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## **Electronisation of the System of Justice and Its Impact on the Protection of Human Rights. Selected Issues**

### **1. Introduction**

In the era of increasing information flow and widespread electronisation in our everyday life, the latest technological and IT developments are increasingly used not only in public administration, but also in the field of justice. This process is proceeding exceptionally dynamically and is clearly widening to further areas of the justice system functioning, which are moving to an electronic mode. Several technological solutions have been introduced in the Polish legal system, allowing safe and easy access to the court.<sup>1</sup>

This phenomenon already took place at the turn of the century, and especially at the end of the first decade of this millennium. It is worth mentioning that these processes began in Poland much later than in other informationally developed states in the Western Europe, for instance, such as Germany or Austria, where it took place in the early 1980-s already.<sup>2</sup>

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<sup>1</sup> Compare: A. Zieliński, *Wokół reformy polskiego sądownictwa*, „Państwo i Prawo” 2009, no. 2, pp. 3–20; A. Żurawik, *Ustrój sądownictwa w Polsce*, Warszawa 2013, *passim*.

<sup>2</sup> Several contributions on the computerization of the justice system in Poland were published in the last few years. Comprehensively and in detail the issues of the electronisation of the Polish justice system was discussed in the monograph entitled *Ewolucja prawa polskiego pod wpływem technologii informatycznych. Elektroniczne aspekty wymiaru sprawiedliwości* (Evolution of Polish law under the Influence of Information Technologies. Electronic Aspects of the Justice System), eds G. Tylec, J. Misztal-Konecka, Lublin 2012, *passim*; *Elektroniczne aspekty wymiaru sprawiedliwości. Materiały konferencyjne* (Stalowa Wola, 3 IV 2008), eds G. Tylec, J. Misztal-Konecka, Bydgoszcz–Lublin 2009, *passim*; M. Maciejewska-Szałas, *Forma pisemna i elektroniczna czynności prawnych: studium prawnoporównawcze*, Warszawa 2014, *passim*; A. Seliga, *Konferencja „Informatyzacja wymiaru sprawiedliwości a usprawnienie postępowań sądowych”* (Jastarnia, 15–16.10.2009 r.), „Krajowa Rada Sądownictwa” 2009, no. 4.

The most important mechanisms introduced hitherto in this field include: electronic court proceedings (e-court), electronic land and mortgage registers and land and mortgage register's proceedings, as well as electronic National Court Register. Intensive work is under way to further computerization of court proceedings in three basic areas: forms of legal actions and evidence proceedings, electronic delivery office and computerization of enforcement proceedings.

The hereby paper aims at presenting some reflections over the selected issues connected with the abovementioned subject, by making a legal analysis of the types of IT and legal solutions implemented in different spheres of judicial proceedings functioning in the system of justice in Poland. The hereafter arguments over the proposed solutions try to prove a thesis, that they could allow unifying judicature, eliminating doubts in interpreting provisions and facilitate communication with the procedural body via the ICT system. These, in turn, could lead to relieving courts and harmonizing the judicature practice in specific cases, as well as assuring the safety of the legal turnover, thus giving better protection of fundamental human rights and freedoms of the citizens, in particular the constitutionally guaranteed right to court<sup>3</sup> and freedom of economic activity.

## 2. Electronic Court Proceedings

A so-called 'electronic court' functioning in the system of ordinary courts has become one of the most expressive manifestations of the electronisation of the judiciary in Poland. It was created to conduct electronic writ proceedings under the provisions of the Act of 9 January 2009 on amend-

<sup>3</sup> On the right to court see: A. Grabowski, B. Naleziński, *Konstytucyjne prawo do niezawisłego i bezstronnego sądu w państwie pozornie praworządnym*, „Państwo i Prawo” 2020, no. 10, pp. 25–47; Z. Kwiatkowski, *Prawo do sądu w demokratycznym państwie prawnym*, „Ius Novum” 2019, vol. 13, no. 2, pp. 33–50; A. Zieliński, *Prawo do sądu a struktura sądowa*, „Państwo i Prawo” 2003, no. 4, pp. 20–31; M. Szwast, *Kształtowanie się prawa do sądu w prawie polskim przed uchwaleniem Konstytucji RP z 1997 r.*, „Przegląd Konstytucyjny” 2019, no. 3, pp. 33–60; J. Gołaczyński, A. Krzywonos, *Prawo do sądu*, [in:] *Prawa i wolności obywatelskie*, eds B. Banaszak, A. Preisner, Warszawa 2002, p. 728 et seq.; A. Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego*, Łódź 2006, p. 55 et seq.; A. Zieliński, *Prawo do sądu i organizacja władzy sądowniczej*, [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, ed. M. Zubik, Warszawa 2006, p. 483 et seq.; Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej* (ogólna charakterystyka), „Państwo i Prawo” 1997, no. 11–12, p. 87 et seq.; idem, *Konstytucyjna zasada prawa do sądu*, „Państwo i Prawo” 1992, no. 10, p. 23 et seq.

ing the Act – the Code of Civil Proceedings and some other acts, which came into force 1 January 2010.<sup>4</sup>

The first electronic court was created at the 6th Civil Department of the Lublin-Zachód District Court in Lublin. The scope of local jurisdiction covered the territory of the whole state, and substantive jurisdiction primarily covered the writ of payment proceedings. The electronic writ-of-payment proceedings was introduced in order to supplement the existing model of writ-of-payment proceedings for solutions that will contribute to its improvement. It allows relieving the courts examining cases in which the facts are not complicated and do not require extensive evidence proceedings. The advantages of the electronic writ-of-payment proceedings cover, first of all, the fact that it enables citizens to communicate electronically with the court, including submitting and paying for a petition. Secondly, it allows them to record activities solely in the IT system, as this mode presupposes the resignation from running paper files. In addition, it allows a quick release of a decision only as an electronic document. Finally, it limits the court's actions to the necessary minimum and acts according to such a principle, that the plaintiff's actions, taken in other ways than by electronic means, do not have any effects and are not processed by the court.

The creation of a new electronic procedure in the administration of justice aims to improve the recognition of civil cases and reduce costs. However, when issuing judgments in a proceedings before an electronic court, a judge has not been eliminated. Activities in the proceedings may be performed by a court clerk (referendary). The proceedings does not require the plaintiff's personal presence in the court, and all the correspondence with the plaintiff is made electronically. During the proceedings, the parties have full access to the files kept in their case, and this access is carried out in the IT system, through publicly available IT networks, with an option of printing the reviewed documents. Court judgments issued in electronic proceedings do not have the characteristics of court documents, because they are not stamped or signed. Issuing a judgment in this form may be a problem for some citizens, because they may not understand its importance and may not be able to appeal within the prescribed period. It can be particularly complicated for people who do not have access to the Internet.<sup>5</sup>

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<sup>4</sup> Ustawa z 9.01.2009 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (Journal of Laws (Dz.U.) 2009 No. 26, item 156, as amended); see also: Act of 17.11.1964 – the Code of Civil Proceedings (Ustawa z 17.11.1964 r. – Kodeks postępowania cywilnego, consolidated text Journal of Laws (Dz.U.) 2020, item 1575, as amended).

<sup>5</sup> Compare: D. Segit, *Elektroniczne decyzje procesowe w przedmiocie pozwu*, [in:] D. Segit, P. Telusiewicz, G. Tylec, J. Widło, A. Wróbel, *Model polskiego elektronicznego postępowania upominawczego*, Kraków 2012, p. 40 et seq.; P. Telusiewicz, *Praktyczna weryfikacja założeń*

An order of payment in the electronic writ-of-payment proceedings is issued by the court in the electronic form. The electronic enforcement title is in the IT system of the court conducting the electronic collection proceedings and is available via the Internet. In fact, the essence of the e-court is, therefore, electronic proceedings, which is a separate form of the writ-of-payment proceedings, of an optional nature. On the one hand, electronic writ proceedings enables safe and easy access of citizens to the court and quick consideration of cases. This allows for the implementation of a constitutionally guaranteed right to court, understood as easy access to it by citizens, as well as the right to consider a case within a reasonable time and without unreasonable delay. On the other hand, however, doubts may be related to, among others, the lack of access of some citizens to the Internet, which in turn may paradoxically limit their right to court<sup>6</sup>.

### 3. Electronisation of Land and Mortgage Registers and Land and Mortgage Register's Proceedings

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The land and mortgage registers constitute an official register of property rights on real estate, maintained in order to establish their legal status and ensure the safety of their trading. In Poland, keeping land and mortgage registers lies within the competence of district courts, in accordance with their local jurisdiction, which is determined by the location of the property. The land and mortgage register's proceedings is aimed at making an entry in the land and mortgage register, including deleting from it.

Computerization of land and mortgage registers was one of the first steps taken by the electronisation of the justice system operating in Poland. One could say that it initiated this large-scale process, because the implementation of electronic land and mortgage registers started in 2003. In the period up to 2010, the first part of the process of computerization

*polskiego modelu elektronicznego postępowania upominawczego*, [in:] D. Segit, P. Telusiewicz, G. Tylec, J. Widło, A. Wróbel, *Model...*, p. 65 et seq.; G. Tylec, *Pozew w elektronicznym postępowaniu upominawczym*, [in:] D. Segit, P. Telusiewicz, G. Tylec, J. Widło, A. Wróbel, *Model...*, p. 24 et seq.; M. Niedużak, M. Szwaśc, *Budowa e-wymiaru sprawiedliwości w Polsce*, „E-mentor” 2013, no. 2(49), <http://www.e-mentor.edu.pl/artykul/index/numer/49/id/1011> (accessed: 11.12.2021).

<sup>6</sup> See also: J. Gołaczyński, *Elektroniczne postępowanie upominawcze. Komentarz*, Warszawa 2019, passim; G. Tylec, P. Telusiewicz, *Elektroniczne postępowanie upominawcze – pierwsze 3 miesiące. Uwagi dotyczące praktyki funkcjonowania*, „Monitor Prawniczy” 2010, no. 14, passim; J. Widło, *Elektroniczne postępowanie upominawcze*, Warszawa 2010, passim.

of land and mortgage registers consisting in the introduction of the 'New Land and Mortgage Register' system was implemented.

The essence of this system is based on public access to the content of land and mortgage registers on the Internet. Its implementation required carrying out the so-called 'Migration' of land and mortgage registers, i.e. transferring them from a paper form to an electronic one, which was already terminated.

Currently, the legal basis for conducting electronic land and mortgage registers by district courts is primarily the Act of 6 July 1982 on land and mortgage registers<sup>7</sup> and its executive sub-statutory act – the Regulation of the Minister of Justice of 16 February 2016 on the establishing and maintaining land and mortgage registers in the ICT system.<sup>8</sup> A central database was created for the purpose of maintaining land and mortgage registers, constituting a nationwide collection. It provides security, in particular protection against unauthorized access by third parties, destruction or loss of data.

The next phase which took place in the extended process of land and mortgage registers' electronisation was implementing a land and mortgage register's proceedings. It took place on 1 July 2016, pursuant to the Act of 15 January 2015 on amending the Act – the Code of Civil Proceedings and some other acts, which enforced provisions changing, among others, the Code of the Civil Proceeding and the Act – Law on the Notary (of 14 February 1991).<sup>9</sup> It implemented an option of submitting an electronic petition (motion) concerning an entry, notification and deleting of data and information provided by the register.<sup>10</sup> Until then, a notary, after having drawn up a notarial deed, had had three days to submit an extract of notarial act containing an application for making an entry or delete in the land and mortgage register. During that time, a dishonest property owner could sell it again and there had been no legal instruments to prevent such an illegal procedure. In order to averts such type of manipulation and to increase the security of real estate transactions, since 1 July 2016 the abovementioned possibility to submit notary applications for entry into the land and mortgage register by means of an ICT system was introduced. This naturally

<sup>7</sup> Ustawa z 6.07.1982 r. o księgach wieczystych i hipotece (consolidated text: Journal of Laws (Dz.U.) 2019, item 2204, as amended).

<sup>8</sup> Rozporządzenie Ministra Sprawiedliwości z 15.02.2016 r. w sprawie zakładania i prowadzenia ksiąg wieczystych w systemie teleinformatycznym (Journal of Laws (Dz.U.) 2016, item 312, as amended).

<sup>9</sup> Ustawa z 15.01.2015 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (Journal of Laws (Dz.U.) 2015, item 218, as amended); see also: the Act of 14.02.1991 – Law on the Notary (Ustawa z 14.02.1991 r. – Prawo o notariacie, consolidated text Journal of Laws (Dz.U.) 2020, item 1192, as amended).

<sup>10</sup> On practical aspects of the land and mortgage register's proceedings more extensively see: H. Ciepla, M. Pytlewska-Smółka, *Elektroniczne postępowanie wieczystoksięgowe w praktyce i orzecznictwie z wzorami wniosków*, Warszawa 2018, *passim*.

strengthens and assures the safety of the real estate legal turnover, thus giving better protection of the right to the private property.

The most significant change that has taken place since then (pursuant to Articles 626<sup>1</sup>–626<sup>13</sup> of the amended Act of 17 November 1964 – the Code of Civil Proceedings) is that the amended provisions introduced an obligation for notaries (also bailiffs and the heads of the Tax Offices in other cases than notary acts, which are also connected with the entry into the register) to submit land and mortgage applications via the ICT system immediately, i.e. on the day of the notarial deed. In consequence, notaries received a new task to perform (a new kind of a separate notary deed), consisting in preparing (as a part of a notary act in a written form, as well as electronically, i.e. in the tele-information system) and placing, first via Internet, an electronic application for entry or delete in the land and mortgage register. Later, within the so far term of three working days, a notary public has to submit the notary act containing the paper version of the application to the appropriate land and mortgage register court, together with the attached relative documents, constituting the entry basis.

Applications for entry into the land and mortgage register are possible due to obtaining an active access to the online land register and access certificate by the mentioned above three entities, including notaries public. Such submissions of applications to the land and mortgage register via an electronic system are provided with a qualified electronic signature.<sup>11</sup>

The ICT system immediately notifies the application submission and the court simultaneously notifies all the changes which can take place in conformity with the content of such an application.

However, the implementation of this program has not completed the entire process of computerization of land and mortgage registers, as it is planned to introduce measures ensuring e-communication of citizens in contacts with courts in terms of land and mortgage register proceedings, for they haven't yet received such a possibility so far.

The land and mortgage register is based on the fundamental principle of openness. It means the right of everyone to view it and receive its copies. Hence, the access to the land and mortgage register via the Internet has undoubtedly contributed to broadening its formal openness, and also to speeding up the possibility of obtaining information about its content. In connection with the above, it was also supposed to improve the efficiency of proceedings in land and mortgages register matters.

However, the practice of the system's functioning during the last five years, since its operation was started, shows that the period of time, which

<sup>11</sup> See also: K. Abramowicz, *Podpis elektroniczny w e-sprawiedliwości*, „Radca Prawny” 2008, no. 3, passim.



it takes the courts providing land and mortgage registers to effectively enter or delete the information in registers, has prolonged and takes up the courts even up to twelve months or longer, especially in large cities. On the one hand, this can be caused by a constantly increasing year by year number of petitions, of course. But at the same time, on the other hand, the main idea and aim of the courts proceedings' electronisation was not only to make the procedure safer, but also to shorten it, thus also giving a wider access for the citizens to the courts and assuring them proper exercising of their right to court.

Obviously, for the time being, the whole system seems to still be not permeable and affective enough. It is also worth taking into account one very important aspect: the land and mortgage registry proceedings needs a judge to lead it, who has not been eliminated from the proceedings. Activities in the led proceedings must be performed by a court clerk (referendary). Therefore, the problem of too much prolonging land and mortgage registers' proceedings could be solved by increasing a number of well qualified judges (referendaries) staff employed in the land and mortgage registry courts. This would most probably shorten the whole proceedings and make it more effective.

Besides that, other phases of electronisation connected with notary acts have also been implemented. Though they are not directly connected with *sensu stricto* administrating justice, still they are with all confidence connected with the legal trade, as well as real estate and commercial turnover, which rests in notaries public. These steps include creating electronic extracts and copies of notary acts and sending them to the central repository. Until now, this system has been introduced only partly, because notaries are obliged to prepare and send electronic extracts and copies of only the acts which are connected with implementing changes in the contracts (agreements) being the basis of trade companies' activities. Such contracts (acts, agreements) are registered by the Electronic National Court Registry and this is the entity to which notaries are obliged to send their electronic extracts and copies connected with the changes in the companies contracts, made in the form of notary acts. In the nearest future an extended system, called an electronic repository of notary acts, is also going to be implemented, which will cover all the notary contracts.

Besides the abovementioned, the National Notary Council also provides electronic registers of testaments, inheritance register and the register of European certificates of succession.<sup>12</sup>

<sup>12</sup> Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4.07.2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Official Journal of the European Union L 201/107).

The newest tendency, which has been intensively discussed recently at the meetings of the Legislative Committee and the Committee of the Human Rights, Rule of Law and Petitions, is connected with an idea to implement a duty of a so-called recording of all the notary activities made in the form of a notarial act. Relative amendments enabling this are intended to be introduced to the Law on the Notary by the legislator. It goes without saying, that such a trend is very dangerous, because it lies in distinct contradiction with the fundamental statutory principle of the secrecy and confidentiality of the notary public activities, being one of the basic standards of the security of the legal estate turnover on the one hand and the protection of the human rights and freedoms – on the other. This, *inter alia*, also breaches the principle of proportionality and a gross restriction of the civil rights of people who, against their will, would be recorded during voluntary and solely private notarial activities. Moreover, it could extremely breach the right to privacy of the parties of notary acts. Such tendency also shows an intention to excessive limiting off human rights and freedoms of the citizens and wish of their even wider invigilation, which do not have any justification in a democratic legal state. Moreover, according to the information provided by the International Union of Notaries (UINL) only three states in the world use recording notarial activities to a limited extent: China, Russia and Belarus. Poland should not adopt such standards, which was clearly underlined by the representatives of the National Council of Notaries who attended the abovementioned meeting of the legislative Committees which took place on 23 March 2021 and who firmly expressed their opposition to the proposed regulation.<sup>13</sup>

## 4. Electronic National Court Register

The National Court Register (NCR) is one of the most important public registers. It was created and commenced on 1 January 2001, pursuant to the Act of 20 August 1997 on the National Court Register.<sup>14</sup> The processes related to the elektronisation of the justice system also affected the functioning of this register, because on 1 January 2007 the Electronic National Court Register (EKRS) was created. Among the most important goals of its creating one should mention, first of all, the improvement of start-

<sup>13</sup> The National Council of Notaries also manifested its position on the matter during its meeting which took place on 26.03.2021.

<sup>14</sup> Ustawa z 20.08.1997 r. o Krajowym Rejestrze Sądowym (consolidated text Journal of Laws (Dz.U.) 2021, item 112, as amended).



ing a business (commercial) activity via Internet services. The Electronic National Court Register (ENCR) allows you to complete and submit online applications for entry into the register of limited liability companies. Each person can have an online access to the documents of the company registered in this mode. ENCR allows you to obtain data on the Internet that are necessary in business processes, e.g. authorizations to represent a registered entity. One of the main achievements of the ENCR is the dissemination of access to registration data by a system of infomats located throughout the country.

Such mechanism and legal instruments should be assessed positively, because of larger publicity and more open access connected with starting and leading commercial activities. Its main idea aimed at guaranteeing better exercising of the constitutionally guaranteed freedom of commercial activity on one hand, and at the same time the safety of commercial trade – on the other. However, here also appears a problem of too long-drawn proceedings taking place in commercial courts which are responsible for making entries, changes and deletes in the register, especially those situated in large cities. The problem has a very similar basis in its source to the district courts providing land and mortgage registers. They also need judges who lead the court proceedings in this field. Activities here are also performed by court clerks (referendaries). Therefore, the problem of too protracted proceedings could also be solved by increasing a number of well qualified judges (referendaries) staff employed in the commercial courts. This would surely shorten the proceedings and make them more effective, assuring proper exercising of the right to court.

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## **5. Conclusions**

The process of the increasing introducing of the latest technological and IT developments into the widely comprehended system of justice is proceeding intensively and dynamically. The tendency of its extending to further areas of the justice system functioning, moving to an electronic mode, can be clearly seen. Therefore, in the Polish legal system there have been introduced several technological solutions which allow safe and easy access to the court. The most important instruments introduced so far include: electronic court proceedings (e-court), electronic land and mortgage registers and land and mortgage register's proceedings, as well as electronic National Court Register. Some further activities aiming at informatisation of court proceedings in the forms of legal actions and evidence proceedings,

electronic delivery office and computerization of enforcement proceedings are intensively taken up currently.<sup>15</sup>

The introduced and proposed ICT solutions allow to unify judicature, eliminate diversities in interpreting provisions, facilitate communication with the procedural body via the ICT system, relieve courts, harmonize and unify the judicature practice, assure the legal turnover safety, and thus can offer better protection of constitutionally guaranteed, fundamental human rights and freedoms of the citizens, such as e.g. the right to court, the right to private property, the freedom of economic activity and others.

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<sup>15</sup> More about the directions of changes related to the computerization of the judiciary in Poland and the current information on the progress in the digitalisation of Polish courts are discussed in the information quarterly of the Minister of Justice "Na wokandzie (On the Record)". Reach, among others, to the article *Cywilna e-rewolucja (Civil e-revolution)*, published in no. 3(21)/2014, pp. 10–11 and others.