WYŻSZA SZKOŁA GOSPODARKI EUROREGIONALNEJ IM. ALCIDE DE GASPERI W JÓZEFOWIE

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DOI: doi.org/10.13166/HR/HPBM8279

THE RIGHT TO COURT OF TECHNOLOGICALLY EXCLUDED PEOPLE IN RELATION TO TOOLS DIGITIZING THE CIVIL PROCESS IN POLAND

Abstract

The article concerns changes in the civil process, the gradual digitization of public space, which in itself is of course positive, but carries certain risks, including for the elderly or those who do not use any technical goods. The article aims to show the problem of technologically excluded people, but also to propose the creation of help for these people to minimize the negative effects.

Keywords: *civil process, digitization, technologically excluded*

Introduction

Along with technological progress and the gradual process of digitization of reality, which of course brings many advantages, it becomes a threat to people who do not follow the times, who do not adapt their lifestyle to the needs of the present. They have no such obligation. However, in the era of mass digitization of the society, but also the justice, dealing with official matters, the question arises how the state ensures the implementation of Article 6 of the European Convention on Human Rights[1], persons who are not proficient in using a computer do not have an account on the common court appeals portal.

Meaning of art. 6 ECHR and the right to court of technologically excluded persons

In accordance with art. 6 European Convention on Human Rights, *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part*

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and subsequently amended by Protocols No 3, 5 and 8, and supplemented by Protocol 2.

of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.. In the case of Golder v. United Kingdom[2], European Court of Human Rights, pointed out that Article 6 of the Convention is a mirror of an important principle underlying the European Convention on Human Rights, namely the principle of the rule of law. Everyone should be able to present their case to the court, and no one can be denied justice. Since the right to a fair trial includes the right of the parties to the proceedings to present to the court arguments which, in their opinion, are important for the resolution of the case. It requires them to be actually heard by the court, and therefore appropriately and duly considered. Article 6 of the Convention also provides for the obligation for the competent court to examine the submitted conclusions, arguments and evidence without prior prejudging their relevance to the decision. How, then, is this right to be exercised if a technologically excluded person is unable to travel to court or participate in a remote hearing?

Digitization in itself is an interesting solution and facilitates, but also in a way speeds up the operation of the justice system. The literature indicates that technological exclusion may be caused by objective reasons, such as the inability to connect to the Internet, lack of financial resources for hardware and software, but also subjective reasons, such as lack of willingness to learn, fear of new technologies[3]. Regardless of the reasons, the legislator should provide for various situations and ensure that every citizen has the right to a court.

The right to a court is a subjective human right, and the purpose of human rights is a normative expression of dignity. In addition, the human right to a court allows the realization and protection of other human rights[4].

[2] Golder v. United Kingdom, Application no. 4451/70, European Court of Human Rights, Judgment of 21 February 1975.

[3] K. Garwol, *Stopień umiejętności korzystania z technologii cyfrowych a wykluczenie społeczne na przykładzie osób niepełnosprawnych, starszych i ubogich*, Nierówności Społeczne a Wzrost Gospodarczy, Wydawnictwo Uniwersytetu Rzeszowskiego, nr 58 (2/2019), Rzeszów 2019, p. 47.

[4] See e. g. K. Orzeszyna, M. Skwarzyński, R. Tabaszewski, *International Human Rights Law*, Warszawa 2023, p. 12.

The right to court applies regardless of the ability to use a computer, telephone or other technical devices. However, without providing certain measures by the state, technologically excluded persons are not guaranteed the implementation of Article 6 of the European Convention on Human Rights, in the same way as persons who freely use these goods. In addition, states restrict these persons from the constitutional right to a court expressed in Art. 45 of the Constitution of the Republic of Poland[5].

The Common Courts Information Portal in Poland

In Poland, the Common Courts Information Portal is made available by the presidents of courts pursuant to Article 22 § 1 of the Act of 27 July 2001 Law on the Common Courts Organization[6] in connection with § 106 paragraph 1 of the Regulation of the Minister of Justice of December 23, 2015 – Rules of operation of common courts[7]. The purpose of this website is to facilitate the access to information on the status of cases and actions taken in the case, which are available in the software supporting the court office, for entities authorized and authorized under applicable law, in particular parties to proceedings and their attorneys, as well as judges and prosecutors. This is undoubtedly a facilitation, not only for professional attorneys, but also for every citizen who can set up such an account and be up to date in their case.

In order to set up an account on the Common Courts Appellate Portal, verification is necessery, and this can be done in three ways:

1. Verification requiring the user's personal appearance at the court's Customer Service Office. As part of this verification, the user is obliged to appear in person at the court's Customer Service Office in order for a court employee to verify the data entered by the user, when completing the application for account registration. The data in the application will be compared with the data contained in the identity card

[5] P. Grzegorczyk, K. Weitz [in:] M. Safjan, L. Bosek (red.), Konstytucja RP. Tom I. Komentarz do art. 1–86, Warszawa 2016, p. 56
[6] Journal of Laws of 2016, item 2062, as amended.
[7] Journal of Laws of 2015, item 2316, as amended.

and business card, if the type of account requires it. The positive verification process ends with submitting a statement in accordance with the template constituting Appendix 2 to the Regulations and activating the account, which consists in providing the user with a printout containing the login and password enabling access to the account;

2. Verification by a professional representative. This verification consists in accepting from a professional attorney who is an attorney or legal advisor the original power of attorney, which gives the authorization to perform the action, as well as the user's signed statement regarding the correctness of the data subject to verification. Positive verification ends with account activation, which consists in providing the proxy with the login and password (secured in the envelope) and providing any information on how to obtain a new password;
3. Verification by submitting a statement signed with a qualified electronic signature or a signature confirmed by a trusted profile[8] in Electronic Platform of Public Administration Services. The verification in question consists in the possibility for the user to submit a statement (in accordance with Appendix 2 of the Regulations of the Information Portal) signed with a qualified electronic signature within the meaning of Article 3 point 12 of the Regulation of the European Parliament and of the Council (EU) of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93 / EC or a signature confirmed by a trusted profile to the court. In this case, personal appearance at the Court's Customer Service Office is not required. Positive verification ends with account activation consisting in sending the login to the user to the e-mail address provided in the account registration application.

Information on activities and documents in cases is updated on the portal once every 48 hours, while e-protocol recordings are published on the 4th working day after the date of the court hearing. The system constructed in this

[8] in Poland called: ePUAP.

way is undoubtedly a great facilitation[9], a comfortable solution for most people. However, a group of elderly people or people who simply do not use many digital goods is actually a complication that has not been resolved by the legislator so far.

Remote hearings in civil proceedings and the right to court of technologically excluded persons in Poland

This also applies to remote hearings in civil proceedings, which are the legislator's idea during pandemic period to ensure that the parties can exercise their right to a court in a safe manner, but also shorten the deadlines in civil proceedings, which have already been extended by the pandemic. Remote court hearings in civil proceedings have been introduced in Article 15 zzs (1) of the Act of March 2, 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them[10]. The solution adopted by the legislator was widely commented on in the media[11], by the doctrine[12] and by representatives of the judiciary[13]. There were votes *for* and votes *against*. It was pointed out that moving away from the openness of hearings by conducting them remotely may cause lawyers, judges and administrative employees to want to improve statistics. This is a phenomenon that is unlikely to be avoided, the pandemic simply accelerated it, so it also reached the judiciary. However,

[9] see e.g.: M. Gutowski, P. Kardas, *Epidemia a digitalizacja działalności prawniczej – czyli o pożytkach i szkodach przyspieszonej cyfryzacji polskiego wymiaru sprawiedliwości*, „e-Palestra: Zagadnienia interdyscyplinarne", https://palestra.pl/pl/e-palestra/16/2020/epidemia-a-digitalizacja-dzialalnosci-prawniczej czyli-o-pozytkach-i-szkodach-przyspieszonej-cyfryzacji-polskiego-wymiaru-sprawiedliwosci (access date: 11.07.2023).

[10] Dz.U.2021.2095.

[11] See e.g. https://www.rp.pl/sady-i-trybunaly/art38278571-zdalne-rozprawy-maja-zostac-na-stale (access date: 9.07.2023).

[12] M. Skibińska, *O zasadności przepisu art. 15zzs(1) ust. 1 pkt 4 ustawy antycovidowej z perspektywy konstytucyjnej zasady proporcjonalności*, PPC 2023, nr 1, p. 105-127.

[13] Judgment of the Court of Appeal in Wrocław of June 24, 2021, III AUa 1738/20, LEX No. 3416400.

the problem in remote court hearings most often concerns an ordinary person. At a remote hearing, the participant of the proceedings loses, because he cannot fully convey his argumentation, emotions and even credibility, which can only be captured in direct contact. Anyone familiar with the courts will admit that the best pleadings do not express them. It is also about giving the participants of the hearing a chance to see what the judge is interested in, whether they miss something and correct it. For some reason, it has still not been decided in Poland to conduct remote trials in criminal cases, fortunately.

Digitization of the functioning of the civil process brings promising prospects, including, in particular, the possibility of increasing the efficiency of the proceedings, significantly improving the degree of implementation in terms of the duration of the proceedings, and reducing costs[14]. All this, in the context of the problems that the Polish judiciary has been struggling with for years, can be assessed as an important alternative to subsequent amendments to the laws concerning the functioning of the judiciary. However, it also carries serious risks, the legislator also forgot about technologically excluded people, if he has already decided to introduce remote hearings, he should ensure that anyone who wants to can participate in them remotely, without excessive difficulties. Therefore, the solution is to designate places, e.g. at the Commune Office, where anyone who wants to participate in a remote hearing will receive equipment for that time, on which they will be able to easily connect with the Court and will have support provided to the person, this may be an official who will provide guidance and help to exercise the right to court for such a person. In such a situation, one can talk about the implementation of Article 6 of the ECHR to every citizen, not only those who are proficient in operating digital equipment. Someone may say: after all, everyone can grant a power of attorney and be represented by a professional attorney. This is true, but there are people who do not want to, prefer to appear in the case in person and this right should not be taken away from them. The state cannot hold the citizen responsible in this respect, because it is within its competence to exercise the right to a court of every citizen.

[14] J. Gołaczyński, *Informatyzacja postępowania cywilnego. Od odrębności do modelu podstawowego*, Gdańskie Studia Prawnicze, n. 5 (57)/2022, p. 145–179.

While the digitization of the civil process in Poland is an idea that deserves recognition, the implementation of this idea shows its weakness. On the one hand, there is a desire to speed up the time of examining the case, on the other hand, there are no practical guidelines from the legislator for the parties to the proceedings, and while for most people it will not be a problem to use the link sent by email by the court, a group of technologically excluded people may have problem. This problem is noticed by the judges themselves and they are already signaling this problem. As they point out: *Despite initial fears and resistances, the vast majority of cases are currently examined remotely. This is convenient for witnesses from distant places and for attorneys, who less and less frequently report collisions with other hearings. The disadvantages of remote hearings are primarily technical problems, the lack of ability to use programs for remote hearings by the persons summoned, as well as issues related to failure to comply with the appropriate conditions of the hearing.[15].* A lot of confusion was caused by the idea of the legislator to leave provisions regarding remote civil hearings in the act after invoking the state of epidemic. Some representatives of the doctrine believe that this form of hearing is not the implementation of Art. 45 of the Constitution and does not implement the right to a court of all citizens[16]. It is obvious that the condition for conducting a remote hearing should be the access of the party to the proceedings to the appropriate devices and the ability to use them. When deciding on the place of the proceedings, but at the same time there is no obligation to make arrangements in this respect, it is the task of the state.[17]. Therefore, it is the legislator who, when preparing a bill, should propose solutions for all groups of citizens, especially the older and weaker ones, who should be provided with legal protection by the state and the implementation of the constitutional principle of the right to a fair trial. Another contentious issue is the principle of transparency of proceedings

[15] M. Domagalski, Rozprawy zdalne mają zostać na stałe, Rzeczpospolita, https://www.rp.pl/sady-i-trybunaly/art38278571-zdalne-rozprawy-maja-zostac-na-stale, [access date: 16.07.2023]

[16] See e.g. opinion prof. Ryszard Piotrowski, constitutionalist: https://www.prawo.pl/prawnicy-sady/rozprawy-zdalne-a-zmiany-w-prawie-konferencja-w-warszawie,521849.html [access date: 16.07.2023]

[17] K. Jasińska, E-rozprawa w postępowaniu cywilnym a prawo do sądu i możliwość obrony swych praw, Studies in Law: Research Papers 2021, No. 2 (29), p. 33.

expressed in Art. 9 of the Code of Civil Procedure, with the simultaneous wording of Art. 326 pairs 4, according to which: *If no one appeared for the announcement of the judgment, including the audience, the chairman or the judge-rapporteur may order not to read the operative part and to give the essential reasons for the decision. In such a case, the judgment is deemed to have been pronounced at the end of the hearing. However, the operative part should be read if the justification for the judgment is to be delivered[18].* Is the procedure then public or is it just a principle expressed on paper? Another example is the wording of Art. 15zzs (1) sec. 1 point 3 of the Act of March 2, 2020 on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them[19] within the indicated period, the presiding judge may order a closed session, if a remote session cannot be held and holding a hearing or a public session is not necessary. However, pursuant to Art. 15zzs (2) of the Act of March 2, 2020 on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them, during the state of epidemic threat or state of epidemic, the court may close the hearing and issue a ruling in closed session after receiving written positions from the parties, if the evidence proceedings have been conducted in their entirety. Why the party to the proceedings is limited to the right to terminate in its own case, this issue actually concerns all citizens, not only the technologically excluded. Pursuant to the regulations, the Court may issue a judgment at a closed session, beforehand the party to the proceedings may express its position in writing. There is a fear that it will serve bad practices, improve statistics in the courts, it only seemingly serves to shorten the time of examining a case. In a democratic state and society, there can be no situation of limiting the right to a court, the right to active defense in one's own case. Such a solution raises serious constitutional doubts.

[18] Journal of Laws of 1964, n. 43, item 2096.
[19] Journal of Laws of 2020, item 374, as amended

Technologically excluded persons in other areas of life

The problem of technological exclusion does not only concern the exercise of the right to a fair trial. The health care sector is also undergoing digitalization on a massive scale, for example in the field of introducing e-prescriptions – drug, where technically excluded people may have difficult access to treatment. The implementation of the right to health is not only about providing basic health care, but also about creating a system where citizens can exercise their rights in the national system[20]. Therefore, since the right to health is a number of rights resulting from the possibility of using the best health condition that is only possible to obtain in the light of current knowledge and medical standards[21], the difficulty with filling e-prescriptions – drug by technologically excluded people is a clear limitation of these rights. The possibility of buying a prescription – drug is the implementation of the right to health, and in some cases it even saves health and life, therefore the legislator should prevent any difficulties related to the implementation of e-prescriptions – drug, so that every citizen can carry out their treatment without difficulties caused only by the change in the form of digitization of the system treatment. The problem of technological exclusion also concerns people with disabilities which is also related to the health care sector, for example as a result of an accident, who, due to their chronic health condition, still have difficulties in accessing many services. The problem of their exclusion is visualized, for example, in a situation where the guarantee sum is exhausted due to a high payment by the insurer for insurance and this payment will exhaust the entire guarantee sum. In such a situation, the problem arises whether the payment of the benefit in the amount corresponding to the guarantee sum actually results in the performance of the obligation?[22]

[20] R. Tabaszewski, *Prawo do zdrowia w systemach ochrony praw człowieka*, Lublin 2016, p. 101.
[21] K. Orzeszyna, M. Skwarzyński, R. Tabaszewski, *Prawo Międzynarodowe Praw Człowieka,* Warszawa 2022, p. 324.
[22] M. Skwarzyński, *The Exhaustion of the Guargantee Sum in Obligatory Insurance Contracts in the Context of an Insurer's Debt and Liability Towards the Wronged Party,* Roczniki Nauk Prawnych, n. 1/2011 (21), p. 134.

Universal digitization and the lack of solutions for technologically excluded people

The research results show that only 72% of households have a computer and merely 71% have access to the Internet[23]. Therefore, in the era of such a rapid technological development, this is a clear disproportion. The solution to this issue in terms of access to court and active defense in court is for the legislator to take action to minimize these inequalities among citizens as much as possible. A citizen who does not use technological goods should have the same access to court as a person familiar with this area. This problem was noticed in Great Britain and described by an organization composed of lawyers working for human rights, dealing with the reform of the law – JUSTICE. Already in 2018, they published a report on people technologically excluded in the justice system, broadly describing the problem, proposing measures to minimize these inequalities, and finally proposing changes in the legal system[24]. In this report, the lawyers postulate and indicate that the implementation of the right of access to court lies with the state and the state should monitor this problem as much as possible and look for solutions on an ongoing basis. First of all, this sector should be subsidized with clear and transparent solutions for technologically excluded people to facilitate their access. Websites, e.g. of courts, should be as simple as possible, so that citizen can easily find the information it need.

What is most lacking in Poland, is the organization of a place where technologically excluded persons could hold a hearing, preferably within their place of residence, for example, it could be a commune office, and state care provided, for example, by officials who could guide a citizen through the trial logging into the system by means of which the party to the proceedings would connect with the court and thus exercise the right to a court.

[23] as cited in: W. Tomczyńska, *Digital exclusion: definitions, causes, countermeasures,* Adeptus, n. 10/2017, p. 2.

[24] *Preventing Digital Exclusion from Online Justice* – A Report of JUSTICE, Chair of the Working Party Amanda Finlay CBE, 2018, https://files.justice.org.uk/wp-content/uploads/2018/06/06170424/Preventing Digital-Exclusion-from-Online-Justice.pdf (access date: 12.07.2023).

Conclusion

Summarizing, a solution based on the creation of a support system for technologically excluded people is an urgent demand that should be implemented and implemented, enabling others to realize their own. The state should ensure the implementation of the human right to a court in accordance with European standards, without excluding any citizen.

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