.e., hearing by the competent procedural authority at its seat) and a remote hearing and when deciding whether to use the last-mentioned mode of hearing or use other particular methods of interrogation, which include hearing at the witness' place of stay and hearing through legal assistance provided by another procedural authority at its seat.

A hearing at the witness' place of stay has the significant advantage that if it is conducted by the procedural authority competent in the case, with the participation of all entities entitled to participate in this action, it is, in principle, no different (in terms of the standard of this action, judged from the perspective of the canon of due process) from a hearing at the seat of the authority. However, the use of the phrase "in principle" is necessary, as this standard may be significantly lowered in a specific case. This will be the case, in particular, if the hearing is not open to all those who would have participated had it been conducted in the aforementioned traditional mode. Such a situation will occur when a hearing is not attended by all the members of the procedural authority having jurisdiction over the case but by its named representative[65]. The standard of the action mentioned earlier will also be lowered when the parties and their procedural representatives cannot participate in the hearing due to obstacles, which would not occur in the situation of examining a witness in the traditional - basic mode.

konferencje-i-szkolenia/4063-szkolenie-online-czynnosci-procesowe-sadu-na-odleglosc-w-postepowaniu-cywilnym-i-karnym-22-stycznia-2021r>, <https://www.bankier.pl/wiadomosc/Rozprawa-w-formie-wideokonferencji-Sedziowie-ucza-sie-pracowac-online-8081023.html>. Accessed on 18 September 2022).

[65] Such a situation can arise during judicial proceedings when the court sits as a panel and the hearing of a witness is conducted by a judge designated from its panel. The provision of Article 396 § 2 of the CCP indicates that the court may order that a witness be examined by a judge designated from the adjudicating panel or by the court, in whose judicial circuit the witness is staying, if the witness's failure to appear in court is caused by insurmountable obstacles.

Given that the rights of the accused and other participants, including witnesses, must be protected during criminal proceedings[66], hearing a witness at their place of stay may involve certain discomforts for the witness themselves. The need to allow entry into the home not only of representatives of the procedural authorities but also of the parties and their legal representatives can be for some people an experience that is not only extremely unpleasant because of the significant intrusion into their right to privacy; but in addition, this raises concerns about the disclosure of the witness' place of residence. Persons who are unable to appear for questioning at the seat of the procedural authority, even one based in the locality in which they are staying, are in no way in a position to resist such discomfort. Moreover, the coercive situation in which they find themselves deprives them of the right to anonymise data on their place of residence, which every witness generally enjoys[67].

The last-mentioned negative consequences do not involve questioning through legal assistance by another procedural authority on its premises. However, this mode of hearing does not apply to all witnesses (such as persons who are bedridden or disabled and cannot leave their homes). Moreover, not only can the other aforementioned circumstances lowering the standard of this procedure occur when this mode of hearing is used, but an even stronger departure from the principle of immediacy is noticeable. Interrogation through legal assistance provided by another procedural authority deprives the authority competent to hear the case of the possibility of personal contact with the source and the means of evidence, in particular, the possibility to ask questions to the person heard in real time and to react in real time to the content of their statements. These are very significant deficiencies that cannot be fully remedied by either playing back the recording of the questioning made by means of a device registering vision and sound[68] or, even more so, by reading the protocol documenting the course of this action. Moreover, the assisting

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[66] LONATI, Simone. Un invito a compiere una scelta di civiltà: la Corte europea dei diritti dell'uomo rinunci all'uso della testimonianza anonima come prova decisiva su cui fondare una sentenza di condanna. *Revista Brasileira De Direito Processual Penal*, vol. 5(1), 2019, pp. 352 – 353.

[67] See Article 148a, 191 § 1a and § 1b of the CCP.

[68] See Article 147 § 2 point 2 of the CCP.

body cannot carry out the questioning to the same level of detail as the body competent to hear the case, even if it conducts it with full diligence and has at its disposal a set of materials and questions presented to it by the commissioning body. The reason for this is prosaic—it does not know the case so thoroughly.

By contrast, the deficiencies described above, lowering the standard of fair hearing, would not occur in the case of properly conducted hearing by videoconference. By using this mode of questioning, it would be much easier to hear the witness by the procedural authority competent to hear the case and to take part in this action by the parties, including the accused deprived of liberty. This mode of hearing would help many witnesses avoid the stressful situation connected with the presence in their home of not only representatives of the authority conducting proceedings, but also of other participants in the trial and, most importantly, would not deprive them of their right to anonymise data concerning their place of residence. As indicated earlier, the possibility of receiving non-verbal communications is limited in the case of hearing by videoconference. Nevertheless, the existence of the aforementioned limitations undermines the standard of a fair trial much less than a situation in which the authority competent to conduct proceedings, a party, or their trial representative is deprived of the possibility to participate in the hearing[69]. Needless to say, there are cases in which a witness feels constrained and frightened by the presence of participants in the proceedings in their home and is not able to give an entirely uninhibited account. Undoubtedly, the strength of the destructive impact of the stress and fear mentioned earlier on the witness' ability to give a free and credible account is much greater than – distinguished by academics – the degree of the negative impact of the specific conditions of an interview by videoconference can have on this ability[70].

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[69] Cf. also BUDNIAK-ROGALA, Aleksandra. Przeprowadzenie dowodu za pomocą środków porozumiewania się na odległość na zasadzie art. 235 § 2 KPC a realizacja zasady bezpośredniości – uwagi w kontekście nowelizacji KPC z 10.7.2015 r. – część 2. *Prawo Mediów Elektronicznych*, no. 3, 2017, pp. 18-23.

[70] This refers, in particular, as mentioned above, to the lack of direct contact with the procedural authority and the necessity to speak to a computer "screen".

Therefore, as long as there are technical conditions for a remote hearing[71], this mode of hearing should take precedence over hearing through legal assistance provided by another judicial body, as well as over a hearing at the place of the witness's stay if the conduct of the latter hearing entails that all those entitled to participate in the procedure will not be able to do so or that it will cause inconvenience to the witness. The priority of hearing by videoconference should not only be considered a "good practice" but also follow explicitly from the law.

Hearing by videoconference should also be the primary mode of hearing of adult witnesses[72] who experience increased atypical levels of stress associated with hearing at the seat of the authority conducting proceedings, caused in particular by having to give testimony in the presence of the accused. It should also be applied in the case of witnesses for whom participation in a hearing at the seat of the authority conducting proceedings may involve risks to their life and health. This mode of hearing would certainly be far more optimal than hearing the witness in the courtroom even in the absence of the accused[73], or offering the witness police assistance during examination.

The Polish legislation, in Article 390 § 2 of the CCP, provides a general rule to a situation where there is a reason to fear that the presence of the accused might have an inhibitory effect on the testimony of a

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[71] Obviously, conducting witness hearings by videoconference will require a prior determination as to whether this is technically possible. However, the current state of technological development, the availability of mobile videoconferencing equipment on the market and the increasing access to the Internet (including high-quality Internet) means that technical considerations will only, in a small number of cases, be a real obstacle to this activity. It is also important that that the persons to be heard understand practical arrangements for videoconferencing - GORI, Pierpaolo; PAHLADSINGH, Aniel. Fundamental rights under Covid-19: an European perspective on videoconferencing in court. *ERA Forum*, vol. 21(4), 2021, p. 575.

[72] The standards for hearing of minors will be discussed in the subsequent paragraph.

[73] E.g., some studies have indicated that people with mental illness, whom we will certainly include in this group, more easily succumb to stress and aggression in the judicial environment and have negative experiences with the justice system – LEGG, Michael; SONG, Anthony. The courts, the remote hearing and the pandemic: from action to reflection. *UNSW Law Journal*, vol. 44(1), 2021, p. 132.

witness. Accordingly, the examination of a witness at a trial is conducted in the absence of the accused, who, by order of the presiding judge, leaves the courtroom for the duration of hearing a given witness. On 8 April 2015, under the third paragraph added to Article 390 of the CCP[74], the presiding judge was given the power to order a hearing by videoconference in the case provided for in Article 390 § 2 of the CCP. However, the introduction of this provision has not changed the practice of Polish courts because of three factors. First, the wording of Article 390 of the CCP is likely to be interpreted to mean that a hearing in the absence of the accused takes precedence over a remote hearing, the latter appearing to be the "second choice" of the legislator. Second, removing the accused from the courtroom for the duration of the witness hearing is a much simpler solution than organising a remote hearing, for which Polish courts are still not properly prepared[75]. Another factor in favour of the aforementioned solution is that, very often, it is only immediately prior to a hearing that witnesses communicate their concerns about being examined in the presence of the accused. In this situation, considerations for the economics of a trial, particularly the speed of the proceedings, make the presiding judge decide to examine the witness at the trial in the absence of the accused. It is not a desirable state of affairs both in

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[74] By the law intended to implement i.a. Directive 2012/29/EU.

[75] In our opinion, this unpreparedness of Polish courts to conduct hearings by videoconferencing on a larger scale is not so much due to the lack of technology available to the courts to conduct these hearings (although much still needs to be done in this area) but mostly because they are perceived as time- and effort-intensive activities. Conducting a traditional hearing is much simpler and in line with what judges have been used to over the years. Judges justifying their reluctance to conduct hearings remotely often refer to the need to respect the principle of immediacy (see, i.a ŁUKASIEWICZ, Anna. Zdalne sprawy karne nie będą masowe, Available at: <https://legalis.pl/zdalne-sprawy-karne-nie-beda-masowe>. Accessed on 17 September 2022). However, it is difficult to find this explanation convincing, considering how often judges decide, for example, to stop at reading out the testimony of witnesses from pre-trial proceedings, abandoning the possibility of hearing a witness by videoconference at the stage of judicial proceedings. This also happens in cases where both the parties and the witness request such a hearing, and the organisation of this activity does not appear to be excessively cumbersome (see the justification of the judgment of the Supreme Court of 18.02.2022, I KK 52/21).

terms of procedural guarantees of the accused and the interests of the witness and the justice system as a whole. When applying this solution, the accused cannot directly participate in the hearing and consequently perceive in real time the messages conveyed by the person being examined and react to them on an ongoing basis. For a witness experiencing the atypical increased stress resulting from having to testify in the presence of the accused, the tension in question is generated by the mere obligation to appear at the seat of the authority conducting proceedings and the associated possibility of even momentary contact with the accused. In addition, for persons with severe communication or social impairments and those with mental disorders, this stress is induced by the very fact of being examined at the seat of the authority conducting proceedings, regardless of the presence of the accused in the courtroom[76]. The stress does not remain without an effect on the quality of the testimony given[77]. All of these disadvantages undermine the standards of a fair trial and can be avoided by conducting the examination of the witness remotely. Therefore, the regulations contained in Article 390 of the CCP should be amended and clearly worded to indicate that hearing by videoconference should be the "first choice" in the case of adult witnesses experiencing atypical, increased stress of having to testify at the seat of the authority conducting proceedings and, in particular, in the presence of the accused. In addition, the instructions given to the witness at the first hearing should explicitly state their right to request a remote examination if the need to give testimony at the seat of the authority conducting proceedings, in particular in the presence of the accused, could negatively affect their mental state and hinder their testimonies.

A remote hearing should also be the "first and statutorily guaranteed choice" in situations where participation in the hearing involves

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[76] CREED, Fabiola; BERMINGHAM, Rowena. Improving Witness Testimony. *Houses of Parliament, Parliamentary Office of Science & Technology, POST-NOTE*, 607, July, 2019, p. 4.

[77] The literature aptly notes that situational factors may cause a person to have difficulty in accurately recreating details or to allow distortions in their account – SYGIT-KOWALKOWSKA, Ewa. Zaburzenia zdrowia i stanu emocjonalnego osoby dorosłej dotkniętej przestępstwem a psychologiczna ocena osobowego źródła dowodowego. *Studia Prawnoustrojowe*, no. 39, 2018, p. 305.

risks to the life and health of the witness. Indeed, this mode of hearing provides the witness with a greater level of security and psychological comfort than an examination conducted at the seat of the authority conducting proceedings, even if the protection is provided in the form of the presence of police officers in the vicinity of the protected person during the procedural action with their participation, on the way to the place where the action is conducted or on the way back[78]. Hearing of a witness at the seat of the authority conducting proceedings with the aforementioned personal protective measures should, in fact, be reserved only for exceptional cases where a remote hearing is not possible.

Evidently, minors and victims of crimes against sexual freedom should also be included in the group of witnesses "with specific needs for protection during a hearing". The Polish legislation also recognises the need to protect witnesses falling into this group, although legal solutions it proposes to protect them can hardly be considered satisfactory, both when viewed from the point of view of the need to safeguard the interests of the witness and the accused. The main shortcoming of these regulations, if viewed from the former perspective, is that the circle of subjects that remain under the protection of the regulations providing for a special mode of interrogation is too narrow. This mode of hearing[79] has been

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[78] Such a form of protection is provided for in Article 4 of the Act of 28 November 2014 on victim and witness protection of and support (Journal of Laws of 2015, item 21).

[79] Witnesses are, in principle, heard only once. This is done by the court in a session in suitably adapted premises at or outside the seat of the court. The hearing is conducted by the court with the attendance of an expert psychologist. The legal representative of an aggrieved minor (or the person in whose permanent custody the aggrieved minor remains) or an adult person named by the victim may also be present at the hearing, if this does not restrict the freedom of expression of the person being examined. The public prosecutor, the defence counsel, the attorney of the aggrieved party may participate in the examination in the so-called technical room, which, if adjacent to the examination room, must be separated from it by an observation mirror or be connected to the examination room by technical means allowing the examination to be conducted remotely with simultaneous transmission of an image or sound. Importantly, the technical means installed in the examination room are intended to allow participants in the technical room to observe the examination room and the witness with particular attention to his facial expressions – see Article 185a, Article 185b § 1, Article 185c – Article 185d of

reserved for the aggrieved persons who are below the age of 15 at the time of examination in cases concerning offences committed with the use of violence or unlawful threat, offences against freedom, offences against sexual freedom and morality, and offences against the family and guardianship (Article 185a § 1 of the CCP). In addition, this mode has been reserved for witnesses who are below the age of 15 at the time of examination in cases concerning offences committed with the use of violence or unlawful threat, offences against sexual freedom and morality, and offences against the family and guardianship (Article 185b § 1 of the CCP).

This special mode of hearing is also applied with regard to minors aggrieved by offences referred to in Article 185a § 1 of the CCP who are 15 years of age or older at the time of questioning, when there is a justified fear that the questioning under other conditions could have a negative impact on their mental state (Article 185a § 4 of the CCP). In the case of victims of offences against sexual freedom, who are at least 15 years of age at the time of an examination, special rules of hearing apply only to the victims of rape, sexual exploitation of insanity or helplessness and sexual exploitation of a relationship of dependence and critical situation (Article 185c § 1 and 1a of the CCP). Concerning witnesses in cases of offences specified in Article 185b § 1 of the CCP, who are minors but 15 years of age or older at the time of questioning, the legislator has stipulated that they may only be questioned by videoconference[80] if the direct presence of the accused at the questioning could have an embarrassing effect on the witness' testimony or have a negative impact on the witness' mental state (Article 185b § 2 of the CCP).

The inclusion of such a narrow range of subjects in the aforementioned special rules of hearing is largely because they introduce far-reaching exceptions not only to the principle of immediacy but above all to the principle of equality of arms, significantly limiting the accused's right to defence. This refers to the principle of hearing a witness only

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the CCP and the provisions of the Regulation of the Minister of Justice of 28 September 2020 on the manner of preparation of the examination conducted under the procedure set out in Article 185a – Article 185c of the CCP (Journal of Laws 2020, item 1691).

[80] I.e. in accordance with the procedure set out in Article 177 § 1a of the CCP.

once (to which there are few, and in practice almost no, exceptions[81]) and to the fact that the accused is not allowed to attend the hearing and his counsel may attend only if the hearing takes place after the presentation of the charges. Accordingly, the rules of the aforementioned examination may be modified by allowing the accused to participate in this action[82], but only remotely, i.e. from a room in a different building than the examination room, with strict observance of the rule that the examined witness may only be asked via the court and that the person being examined is not exposed to eye contact with the accused. Allowing the accused to participate in the aforementioned hearing can not only reinforce the fair trial standard against the passive party to the trial but also significantly reduce the need for repeating the hearing. However, this solution may only be applied if the hearing of a witness takes place after the presentation of the charges, which is relatively rare. Accordingly, it should be postulated to introduce the institution of the defence counsel for the "unknown perpetrator"[83], who would participate in the hearing mentioned earlier if it was conducted before the presentation of the charges and who would represent the interest of the said subject in the course of the proceedings[84].

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81 In this context see Article 185a § 1 and Article 185c § 1a and 3 of the CCP and decisions of the Supreme Court of 21.04.2021, V KK 40/20, LEX no. 3219865 and of 15.06.2021, II KK 248/21, LEX no. 3317139.

82 Suffice it to mention that the provisions of European instruments including, in particular, Directive 2012/29/EU of the European Parliament and of the Council do not indicate that to safeguard the interests of victims with special protection needs, the accused must be deprived of the opportunity to participate in their hearings. It is only necessary to take measures to ensure that there is no visual contact between victims and perpetrators when giving testimony and that the victim may be heard in their absence in the courtroom, in particular through the use of appropriate communication technologies (Article 23 paragraph 3 of Directive)

83 Such suggestions are also made in the judicature. See judgment of the Supreme Court of 2.07.2020, V KK 84/19, LEX no. 3277300

84 Despite these solutions, the need to repeat the hearing of a witness could arise in an individual case. In such situations, repeating the hearing of the witness should occur only under the rules reserved for the first examination. Before deciding whether to carry out the procedure or waive it for the witness' benefit, the authority conducting proceedings should consult an expert

The implementation of these standards without detriment to the guarantees of the accused and threats to the witnesses' interests, would make it possible to extend this special mode of hearing to a larger group of persons questioned, i.e., in principle, all minors (i.e. persons who, at the time of examination, are under 18 years of age) irrespective of the category of cases in which they are examined[85] and adult victims of other crimes whose nature indicates an increased risk of secondary victimisation when this procedural step is conducted with their participation, including, for example, victims of offences of forced prostitution or human trafficking. Special rules of hearing, with the above modifications, could also apply to non-aggrieved eyewitnesses of particularly drastic crimes who have suffered trauma as a result of witnessing them. Indeed, in the case of this category of witnesses, examining them in traditional form may aggravate the effects of the trauma suffered or delay the recovery process[86].

In conclusion, it should be recalled that any departure from the traditional – basic mode of hearing, i.e. hearing at the seat of the authority competent in the case with the parties and their procedural representatives having the possibility to participate in this procedure requires not only formal but also substantive justification[87]. Therefore,

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psychiatrist or psychologist as to whether repeating the hearing under the conditions described above may negatively affect the witness' mental state.

85 A study involving children aged 8–10 who were aware that they were participating in a trial experiment rather than a real criminal trial indicated that the children questioned in a courtroom setting had reduced memory and higher levels of stress than those questioned in the private room - see in more detail NATHANSON, Rebecca; SAYWITZ, Karen J. The effects of the courtroom context on children's memory and anxiety. *The Journal of Psychiatry & Law*, vol. 31(1), 2003, pp. 67-98.

86 Cf. RISAN, Patrick. *Accommodating trauma in police interviews. An exploration of rapport in investigative interviews of traumatized victims*. University of Bergen, 2017, pp. 13-14.

87 In fact, the ECtHR stresses that the inability of the defence to cross-examine or obtain the cross-examination on behalf of the defence of a prosecution witness can only be considered justifiable in the light of the fair trial standard if there was a compelling reason behind it. Although the absence of a valid reason justifying the failure to call a witness does not in itself render the trial unreliable, it remains an important element for assessing the overall fairness of the trial and may tip the scales in favour of finding a violation of Article 6.1

a situation, and one which generally exists in the Polish legal order, in which the legislator does not confer on the authority conducting proceedings the competence to be able to derogate from the special rules for the examination of minors and victims of sexual offences in situations where the circumstances of the case indicate that it would be manifestly inappropriate to do so[88], should be assessed negatively. In the absence of such a regulation, authorities conducting proceedings apply the aforementioned rules in situations in which the protection of the interests of the persons questioned does not require it (e.g. the victim of a crime against sexual freedom is not reluctant to have contact with the accused and actively participates in all procedures with their participation, both in criminal and civil proceedings[89]). In these circumstances, the application of particular forms of examining a witness and the strict adherence to the principle of hearing a witness only once not only does not serve to realise the standard of a fair trial but rather undermines this standard[90]. While introducing, in principle, the most legitimate solutions aimed at protecting the interests of aggrieved parties and witnesses in the criminal process, the legislator must not forget that the restrictions on the procedural guarantees of the accused that are a consequence of their implementation, in particular, preventing them from fully exercising their right to the defence, apply to a person covered by the presumption of innocence, and the accusation of even the most drastic crime may ultimately prove to be wrongful.

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and 6.3(d) of the Convention. See, inter alia, judgment of the ECtHR in case Przydział v. Poland of 24.05.2016, application no. 15487/08.

88 The only provision that creates such a possibility concerns the abandonment of the examination of minors who are witnesses under Article 185b § 1 and § 2 of the CCP. Article 185b § 3 of the CCP indicates that the last-mentioned regulations do not apply to a witness who participated in the commission of an offence for which criminal proceedings are pending, or a witness whose act remains in connection with the act for which criminal proceedings are pending.

89 E.g. in cases of divorce proceedings.

90 See judgment of the Supreme Court of 10.09.2019, V KK 285/19 and decision of the Supreme Court of 29.03.2022, V KK 332/21.

Conclusions

Regardless of how we define the right to a fair criminal trial, we must see the criminal trial as an institution in which not only the rights and freedoms of the accused but also the rights and freedoms of other actors, including, in particular, victims, and witnesses, will be respected. The ECtHR does not doubt this either. The Court, while in principle recognising the right to a fair trial, in terms of Article 6 of the ECHR, for the accused alone, also recognises the need to safeguard the rights of other participants in the trial. It derives this obligation from other provisions of the Convention. This leads to the conclusion that only a criminal trial in which the fundamental rights and freedoms of all participants, including witnesses, are protected, will deserve to be called a due process of law. The lawmaker also recognises this. Both at the international and supranational level, as evidenced by the arguments in the first chapter of this work, and at the national level, as evidenced by the arguments in the third chapter of this work, it introduces regulations to safeguard the rights of, among others, victims, and witnesses. However, merely introducing such solutions does not guarantee a fair criminal trial and realisation of the standards of Article 6 of the ECHR. Everything depends on their shape and how they are applied. These regulations must be shaped, interpreted, and applied in such a way that they do not restrict the rights of the accused anchored not only in Article 6 of the ECHR but also in other supranational, international and national legal instruments. Moreover, the protection afforded by these provisions to victims and witnesses must not be theoretical or illusory. Indeed, the rights guaranteed by the Convention and national laws implementing the principle of a democratic rule of law must be practical and effective[91]. The theses in the third chapter of the study on the functioning of the provisions on videoconference hearings in the Polish legal order show that making these demands a reality is not always an easy task but certainly achievable.

To do this task properly, first, the problem and the objectives should be identified. The issue, in this case, was to establish that the use

[91] Judgment of the ECtHR in case Nataliya Mikhaylenko v. Ukraine of 30.05. 2013 r., application no. 49069/11, § 32.

of the traditional form of questioning (i.e. at the premises of the trial body, in the presence of the accused), to a specific category of witnesses would entail causing a danger to the physical and mental health of the witness or inducing a level of stress that would preclude the witness from giving a free and credible testimony. In other words, using this form of questioning would violate witnesses' fundamental rights and freedoms (e.g. rights to personal safety and freedom from torture). Notably, there could be no situation in which testimony of this category of witnesses could not be used in a criminal trial or a situation in which the accused would be deprived of the possibility to effectively challenge a witness's statements, which is inherently linked to the possibility of participating in the examination of the witness and asking questions.

Once the problem has been identified, an instrument should be chosen whose application would ensure an optimal level of protection for witnesses in the performance of activities with their participation in the criminal process as well as guarantee the possibility for the procedural authorities to duly assess their testimony while not depriving the accused of their procedural guarantees. An analysis of the advantages and disadvantages of various procedural instruments is crucial to arrive at an optimal solution, which may still sometimes deviate from the ideal. For example, hearing by videoconference involves difficulties in assessing the credibility of the witness' testimony due, among other things, to the impossibility of receiving all the non-verbal messages and the impact that the specific conditions of hearing by videoconference may have on the content of the witness's testimony. However, in assessing the usefulness of the instrument, the consequences of not using it or using an alternative solution must always be considered. These issues are discussed in the second and third chapters.

The example of hearing by videoconference, which was the subject of this study, indicates that the work does not end with the choice itself. It is necessary to always keep in view the intended objectives as well as the advantages and disadvantages of the chosen instrument to give it the legal shape to maximise its positives and reduce its negatives. This often requires in-depth consultations not only with those who will be applying these regulations but also with representatives of other communities. For example, when establishing provisions for the hearings

by videoconference, the lawmaker should consult the representatives of the legal community, the IT industry, and psychologists.

In addition, the aforementioned remarks on videoconferencing interrogation indicate that it is sometimes necessary not only to equip the procedural authorities with the necessary technology to use this instrument in practice but also to conduct training to disseminate the knowledge of its advantages and disadvantages and to make the representatives of the procedural authorities move away from habits, established paths, and patterns. Furthermore, the functioning of the regulations in practice should be continuously monitored to be able to immediately react to changes in the socioeconomic environment (in this case, primarily related to the constantly developing IT technology) and eliminate solutions that do not work in practice.

It is necessary, as evident from the remarks in the third chapter of the work, to leave a certain amount of flexibility to the procedural authorities, allowing them not to use an instrument aimed at protecting witnesses in cases where the circumstances of a particular case indicate that it is inappropriate. Indeed, in these situations, such an instrument does not protect the interests of the witness (there is nothing to protect) and interferes wholly unjustly with the accused's right to a fair criminal trial.

In conclusion, we would like to clarify that a properly structured and applied hearing by videoconference, despite its disadvantages, in many cases is the best instrument to reconcile the conflicting interests of witnesses and defendants in criminal proceedings. The witnesses can be questioned without having to appear at the procedural authority's premises and have direct contact with the accused, which can be highly inconvenient for them for various reasons. Moreover, the accused does not lose the opportunity to participate in the questioning of the witness and to observe them (albeit in a somewhat limited way) during the performance of this procedural act. Hearing by videoconference provides procedural authorities with valuable and admissible evidence. In other words, the skilful use of hearing by videoconference in a criminal trial will enhance rather than undermine its fairness.

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