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The Constitutionalization of the Internet and the Right to Non-Use

Abstract: The author discusses the phenomenon of non-use, defined as a conscious refusal to use the internet, and its constitutional justification. She defends the thesis according to which an individual's decision not to use the internet, and thus electronic communication, may have a constitutional background. It is also discussed that the traditionally understood principle of freedom of form should not be subject to an exception that makes the effectiveness of administrative proceedings dependent on their performance electronically, especially through an ICT system. This constitutionally guaranteed right cannot be hindered by a lack of or deficiency in the necessary statutory regulations. The introduction of a procedural regulation about the right not to use the internet within the laws on administrative and tax proceedings is postulated.

Keywords: constitutionalization, non-use attitude, administrative procedures, proportionality

Introduction

The intensive development of modern technologies and the ubiquity of communication and data transmission have led to a need to introduce regulations dedicated to these issues, although initially the normative order of the internet (as it is called by Kettermann (2020, p. 61)) was a work of interaction between existing regulations and new forms of social activity and accompanying technologies. It can be observed that in this phase of 'digital transition', there was an adaptation through the dynamic interpretation of regulations previously applied only in the analogue world (de Gregorio, 2022, p. 7). Examples of such regulations are primarily provisions of civil law:

on property, in particular intellectual property, on the protection of personal data, or on contracts. Without diminishing the role of global businesses in building the digital world, which has been emphasized in the literature, significance should also be attributed to nation states and their administrations (de Gregorio, 2022, p. 7). While transnational corporations have long recognized the potential of electronic communication and concluding contracts remotely, delivering material goods based on online offers, and multiplying goods and services used exclusively in virtual reality (especially entertainment broadly understood, including computer games), public administration in many countries has only recently begun using the possibilities of the digitalized world. In a sense, public administration is catching up, learning from the experience gained in private companies. As Lessing has aptly noted, the interactions between administrations and businesses are mutual, and as a result of the interpenetration of the private and public spheres, a 'change in the effective architecture of the internet' (2006, pp. 60) is taking place. The aim of this article is to verify the thesis that the concept of non-use has a constitutional basis, allowing for the protection of individuals who do not use modern technologies when dealing with public administration. It has been based on comparative legal, sociological and dogmatic research. In various parts of the text, the terms 'the right not to use the internet', 'freedom from internet use' and 'a non-use attitude' appear. I understand the first two as equivalent, a right to refuse to use the internet and freedom from obligation in this respect, the sources of which I seek in constitutional regulations. I use the term 'non-use attitude' to describe a sociologically interesting behaviour that assumes reluctance or resignation about using the internet.

1. The Digitalization of public life in the light of fundamental rights and freedoms

The development of regulations dedicated to the computerization of public life has caused various consequences in the sphere of individual rights and freedoms, especially fundamental ones. The necessary reaction by the legislature in this situation is described by a concept called 'the constitutionalization of the internet', a 'process by which a constitution is introduced into a legal order, whether domestic, or [...] international' (Jamart, 2014, pp. 57). What is more, according to Jamart, 'global constitutionalism embraces the idea that a constitution should govern our globalized world, keeping in mind that the form and substance of such a global constitution may have little to do with that of domestic constitutions. There is a continuum of global constitutionalism visions [including] support for a world government that would resemble domestic governments' (Jamart, 2014, pp. 57–58). Global constitutionalism is described as 'not a comprehensive concept but rather an amalgamation of ideas (key themes), with some thinkers stressing certain features and some thinkers stressing other features of what they be-

lieve would be constitutive of a global constitution' (Schwöbel, 2011, p. 51). The concept refers among other things to 'recognition of individuals' rights' (Schwöbel, 2009, p. 4), and provides useful parameters for evaluating the meaning and significance of the internet's freedom and principles (Jamart, 2014, p. 57).

A question about the effects of this phenomenon on the legal system and the legal situation of the individual naturally arises. It seems particularly interesting to consider whether a non-use attitude towards the internet, which has recently become increasingly common, may also be entitled to constitutional protection. The example of Poland proves that the isolation of the pandemic has become a kind of catalyst for the introduction of new technologies to public administration and the proceedings conducted by it. Previously, the implementation of the option of handling a case online, which was formally available, posed quite a few difficulties for administrations, which rarely initiated actions aimed at launching electronic delivery based on Article 39(1) of the Code of Administrative Procedure (Sejm of Poland, 1960) – a provision in force since 21 November 2005.

Moreover, this provision has been amended many times, proving the helplessness of the legislature in its striving to implement the postulate of the computerization of administration. It was only during the pandemic that a significant change was made to Article 14 of the Code of Administrative Procedure, consisting in the admission of online services, the preparation of documents in electronic form and their automatic generation; this was a result of the addition of paragraphs 1(a)–(d) to this provision, based on Article 61 of the Act of 18 November 2020 on Electronic Delivery (Sejm of Poland, 2020c). The assumption of these regulations was, generally speaking, to limit the personal contact of persons involved in administrative proceedings for health and safety reasons, but without prejudice to the proceedings' course or the identification of individual entities, and ensuring the integrity and confidentiality of the information sent, as well as the reliability and integrity of data sent in both directions. In the same period, the Act of 16 April 2020 on Specific Support Instruments in Connection with the Spread of the SARS-Cov-2 Virus (Sejm of Poland, 2020a) was adopted, with Article 39(3) being added to the Code of Administrative Procedure; this extends the scope of application of ICT (information and communications technology) systems that were previously used to a small extent by the administrative organ (Holtgrewe, 2014, 11–14).

The issue of the digitization of administration has not bypassed EU legal acts, as exemplified by Regulation (EC) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC, Regulation (EU) no. 2024/903 of the European Parliament and of the Council of 13 March 2024 Establishing Measures for a High Level of Public Sector Interoperability within the Union (Interoperable Europe Act), Regulation (EU) no. 2021/694 of the European Parliament and of the Council of 29 April 2021 Establishing the Digital Europe Pro-

gramme and repealing Decision (EU) 2015/2240, and Directive (EU) of the European Parliament and of the Council no. 2016/2102 of 26 October 2016 on the Accessibility of Websites and Mobile Applications of Public Sector Bodies. This issue has also been the subject of discussion in international law for years, both in terms of the potential of new technologies in the service of administration and the protection of universal and free access to the internet (Mayer, 2001; Perritt, 2000; Uepermann-Wirtzack, 2010). The intensive activities of the legislature, directed at human actions on the internet, do not escape issues covered by the subject of the protection of fundamental rights and freedoms. Several important points can be distinguished here.

Firstly, new threats have emerged to these rights and freedoms, as exemplified by interference with the right to privacy, the secrecy of correspondence and even identity theft, as well as violations of property rights through hacks of electronic bank accounts. The not-uncommon cases of mass leaks of the personal data of users of ICT systems, medical information and data on individuals collected by employment offices and by universities are an increasingly serious problem in modern societies (Wittenberg, 2023). Scientists emphasize that the availability of certain methods of ensuring the security of collected data does not guarantee that unlawful takeover of it will not occur (Jałowicka, 2023). The reported threats necessitate the development of not only new methods of securing data, but also the creation of relevant regulations in the field of public law.

Secondly, as a result of the transfer of part of human activity to the virtual world, the rights of citizens, which were previously only exercised in the analogue world, should now also be available in the online sphere. Here, we can point out the need to ensure the protection of personal rights in connection with online activity, the protection of ownership of digitally available and exercised rights, security of data storage and the circulation of currencies constituting a means of payment on the internet.

Thirdly, the protection of individual rights in the case of disputes about law in the constitutional sense should be subject to implementation in courts. Among the problems that emerge in this area, we can mention the identification of the defendant, because the complexity of the subjective structures of suppliers of various online goods and services as currently created complicates the implementation of the obligation to identify the defendant. The lack of spatial restrictions on activities means that the other party to the contract can be located anywhere in the world, which in turn makes it difficult to find a court competent to resolve any dispute and a law governing the established relationship of obligation, not to mention certain language obstacles or lack of knowledge of foreign law. The diversity and degree of the development of services that may constitute the subject of obligations performed on the internet may additionally complicate the construction of the claim. Regardless of this, the issue of enforcing a judgment that upholds a claim, especially forcibly, appears problematic. One may wonder about the formula for pursuing and realizing redress for damages incurred in connection with virtual activity. This may need moving de-

pending on what exactly is on the internet – it could equally be ‘damage on the internet’ or ‘property on the internet’.

Fourthly, the consequence of the computerization of administration is a modification of the procedural rights and obligations of an individual and of methods of shaping public law relations. Despite the availability of the first regulations in this area, the administrative organ initially had difficulty fulfilling the requests of individuals to put electronic correspondence into circulation, but currently, many administrative proceedings have been transferred to the virtual world in their entirety. The ICT systems used for this purpose allow all procedural activities to be carried out without the need for physical contact between the party to the proceedings and the administrative body. These technologies, which streamline the proceedings and reduce their costs, have proven to be convenient for the administrative organ. Electronic forms have also become popular, standardizing requests and eliminating the applicant’s freedom of expression. By excluding the possibility of entering unconventional information or providing additional data that does not fit in the form, the administrative organ automatically avoids difficult cases that deviate from the average (Dudek, 2023). The facilitation and acceleration of proceedings are therefore accompanied by a standardization of their subjects, which in reality could differ. It can therefore be seen that the form procedure may result in an effect where a sort of fiction as to the content of the request is adopted, which is determined by the section of the application. In the current legal system, there are already proceedings being conducted in which communication with the authority takes place exclusively electronically; an example are those in matters of agricultural payments. The freedom to choose the form of application that existed until recently, guaranteed by Article 63(1) of the Code of Administrative Procedure, has been abandoned.

2. The computerization of administrative proceedings and procedural guarantees

In its original wording, the provisions of Article 22(1) and (3) of the Act of 5 February 2015 on Payments under Direct Support Schemes (Sejm of Poland, 2015) provided that applications for payments were to be submitted on a form made available on the agency’s website or sent to the farmer if he or she had submitted an application in the previous year. As a result of the amendment made on the basis of Article 1(4) of the Act of 10 January 2018 Amending the Act on Payments under Direct Support Schemes and Certain Other Acts (Sejm of Poland, 2018), the method of submitting applications was reformed, limiting it to a form on the website of the Agency for Restructuring and Modernization of Agriculture. This regulation is still in force, on the basis of Article 17 of the Act of 8 February 2023 on the Strategic Plan for the Common Agricultural Policy for 2023–2027 (Sejm of Poland, 2023). Under the cur-

rent legal regulation, customs law activities, including primarily the submission of declarations and their correction on the basis of Article 173(1) of Regulation (EU) 2013/679 of the European Parliament and of the Council of 9 October 2013 Establishing the Union Customs Code (European Parliament & European Council, 2013), are also made exclusively electronically.

The legislature has therefore adopted the principle in these matters that without access to the internet, understood as technical hardware capabilities or the ability to operate appropriate devices, it is not possible to submit or modify a request to the authority. Transferring certain categories of administrative proceedings to IT systems assumes that the party to such proceedings uses a computer and appropriate software, has access to the internet and uses it. Therefore there is a doubt as to whether imposing such requirements constitutes an excessive restriction on access to proceedings for entities who, for whatever reason, do not use a computer, other electronic devices or the internet. In the current legal system, this problem applies only to proceedings conducted by administrative organs, as opposed to court procedures, within which there is – so far – neither the possibility nor the obligation to conduct electronic communication, nor for the parties to participate in procedural activities in the ICT system. However, the content of regulations relating to administrative proceedings determines the position of a party to court proceedings.

3. Access to administrative proceedings and the exercise of the right to a court hearing

If we are dealing with an individual's dispute about a right examined by administrative organs, the realization of the right to a court hearing, within the meaning of Article 45(1) of the Constitution of the Republic of Poland and thus also Article 6(1) of the Convention on Human Rights and Fundamental Freedoms, depends on the prior exhaustion of administrative proceedings (Judgment of the Constitutional Tribunal, 1998; Judgment of the Constitutional Tribunal, 2000). Since these proceedings are treated as preliminary, any restrictions on access to them must be considered as barriers to initiating a trial. Their admissibility must therefore meet the criteria of the proportionality test, resulting from Article 31(3) of the Constitution of the Republic of Poland. The technical conditions for communication with administrative organs imposed by the legislation may raise constitutional doubts, especially in the reality of the domestic imperfections of the functioning of the internet. One may wonder whether in this aspect the constitutionalization of the internet should be understood as the legislature's obligation to establish a guarantee of universal access to the network without any costs being incurred. If the functioning of the state and its organs in relations with citizens is to take place digitally, one should expect the removal of existing obstacles that are difficult for individuals to overcome.

Since certain elements of functioning in society are implemented exclusively via the internet, it means that this communication channel should be available universally, without exception. Technical obstacles to access to the network still constitute a serious problem. Although, according to statistical data for 2024, 95.9% of households already have access to the internet, at the same time there were as many as 2,482,606 so-called 'next-generation access' white spots, i.e. addresses without an internet service providing a bandwidth of at least 100 MB/s (Minister of Digitalization and Connection Institute, 2024, pp. 5–6, 9). Connecting to a network of sufficient quality to send the necessary data may therefore prove impossible in some locations. Thus the participation of an individual in proceedings conducted via an ICT system may be blocked. Other situations may result from temporary technical difficulties or the failure of the internet, the electrical network that determines the operation of broadband internet, or the mobile network, based on which the so-called mobile internet operates.

The legislature did not decide to provide detailed regulations for cases of this type of disruption or, even more so, its legal consequences, which seems understandable given the variety of causes and circumstances of such events. However, this does not mean that they should automatically have negative consequences for the individual. It should be postulated that, firstly, the administration should bear full responsibility for the proper functioning of the system, and secondly, the citizen should be released from the obligation to prove such events, which are not always fully tangible, and the state of probability should be considered sufficient even in proceedings conducted on the basis of the adversarial principle; an example of this is the procedure regulated in Article 66(2) of the Act of 8 February 2023 on the Strategic Plan for the Common Agricultural Policy for 2023–2027 (Sejm of Poland, 2023) or Article 15(2) of the Act of 10 July 2015 on Supporting the Sustainable Development of the Fisheries Sector with the Participation of the European Maritime and Fisheries Fund (Sejm of Poland, 2020b), in which, regulated by the provision of Article 7 of the Code of Administrative Procedure, the burden of proof was modified in such a way that, following the example of civil proceedings, the proof obligation rests with the person who derives legal consequences from the claim.

The case law of administrative courts seems to protect such a higher level of protection of the procedural rights of an individual. An example of the procedural guarantees of a party to proceedings conducted via an ICT system, understood in this way, is the view contained in the justification of the judgment of the Supreme Administrative Court of 22 January 2025, according to which:

The fact that [...] the system remains at the exclusive disposal of the public administration makes it difficult, if not impossible, for the complainant to prove errors or obstacles encountered in using the system. These conditions mean that the appropriate level of guarantee of fair proceedings requires that, in order to challenge the effectiveness of an action performed using an ICT system, it is sufficient to merely

substantiate – instead of prove – the circumstances indicating obstacles in access to or operation of the system.

It can be added that the exclusion of the obligation to apply the provision of Article 7 of the Code of Administrative Procedure – as is sometimes the case in separate proceedings – and the limitation by law of the principle of objective truth derived from this provision to the obligation to assess the collected evidence cannot lead to releasing the administrative organ from the proper organization of the proceedings or to going beyond the limits of the law as stated in Article 7 of the Constitution. In the principle of legalism resulting from this provision, I would see the constitutional sources of procedural guarantees also carried out within the ICT system.

Apart from the problems of technical accessibility, obstacles to using the internet include the non-use attitude presented by part of society. This consists of a conscious refusal to use the internet despite having the technical possibility. The risks indicated above related to the imperfection of technology, possible disruptions in its functioning and uncertainty of the effects of such events, as well as the high level of complexity and the lack of uniformity of legal regulations, may cause a – justifiable, it seems – reluctance on the part of an individual to use IT tools, including in relations with the administrative organs or courts.

4. The phenomenon of non-use and its causes

The heterogeneity of reasons for individuals to stop connecting to the internet has already been noted in scholarship, including choosing a negative attitude towards for the internet, for example dictated by a need for an ‘internet detox’, protection against access to information offered on the internet or lack of sufficient financial possibilities or skills (Kloza, 2024, p. 3). Sociological studies conducted in European countries have shown that the reasons for not using the internet are indeed complex and go beyond superficial associations. Since access to this medium is possible regardless of social status, then giving up using it should be associated with other factors.

It has been shown that people who are in a worse personal, social or economic situation than the average citizen tend to be less involved in using modern information and communication technologies (Helsper & Reisdorf, 2013, p. 94).¹ A certain stereotype has also been verified, according to which men are more interested in and familiar with using the internet. As it turns out, more frequent access to new technologies by men – usually for professional reasons – is a significant factor increasing

1 According to statistics, around 7 million Britons have never used the internet. Today, 5% of the population remains offline, which is around 2,8 million (Petrosyan, 2024). In Poland, about 12% of the population does not use the internet, although it is estimated that this is over 4,000,000 inhabitants, because official statistical publications take into account the number of inhabitants of a given territory, not the citizens of a given country (All 4 Comms, 2024; Kemp, 2024; Sas, 2025).

their share among people over 65 who use the internet. It has also been proven that in this age group and older, using the internet is more frequent in the case of users living together with other people. Loneliness is therefore a factor that reduces the level of interest in the internet (van Deursen & Hellspers, 2015).

The reason for a reluctance to use the internet is not one's level of wealth, but primarily, in 50% of cases, because of lack of interest, as scientists from Oxford have shown based on a representative 2,057 surveys completed by people aged 14 and older. Among those who do not use the internet, issues such as lack of access or skills or concerns about costs were mentioned next. These gained importance only in the case of people who gave up using the internet (so-called ex-users), but not in relation to people who have never done so (so-called non-users). It is worth emphasizing that the obstacle of lack of access, revealed by younger people, disappeared among older people, who emphasized the problem of insufficient skills. People who were lonely or shy were definitely more absorbed in access to the internet, and they saw barriers in free access to the network rather than other factors (Helsper & Reisdorf, 2013, p. 95).

The problem of lack of interest occurs particularly in societies where access to the internet is common. In Sweden, where 95% of the population has the opportunity to use it, over 62% of users over the age of 66 give up this medium. Lack of interest also occurs regardless of the level of wealth of the society. It has even been observed in Switzerland, considered a wealthy country, where the internet is treated as a common good (Kappeler et al., 2020, pp. 7–9). The concept of lack of interest is capacious and can mean a real lack of willingness to reach for the possibilities created by the internet, as well as fully understandable fears of increasingly aggressive cybercrime or violations of privacy, or the increasingly well-described phenomena of information overload and other stimuli from electronic media, information smog (Tadeusiewicz, 1999, p. 97), disinformation, a state of overstimulation dangerous to human health (Rarot & Wójcik, 2023) or increasingly better and more frequently diagnosed electrosensitivity (Belhomme & Irigaray, 2020; Rööslia et al., 2010). As it turns out, the benefits of the mass flow of data and information often conceal threats that science is only just discovering and exploring, and it is difficult to fully define them at the moment.

The paradox is that – as sociologists have proven – an obligation to use internet communication, the fulfilment of which could serve to facilitate access to administrations for individuals who are limited to some extent in handling their matters in person, i.e. elderly people, those isolated due to various personality problems, those with disabilities, or those who are shy and withdrawn, may intensify the state of exclusion of those who have already been affected by unfavourable socio-economic patterns and negative attitudes towards the internet. Therefore the computerization of administration should be accompanied by an effort to equalize differences between individuals. Otherwise, the consequence of increasing the reach of computerized administration would be a deepening of the social stratification between the information elite and the digital underclass (Kappeler et al., 2020, p. 9). More educated people

use the internet more often than those who remain less educated (van Deursen & Helsper, 2015, pp. 185–186), and acquiring the missing knowledge and skills in later life undoubtedly becomes more difficult. There are still individuals in society for whom this is a difficult barrier to overcome.

The reasons for presenting a non-use attitude are diverse. Analysis of sociologists' views and statistical data, as well as applicable law, proves that the reasons for reluctance to use the internet in modern society are concerns about the protection of one's health or emotional state, protection against cybercrime, the security and integrity of data transmitted on the internet, disinformation and reducing the risk of using devices and systems without sufficient skills, as well as avoiding cases of disruption in the functioning of modern technologies and devices. At least some of the circumstances listed are justified by the content of fundamental freedoms and rights as subject to constitutional protection.

5. Legal protection for those who do not use the internet

It is enough to refer to the provisions of Articles 47, 51(1) and 68 of the Constitution, which guarantee the protection of personal health, the security of personal data and the privacy of an individual, to confirm the thesis about the constitutional reinforcement of the non-use attitude in relations with public administrations. I therefore believe that the right to non-use, or more precisely freedom from using the internet, is not an independent human right that would require the intervention of the legislature, but is a derivative of existing rights and freedoms, while remaining determined by the conscious choice of the individual and therefore dependent on the accompanying individual motivation (which is not necessarily revealed externally) (Kloza, 2024, p. 3).²

The legislature is obliged to shape the legal system in such a way that the right to protect constitutionally secured values can be implemented. An example of a legal solution that can serve this purpose is the one adopted in the Act of 19 July 2019 on Ensuring Accessibility for People with Special Needs (Sejm of Poland, 2024). Article 6(3)(d) of this Act establishes the obligation of administrative organs to provide assistance to a person who does not have sufficient skills or technical capabilities, and even to organize communication with a person with special needs in the form specified in their application. This provision specifies the minimum requirements for ensuring accessibility for people with special needs, which are included in the scope of information and communication accessibility, among other things, and which ensure, at the request of the person with special needs, communication with a public entity in the form specified in the application. The category of a person with special needs includes any person who, due to their external or internal characteristics, or

2 Kloza also emphasizes the view which assumes the development of a separate human right in parallel with the content of the freedom I have described.

due to the circumstances in which they find themselves, must take additional actions or apply additional measures in order to overcome a barrier in order to participate in various spheres of life on an equal basis with other persons. Assuming that the non-use attitude constitutes one of the listed internal characteristics of an individual, such a person should be classified in the category of persons entitled to the treatment guaranteed in the above-mentioned provision. The cited regulation does not correspond to the relevant procedural provisions, because neither the provisions of the Code of Administrative Procedure nor the acts regulating separate administrative proceedings or proceedings not bearing the characteristics of a jurisdictional-type procedure contain appropriate regulations that take into account respect for the right resulting from the provision of Article 6(3)(d) of the Act within the framework of administrative proceedings.

Conclusion

The constitutional basis of the non-use attitude leads to the conclusion that it is necessary to introduce appropriate regulations into the code-level regulations (i.e. the Code of Administrative Procedure and the Tax Ordinance) that guarantee the individual the right to participate in proceedings without the need to use the internet. Moreover, the traditionally understood principle of freedom of form should not be subject to an exception that makes the effectiveness of the proceedings dependent on their performance electronically, especially through an ICT system. In the current legal status, such regulations are already in force, as exemplified by the aforementioned Article 17 of the Act of 8 February 2023 on the Strategic Plan for the Common Agricultural Policy for the years 2023–2027, raising doubts as to compliance with the provisions of the Constitution. Since the exercise of a constitutionally guaranteed right cannot be hindered by a lack of or a deficiency in the necessary statutory regulations, one may wonder about the effects of an individual's formulation before a court of an allegation of defectiveness of the regulation that obliges participation in administrative proceedings using the internet. This problem will probably have to be faced by the administrative courts if non-users decide to consistently defend the validity of their attitude by initiating disputes with administrations. Only *ad casu* can the reasons emerge that require deliberation when considering the validity of imposing the obligation to communicate electronically on an entity in a specific category of proceedings. The constitutionalization of the non-use attitude also means that the validity of its expression should be subject to analysis in the context of the criteria for the admissibility of proportionate restrictions on constitutional rights and freedoms established in the provision of Article 31(3) of the Constitution. It seems that while the legislation may require an entrepreneur to communicate electronically, the act should guarantee other entities the possibility of at least equivalent contact in a analogue form.

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