

E-JUSTICE: theoretical principles and problems of realization of the right to judicial protection in the conditions of digitalization

Oleksandr Mykolenko^{1†}, Volodymyr Dryshliuk^{2††}, Nataliia Volkova^{3†††}, Valerii Prytuliak^{4††††}, Olha Verba^{5†††††}

Odessa I.I. Mechnikov
National University

Odessa State University
of Internal Affairs

National University
«Odesa Law Academy»

National University
«Odesa Law Academy»

Lviv State University
of Internal Affairs

Summary

The article deals with the peculiarities of the realization by citizens of the constitutional right to judicial protection in the conditions of digitalization. The purpose of the article was to establish the state of implementation of "e-justice" and to analyze the features of e-justice in Ukraine and abroad. In particular, in October 2021, Ukraine will have a full-fledged e-justice system, which includes all the necessary elements of justice, from filing a claim in electronic form and ending with the consideration of the case by videoconference. To carry out scientific research, the authors used some methods, among which are the methods of induction, deduction, hermeneutic, comparative analysis, and formal-legal method. The authors of the article concluded that the process of introduction of the e-justice system in the world is irreversible and necessary. It is gratifying that Ukraine is in the rear of the developed world in this context. The coming months will provide grounds for interim conclusions on the quality of domestic e-justice. However, proper scientific understanding of e-court issues, taking into account the significant experience of e-justice in European countries and the work of the domestic Ministry of Digital Transformation, will undoubtedly make it possible to bring Ukrainian e-justice to the proper functional level. Further research will assist in this.

Key words:

e-justice, justice, e-court, digitization, right to judicial protection.

1. Introduction

From this section, input the body of your manuscript according to the constitution that you had. For detailed information for authors, please refer to [1]. Modern information technology has become an integral part of everyone's life. In fact, every sphere of human life is subject to change due to the penetration of information technology. The field of justice is no exception. Interestingly, the ongoing coronavirus pandemic has significantly accelerated the introduction of modern information technology in the judiciary. The concept of "e-justice" has become widely used.

E-justice is traditionally understood as a way of administering justice based on the use of modern

information and communication technologies and ensuring transparency, openness, and accessibility of legal proceedings.

According to Bryantseva and Soldatkina (2019) [1], e-justice is a significant milestone on the road to digital. Based on the analysis of European e-justice, Antonov identifies three fundamental functions that the European e-justice system should have: access to information in the field of justice; dematerialization of litigation, that is, replacing "physical" relations between the parties with "electronic" ones in the process of administering justice; the relationship between the judiciary, including when using videoconferencing (Antonov, 2017 [2]). The technical means proposed at all stages can be both digital and analog. The task is to immediately count on the use of digital technologies, making the most of the rich toolkit of the Internet's virtual space.

At the same time, human rights mustn't be violated in any way during the transition to e-court. Thus, an essential function of each state is to ensure the right to a fair trial, in whatever format the trial takes place.

2. Theoretical Framework or Literature Review

Henriette Christine Boscheinen-Duursma and Roksolana Khanyk-Pospolitak in their scientific article named «Austrian and Ukrainian Comparative Study of E-Justice: Towards confidence of Judicial Rights Protection» (2019) research the common and distinctive features of e-justice in Ukraine and Austria. The authors analyze the models of e-justice in the two countries in terms of borrowing useful experience for each country. The article analyzes the connection between civil proceedings and e-justice [3]. Finally, the authors of the article made their own conclusions about the advantages and disadvantages of each country in the field of e-justice.

Rodrigo Sandoval-Almazan, J. Ramon Gil-Garcia in their article «Understanding e-Justice and Open Justice Through the Assessment of Judicial Websites: Toward a

Conceptual Framework» (2018) analyzed the state of e-justice in Mexico. The authors of the article researched the websites of all judicial authorities, assessed the e-justice system in general, in particular, in terms of openness to the general public and access to justice, and offered their vision for improving this system [4].

Giampiero Lupo and Jane Bailey in the article «Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples» (2014) argue that the technological solutions on which the electronic justice system is built, as well as the principles of process management in the system itself, can be critical to positive outcomes in the administration of justice. The article presents six examples of e-justice systems as analyzed in terms of access to justice: three European examples (Italian online litigation; English and Welsh monetary claims online; European Union cross-border e-code) and three examples from Canada Ontario Integrated Justice (IJP), Ontario Court Information Management System (CIMS) and e-Court of British Columbia project) [5].

Ronald van den Hoogen in his article «Will E-Justice still be Justice? Principles of a Fair Electronic Trial» (2008) analyzes the prospects for the full transition of justice to electronic format and provides its vision of the necessary legislative changes that should accompany such a process [6].

3. Methodology

First of all, the method of induction allowed the authors to make several generalizations based on the analysis of the effectiveness of the e-justice system in individual countries. In particular, the German system even provides for the possibility of online consultation of stakeholders by court representatives. This experience is useful for implementation in other countries.

Moreover, the method of deduction, as a way to analyze the general patterns of the phenomenon in order to formulate its specific manifestation, allowed the authors to draw reasonable conclusions about the direct relationship between the quality of e-justice and the degree of access to justice. In particular, the simpler and clearer the model of e-justice, the more people go to court to exercise their right of access to justice, especially during pandemics and quarantine.

The method of comparative analysis allowed the authors to compare models of e-justice in different countries and draw conclusions about the pros and cons of each country included in the study.

Besides, the formal-legal method provided the authors of the article with tools for the study of legal concepts and categories, in particular – legal norms governing the introduction of e-justice both in Ukraine and abroad. In due course, with the help of this method the norms of the law of Ukraine "About modification of some legislative acts concerning the maintenance of stage introduction of the Unified judicial information and telecommunication system" are analyzed.

4. Results and Discussion

A valid question arises, what is the right to a fair trial and how it is provided in the context of "e-justice". The right to a fair trial is a complex right of the person, which is guaranteed by the international and national norms (which are the mass of process rights, the implementation of which depends not on the will of a person but from the action of authority body, which are responsible for the case study).

The right to a fair trial is a well-known international law. It is inextricably linked with the right to an efficient renewal of the violated rights and the recognition of the fact that the most adequate body is able to do so. Therefore, all authoritative inter-legal acts enshrine, first of all, the right to judicial protection, or to ensure access to justice.

The pandemic, which began in 2020, raised the issue of e-justice, which would provide an opportunity to organize a remote trial and provide access to justice for all categories of citizens.

In addition, the use of information technology allows you to optimally organize the trial and, as a result, to increase the efficiency of justice (Reshetnyak, 2013) [7].

Speaking about electronic justice abroad, first of all, it is worth analyzing the US experience in this matter.

In the United States, e-justice is represented by the Public Access to Court Electronic Records (PACER) and Case Management / Electronic Case Files (CM / ECF) systems for filing documents in courts. The website was developed by the United States Courts Administration. The central purpose of its creation is to provide electronic access to judicial information at a reasonable cost, following legislative and judicial policies, security requirements. The technical department manages the development and maintenance of electronic public access systems in the judiciary and through the PACER service center provides centralized billing, registration, and technical support to the judiciary and the public. The program is fully funded by user fees set by the judicial conference. The proceeds from the fees are used to support the ongoing operations of the program, the development and maintenance of the CM / ECF system used by federal courts throughout the country,

and to finance the costs for the electronic public access to courts in areas such as courtroom technology, electronic notification in bankruptcy cases; and web-based jury notification.

CM / ECF is the comprehensive case management system of the United States Federal Judicial System for all arbitration, circuit, and appellate courts. It allows courts to maintain electronic files of cases, accept applications and provide online access to submitted documents, making all information on the case available. The system provides multi-criteria access to case files, offers advanced search and reporting capabilities, immediate document updates, downloads, and prints directly from the court system.

Information on US courts is available at www.uscourts.gov. There is no additional charge associated with the CM / ECF system, but Public Access to Court Electronic Records (PACER) is a paid service. PACER allows you to get acquainted with the register of accepted applications, track the progress of the case, the history of decisions made, the calendar of the date of appointed meetings (CNews, 2016) [8].

To obtain a PACER account, you must complete the online PACER registration form on the website, and for immediate access to court records during registration, a credit card is required.

There is now a new electronic filing system in the US Supreme Court. Although the official submission form is paper, all parties represented by a lawyer must submit electronic versions of documents through the system. Requests from non-prosecutors are submitted only in paper form, then scanned, and can be accessed electronically on the court file.

For security reasons, systems management is decentralized. Each of the country's federal courts has its own server, which from a technical point of view contributes to the creation of a less loaded architecture.

The development of e-justice in Europe also has its own specifics.

Its content is different in different European countries, the European Union (EU) has presented its point of view on the e-justice portal (2021) [9]. Electronic justice (according to the portal) is the use of information technology to ensure broader access of citizens to justice, facilitate procedures, and more efficient dispute resolution and punishment (Moshkov, 2015) [10].

In recent years, an increasing number of states have been amending their legislation to use information technology in legal proceedings, to communicate between courts and litigants through communication channels such as the Internet. These can be applications in electronic form sent

by the plaintiff to the court, court documents transmitted by the court to the parties in electronic form.

In some states, the use of the Internet for communication is allowed for almost all types of civil proceedings, while in others – it is limited to certain types of legal proceedings.

The portal “Electronic justice. Automatic Processing” provides information on the current state of the use of information technology in national courts (European e-Justice Portal, 2021) [11].

In particular, Estonia allows parties to use the electronic file system in civil and administrative proceedings (initiating proceedings, filing documents and appeals, etc.), as well as in criminal and misconduct proceedings (a limited number of documents can be submitted, concerning existing litigation). The system is available at any time.

Some documents can only be submitted via the Internet – these are payment orders for quickly tracking debts or maintenance claims.

Login to the system is carried out using an ID-card or a mobile identifier (Mobile-ID). The portal is protected. When entering the portal, users will be given access only to its affairs and data. Persons who are not involved in the proceedings do not have access to the proceedings of others. Data is transmitted using the national information system X-Road, which provides secure Internet data exchange between government information systems.

To file a claim with the court, you must fill out the forms provided. They differ depending on the type of proceedings and the petition, but they have the same format: it is required to provide general information about the case, data on the parties, any documents attached to the petition, information on the payment of the state fee. More detailed is the application form for an expedited payment order, it must be entered in the form of metadata.

Procedural documents are filed through an electronic file system using an electronic signature. If the case goes to court, the electronic file system automatically stores the date on which the case was filed. A person who has sent a document initiating a trial or other procedural document to the court through the electronic file system will receive an automatic confirmation of receipt of the document by e-mail, indicating the date and time of its receipt by the court. The state fee (if necessary) is paid either via a bank link in the electronic file system or outside the system via internet banking or at a bank branch.

In the expedited procedure for processing a payment order, all court documents, including decisions, are automatically created in the information system. If the defendant does not answer, that is, does not file an objection, the court issues a payment order for the corresponding amount.

Judgments, rulings, and subpoenas may be served electronically to litigants, either through the electronic file system or through the participant's e-mail. The recipient of the document must notify the court of receipt if the document was sent by email, while if the document is filed through an electronic file system, the date on which the recipient receives and opens it is recorded automatically.

In civil and administrative proceedings, the court may issue a decision electronically, protecting it with the electronic signature of a judge or other similar technically secure means.

In the electronic file system, it is possible to fill out an application for compulsory execution of a court decision and search for additional documents on this decision, which can be attached to the application. The completed application is electronically signed and, together with the documents, is sent to the email address of the bailiff.

In Estonia, the electronic file system can be used to keep track of business online. The user must log in with an ID-card or Mobile-ID. In civil and administrative proceedings, the parties can view all documents related to the case and not be marked as confidential.

Electronic justice is well developed in the Czech Republic. Any claim can be filed electronically, and you can use three methods. Firstly, a claim can be submitted by e-mail, and it must be certified by a qualified electronic signature following the legislation of the Czech Republic.

The plaintiff should contact the ePodatelna (2021) website or by e-mail of the relevant judicial secretariat, the addresses of which are on the website. Secondly, the so-called data box (databox) can be used (special electronic storage intended for filing documents and communicating directly with the public authorities of the Czech Republic) [12].

Both of these filing methods are equivalent to the standard written format. The third way is even closer to this format: claims are filed by regular e-mail without their electronic signature, but in this case, an identical text must be submitted within three days in standard writing or using the methods described above, otherwise, the court will ignore it.

Electronic submission is possible at any time. All claims can be filed electronically, but an electronic payment order is filed only electronically. The applicant submits a claim using the electronic form completed on the ePodatelna website, or directly to the e-mail address of the relevant judicial secretariat and signs it with a qualified electronic signature.

The plaintiff can claim up to CZK 1 million, and the conditions for issuing an electronic payment order include

the correct completion of the form and the payment of a court fee. If all conditions are met, the court may issue an electronic payment order. In it, it orders the defendant to pay the claim and the costs of the proceedings within fifteen days from the date of its receipt or to appeal to the court. An electronic payment order that has not been appealed has the force of a final judgment. If any of the defendants file an appeal within the due time, the electronic payment order will be canceled, and the court will schedule a hearing.

Claims can be filed in any format unless the law establishes a specific format for certain acts. The applicant choosing to use the ePodatelna or databox portal can refer to the instructions and user manual on the respective web pages for information.

When storing and transferring data, courts, and bailiffs act in accordance with the legislation on the protection of personal data and other relevant legal regulations.

A claim filed over the Internet can be withdrawn in the same way as in a standard way. The defendant has the ability to respond to a claim initiated over the Internet, also over the Internet, but this is not required.

Documents can be submitted to the court electronically for any type of legal proceedings. An appeal, like a claim, is allowed to be filed electronically.

Court documents are transferred to the information boxes (databox) of the persons who established them, or by e-mail, certified by a qualified electronic signature, to the e-mail address provided by the addressee to the court. For the delivery to take effect, the addressee must confirm receipt within three days from the date of sending the document (for example, to the e-mail address of the relevant court) by sending a message certified by his qualified electronic signature. Enforcement proceedings can also be initiated electronically.

Electronic justice is well developed in Germany. The system, through which registered users can submit documents is called Elektronisches Gerichts- und Verwaltungspostfach (EVGP) – Electronic Court and Administrative Mailbox (EGVP 2021) [13]. It was developed after creating the basic legal environment for e-justice.

Great attention is paid to information protection and data security. When accessing the website, data is automatically collected about the type of web browser, the operating system used, the domain name of the Internet provider, and other information technically necessary for the correct delivery of the requested content and the optimization of the website. Personal data voluntarily provided to the website is not transferred to third parties, but is stored and used only for the purposes for which they were provided and only as

long as it is necessary to achieve these goals. For the security of data in transit, modern encryption methods are used, for example, SSL.

The peculiarity of electronic justice in Germany is associated with its state structure and the structure of the judicial system. The law allows for the initiation of legal proceedings over the Internet, but in practice, this does not apply everywhere (not in all federal states and not in all courts) and depends on whether the relevant rule is adopted in a particular federal state or court. The user has the opportunity to obtain additional information by going to the page of the corresponding court.

Some types of legal proceedings can be carried out entirely electronically, for example, registration and payment orders, as well as legal proceedings related to administrative offenses. Electronic documents are allowed to be submitted at any time. The technical requirements are set by federal state regulations and generally require documents to be submitted using the OSCI (Computer Interactive Services Interface) format, which is a component of the EGVP. The message does not need to be signed, but any type of signature specified in the relevant procedural rules is required for filing claims, usually a qualified electronic signature. Legal fees depend on the type of case and are paid in a variety of ways, including electronic payment.

A claim filed through an electronic system can be withdrawn as usual. When initiating proceedings over the Internet, the defendant chooses how to respond to him.

According to Art. 174 (3) of the Criminal Procedure Code of the Federal Republic of Germany (DeJure, 2021) court decisions can be transmitted to lawyers, notaries, bailiffs, and tax consultants, also in electronic form, to everyone else – if only they have agreed to receive documents in electronic form [14].

It is also permissible to file an appeal in electronic form if it is provided for by the relevant regulations in the court in question.

Some federal states provide for online consultation of the parties in cases before the administrative and financial courts. Dates of hearings in civil cases are also available electronically.

Thus, the development of e-justice is the imperative of the times associated with a lifestyle change, caused by the active development and widespread introduction of information and communication technologies. As a result of its application, the form of judicial proceedings is improved, wider access of citizens to justice is provided, the conduct of cases is facilitated, and disputes can be resolved more efficiently.

There are peculiarities of using e-justice in different countries.

It depends on the state structure, the structure of the judicial system, the technical implementation of electronic court proceedings, and the development of information technologies. Much attention is paid to the protection of information and the security of stored and transmitted data.

The most effective e-justice operates in those countries where there is no “paper” mediation during the transfer of electronic documents at the stages of the trial, that is, there is the possibility of the existence of all judicial information in the case in digital form (at least in parallel with the possibility of using the traditional, paper form).

Regarding Ukraine, on September 4, 2021, the official newspaper Golos Ukrainy published an announcement on the creation and operation of three subsystems (modules) of the ESITS (Unified Judicial Information and Telecommunication System). Thus, this is the beginning of the functioning of a true electronic court in Ukraine, which includes 3 subsystems (“Electronic Cabinet”, “Electronic Court”, video conferencing subsystem).

In addition, the provisions on the possibility to participate in the court hearing by videoconference, the functioning of official e-mail addresses, and the procedure for registration, authentication, and access of persons to the subsystems (modules) of the ESITS that operate (e-office); changes the procedure for committing procedural (or other) actions in terms of recording court hearings conducted by videoconference using the videoconferencing subsystem.

Registration in the system is done by registering the official e-mail address in ESITS. If the user enters and completes the information in the registration form, the subsystem automatically generates the user's e-mail address. Thus, registration of the official e-mail address is carried out using EDS, which should be received in the Accredited center of certification of keys. After such registration, the user actually creates his / her e-office in ESITS, from which he / she participates in legal proceedings by electronic means. The official website of the judiciary contains detailed step-by-step instructions for registering users in the ESITS, recommends that all litigants undergo such registration (even those who have the right to voluntarily join the system according to procedural codes), and a reduced court fee rate was listed for registered users who file claims, appeals, and appeals and other procedural documents through the EITC with a reduction factor of 0.8. In particular, to register, you must log in using an electronic key (obtained from the Accredited Key Certification Authority) at the e-mail address: <https://cabinet.court.gov.ua>, enter the last name, first name, patronymic in the appropriate fields, date of birth, registration number of the taxpayer's account card, telephone number, e-mail address.

Registered users of the system receive the following opportunities:

- court decisions and executive documents are issued and used in electronic form;

- delimitation of communication between the party to the case and the court on the following principle: participants who have an official e-mail address (registered their own "e-office" in the Court Cloud) send and receive information and documents from the court only in electronic form, and others – in the paper;

- participation of the person in a court session in the mode of videoconference is provided; two types of such participation have been established – outside the court premises and in the court premises;

- In the case of a court hearing by video conference, the parties may provide evidence, written explanations, etc. via their personal computers in the form of an electronic document.

The advantages of the electronic method of submitting an application:

- 1) there is no possibility to leave the application without motion;
- 2) a person may file a statement of claim without leaving home or without being distracted from work;
- 3) a person can pay the court fee in the required amount without obstacles and without wasting time;
- 4) a person immediately after the registration and distribution of the case may find out the case number and the judge who will consider the case.

The legislation also stipulates that persons who have registered official e-mail addresses in the Unified Judicial Information and Telecommunication System shall submit procedural and other documents, written and electronic evidence, perform other procedural actions in electronic form exclusively through the Unified Judicial Information and Telecommunication System, using one's own electronic digital signature, equated to a handwritten signature following the Law of Ukraine "On Electronic Digital Signature" (expired), unless otherwise specified by this Code. Peculiarities of the use of electronic digital signature in the Unified Judicial Information and Telecommunication System are determined by the Regulations on the Unified Judicial Information and Telecommunication System.

It should be remarked that access to the e-Court subsystem allows not only to participate in litigation by electronic means, to submit and receive procedural documents in electronic form, but also to use other tools. For example, ESITS users have access to the Judicial Practice, Statistics,

and others subsystems. The introduction of the Judicial Practice subsystem and the provision of its complete and up-to-date information will enable all persons interested in judicial practice to obtain generalized information on all court decisions, as well as on new court decisions in cases of administrative offenses. The development of this subsystem will contribute to the unity of judicial practice (a generalization of judicial practice and support of the judicial decision-making process within a single approach to the application of legal provisions), allow legislators to analyze the application of laws, facilitate research in judicial practice, and provide information in for statistical purposes (Kohut, 2016) [15]. It is also important that the EITC provides permanent access to all case materials (not just court decisions), reduces the time for sending documents, which contributes to the absence of delays associated with the transfer of cases between courts of different instances, allows you to participate in a video conference without visiting the court, automatically sends orders to the Unified State Register of Enforcement Documents.

5. Conclusions

If you would like to itemize some parts of your manuscript, please make use of the specified style "itemize" from the drop-down menu of style categories. As a result of the study, the authors of the article concluded that the introduction of e-justice in all countries. This process has accelerated significantly since the announcement of the Covid-19 pandemic and the introduction of several restrictive measures around the world, up to full lockdown. At the same time, the only way to ensure the rights of citizens to justice in such conditions is the electronic court.

Currently, the degree of the introduction of electronic justice in different countries is uneven. In particular, the e-justice system in Estonia is fully operational. Moreover, almost all services provided by the state to citizens can be obtained electronically, including "electronic citizenship". Until recently, the e-justice system in Ukraine functioned with restrictions and not in full, but from October 2021, all elements of this system will work in full, including online litigation.

Thus, e-justice is a requirement of the times, but regardless of the form in which justice is administered, the general principles of access to justice and the principle of the right to a fair trial must be strictly adhered to.

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Oleksandr Mykolenko - Doctor of Juridical Sciences, Professor, Head the Department of Administrative and Commercial Law of Odessa I.I. Mechnikov National University. ORCID: <https://orcid.org/0000-0002-9755-9454>

Volodymyr Dryshliuk – Ph. D, Associate Professor, Head of the Department of Labor, Land and Commercial Law, Odessa State University of Internal Affairs. ORCID: <https://orcid.org/0000-0002-2274-441X>

Nataliia Volkova - Ph.D., Associate Professor of Department of Civil Procedure of National University «Odesa Law Academy» <https://orcid.org/0000-0003-4346-1862>

Valerii Prytuliak - Ph.D., Associate Professor of Department of Civil Procedure of National University «Odesa Law Academy». <https://orcid.org/0000-0003-2490-0225>

Olha Verba - Candidate of Juridical Sciences, Docent, Associate Professor at the Department of Civil Law Disciplines, Institute of Law, Lviv State University of Internal Affairs. <http://orcid.org/0000-0001-9254-9575>